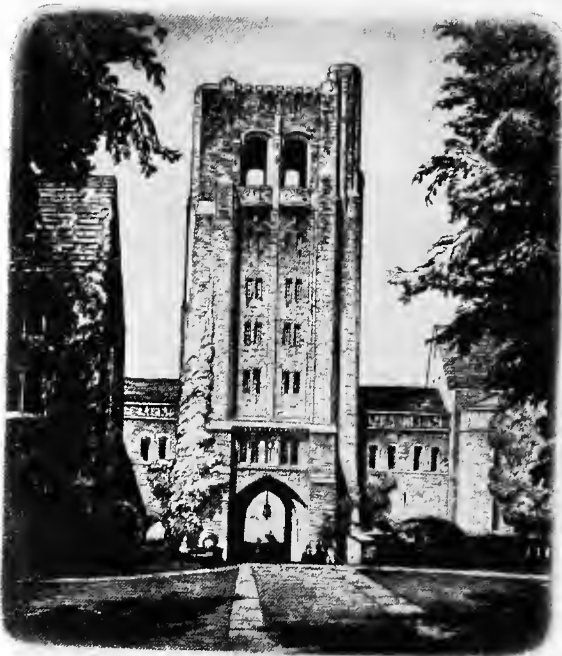
KFN
5975
W14

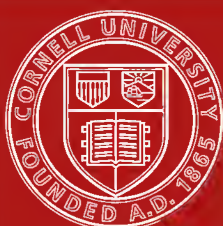


Cornell Law School Library

Cornell University Library
KFN5975.W14
v.2
The law and practice in civil actions an

3 1924 022 881 837 law

Hon Douglass Boardman
with sincere regards of
William Wait



Cornell University Library

The original of this book is in
the Cornell University Library.

There are no known copyright restrictions in
the United States on the use of the text.

http://www.archive.org/details/cu31924022881837

THE

LAW AND PRACTICE

IN CIVIL ACTIONS AND PROCEEDINGS IN

JUSTICES' COURTS

AND ON

APPEALS TO THE COUNTY COURTS

IN THE STATE OF NEW YORK,

INCLUDING THE PRINCIPLES OF LAW RELATING TO ACTIONS OR DEFENSES; THE RULES OF PRACTICE, OF PLEADING, AND OF EVIDENCE; TOGETHER WITH PRACTICAL FORMS AND PRECEDENTS.

BY WILLIAM WAIT,

COUNSELLOR AT LAW.

IN TWO VOLUMES.

VOL. II.

ALBANY:

PRINTED FOR THE AUTHOR,

AND SOLD BY LAW BOOKSELLERS GENERALLY.

1865.

12 B20

La 2910

Entered according to the act of Congress, in the year one thousand eight hnndred and sixty-five,
By WILLIAM WAIT,
In the Clerk's Office of the District Conrt of the United States, for the Northern District of New York.

WEED, PARSONS & COMPANY, ALBANY, N. Y.,
PRINTERS, STEREOTYPERS AND BOOKBINDERS.

CONTENTS.

PART V.

PRACTICE, PROCESS AND PLEADINGS.

CHAPTER I.

GENERAL PRELIMINARY CONSIDERATIONS.

CHAPTER II.

JURISDICTION IN CIVIL ACTIONS. 4.

	PAGE.
Definition,	4
Its incidents,	5
Where exercised,	5
Its territorial extent, &c.,	6
Jurisdiction of the person,	11
Of the property,	13
As to amount,	14
Of the subject matter, &c.,	15
When void for want of jurisdiction,	15
When erroneous for want of jurisdiction,	16
What proceedings are necessary,	16
How far consent will confer it,	16
Errors, when waived by pleadings,	17
How far it may be lost,	20
Ought to appear on the face affirmatively,	20
Personal disqualifications,	21
Interest of the justice, or a party to the record,	22
Relationship to parties,	24
Innkeeper, &c.,	28
Actions expressly excepted,	28
People a party,	29
Title to lands in question,	29
Assault and battery, &c.,	36
Actions against executors, &c.,	38
Oath of office,	38
Nature of justice's jurisdiction,	39
Amendments, &c.,	39

CHAPTER III.

COMMENCEMENT OF ACTIONS. 39.

SECTION I.

OF ACTIONS AND OF PROCESS. 39.

To be in name of people,	41
To be in English,	41

PAGE.
Must be signed, ... 41
Must not be issued in blank, ... 41
Must be properly directed, ... 43
Process to state name of plaintiff, ... 43
Process to state name of defendant, ... 44
Fictitious names, ... 44
Return day, ... 45
Time, how computed, ... 45
Plea in the process, ... 46
Sunday, issuing or service of process on, ... 46
Election day, ... 47
Town meetings, ... 47
Penalties, process to be indorsed, ... 47
Amount, jurisdiction as to, ... 48
Deputing person to serve process, ... 48
Officer, when protected, when not, ... 49
Officer bound to execute process, ... 49
Officer cannot take reward, extra fees, &c., ... 50
Process amendable, ... 50
Waiver of defects in process, ... 50
Process, when set aside for fraud, ... 51
Process served by constable in his own favor, ... 52

SECTION II.

ACTION, WHERE TO BE COMMENCED. 52.

SECTION III.

ISSUE WITHOUT PROCESS. 54.

SECTION IV.

ACTION, WHEN DEEMED COMMENCED. 55.

CHAPTER IV.

LONG SUMMONS. 59.

SECTION I.

LONG SUMMONS, WHEN PROPER. 59.

SECTION II.

SERVICE OF SUMMONS. 65.

CHAPTER V.

SHORT SUMMONS. 75.

What necessary to authorize short summons, ... 80
When facts should be stated in affidavit, ... 80
Facts in affidavit of non-resident plaintiff and resident defendant, .. 82
Facts when plaintiff and defendant non-residents, ... 84
Form of bond given when both parties non-residents, ... 84
Deposit of money, ... 86
Form of short summons, ... 86

CHAPTER VI.

OF PROCESS BY WARRANT. 87.

SECTION I.

WARRANT. 87.

PAGE

Cases in which warrant may issue, ... 89
Cases in which a warrant must issue, ... 91
Actions against freeholders, &c., ... 92
Non-resident defendants, ... 96
Resident defendants, not freeholders, &c., ... 96
Affidavit for warrant, ... 96
Fictitious name of defendant, ... 99
Amount of demand, ... 100
Affidavit, by whom made, ... 100
Original affidavits defective, ... 101
Quashing warrant, ... 101
Application, how made, ... 102
In what town to sue, ... 102
What the affidavit should show, ... 102
Detention of canal boats, ... 108

SECTION II.

SERVICE OF WARRANT. 111.

Arrest, what it is, ... 111
Who may arrest, ... 111
When to arrest, ... 111
Where to arrest, ... 112
Who exempt from arrest, ... 112

CHAPTER VII.

ATTACHMENT. 121.

SECTION I.

GENERAL REVIEW OF THE SUBJECT. 121.

SECTION II.

LONG ATTACHMENTS. 124.

SECTION III.

AFFIDAVITS. 126.

Must be affidavit in all cases, ... 128
Affidavits are not to be entitled, ... 128
Affidavit, when to be made, ... 129
Affidavit, how often used, ... 129
Where to be made, ... 130
Nature of plaintiff's demand, ... 130
Demand must be due from defendant personally, ... 132
Joint liabilities of defendants, ... 133
Demands against corporations, ... 134
Fictitious names of defendants, ... 134
Amount of demand, ... 135
Affidavits, by whom made, ... 135
Should show cause of action on contract, &c., ... 136
Facts should show a case affirmatively, ... 136

PAGE.

Hearsay not competent, 136
Should show amount of debt, &c., 136
Must not state facts on belief, 137
Facts not to be stated by way of recital, 138
Satisfactory to the justice, 138
Facts and circumstances must be stated, 139
Affidavit, when sufficient collaterally, 144
Revised Statutes, what is a case under, 145
About to depart from the county, 145
Keeps concealed, &c., 145
Non-imprisonment act, what is a case under, 146
Has disposed of property, 146
Has assigned his property, 147
About to assign, &c., 147
Venue in affidavit, 147
Oath to affidavit, 148
Signing affidavit, 148
Joinder of classes of cases, 149
Original affidavits defective, 150
Quashing attachments for defective papers, 151
Controverting attachments, &c., 151
Long attachment, against whom issued, 152
General points as to affidavits, 153
Manner of drawing affidavits, 153
Applications for attachments, 154
Bond for attachment, 157
Must be bound in all cases, 159
Covenant will not do in place of bond, 159
Deposit of money will not supply place of bond, 160
Bond must describe parties correctly, 160
Execution of the bond, 160
Who to be sureties, 161
Liabilities of sureties, 162
Penalty of the bond, 163
Condition of the bond, 163
Bond, when to be executed, 163
Amendment of bonds, 163
Action upon attachment bond, 164
What the attachment must contain, 165

SECTION IV.

SHORT ATTACHMENT. 166.

Form of bond for short attachment, 171
Form of application for a short attachment, 171
Form of short attachment, 171
Short attachment, against whom issued, 171

SECTION V.

SERVICE OF ATTACHMENT. 172.

When to serve attachment, 172
Where to attach, 172
What property exempt, 173
How to attach, 173
Defendant may retain possession of goods, 175
Return to attachment, 180

CHAPTER VIII.

REPLEVIN, OR REQUISITION OF PERSONAL PROPERTY. 183.

SECTION I.

REPLEVIN PROCESS. 183.

PAGE.
Nature of the action, 183
Nature of the property, 183
What title or right plaintiff must have, 185
Parties to the action, 186
Value of the property, 186
Demand before action, 186
Time of claiming delivery of property, 186
Proceedings before process issues, 186
Must be affidavit in all cases, 186
Who to draw affidavits, 186
Who to draw copies for service, 187
Who to make affidavits, 188
Affidavits not to be entitled, 189
Belief as to facts stated, 189
Description of property, 189
Ownership, how stated, 190
Right to immediate possession, how stated, 190
Wrongfully withheld, &c., 191
Cause of detention, &c., 191
Not for any tax, fine, &c., 191
Actual value of property, 192
General rules as to affidavits, 192
Indorsing direction upon affidavit, 192
Controverting affidavits, 192
Defective affidavits, 193
Must be security in all cases, 195
Must be in writing, 195
Who to execute bond, 195
Penalty of bond, 196
Condition of bond, 196
Approval of sureties in bond, 196
Delivery of bond to justice, 197
Amendment of bond, 197
Liability of the sureties, 197
Summons, when to be issued, 198
Statutory requirement of summons, 199
Long summons, 199
Short summons, 200
Must be a summons and not a warrant, 200
Notice in the summons, 201
Summons not to describe property, 201
No direction indorsed on summons, 201
Form of summons, 201

SECTION II.

SERVICE OF REPLEVIN PROCESS. 202.

Where to be made, 202
When to be served, 202
How to be served, 202

PAGE.
Serving copies on defendant, ... 205
Serving copies on defendant's agent, ... 206
Leaving copies at defendant's residence, ... 206
Delivery of property to plaintiff, ... 206
Return of constable, when to be made, ... 207
What the return should show, ... 207
Proceedings on the part of the defendant, ... 210
Returning property to defendant, ... 212
Claim of property by a third person, ... 214
Must be on affidavit, ... 214

CHAPTER IX.

APPEARANCE. 217.

What it is, ... 217
When to appear, ... 217
Non-appearance of justice, ... 217
Non-appearance of the plaintiff, ... 219
Non-appearance of the defendant, ... 220
How the parties are to appear, ... 222
Appearance by attorney, ... 224
Appearance by next friend or guardian, ... 229

CHAPTER X.

PROCEEDINGS BEFORE PLEADING. 234.

CHAPTER XI.

JUSTICE A MATERIAL WITNESS. 237.

General principles, ... 237
When to make the application, ... 237
Who to make the application, ... 239
How to apply, ... 239
In what actions, ... 242
Judgment of discontinuance, ... 244
Errors of the justice, how corrected, ... 244

CHAPTER XII.

ANSWER OF TITLE TO LAND. 245.

In what actions title may be interposed, ... 245
When the defense must be pleaded, ... 245
Who may interpose this defense, ... 246
How to plead title, ... 247
Action in supreme court, ... 250
Title on plaintiff's own showing, ... 251

CHAPTER XIII.

OFFER OF JUDGMENT. 255.

In what actions, ... 255
Who may make the offer, ... 256
At what time, ... 256
How to make the offer, ... 256

CHAPTER XIV.

PARTIES TO ACTION. 259.

SECTION I.

GENERAL PRINCIPLES. 259.

SECTION II.

WHO TO BE PLAINTIFFS OR DEFENDANTS. 264.

	PAGE.
Plaintiffs in actions arising on contracts,	264
Principals, actions by,	265
Agents, actions by,	267
Assignees, actions by,	268
Executors and administrators, actions by,	270
Trustees of an express trust, actions by,	271
Persons authorized by statute, &c.,	272
Lunatics, &c., actions by,	273
Infants, actions by,	273
Married women, actions by,	273
Joinder of plaintiffs,	274
Misjoinder and non-joinder of plaintiffs in actions on contract,	275
Misjoinder of plaintiffs,	276
Non-joinder of plaintiffs,	276
Defendants in actions on contracts,	277
Who to be defendants under § 119 of the Code,	277
Partners, actions against,	278
Joint stock companies, actions against,	279
Corporations, actions against,	279
Infants, actions against,	279
Married women, actions against,	280
Principal and surety, actions against,	280
Joint debtors, actions against,	281
Counties, towns and public officers, actions against,	281
Change of parties, &c.,	282
Misjoinder of defendants,	282
Non-joinder of defendants,	282
Plaintiffs in actions for wrongs,	283
Action by assignee,	283
Actions by executors and administrators,	283
Husband and wife,	283
Partners, actions by,	283
Corporations, actions by,	283
Joint stock companies or associations,	283
Town and county officers,	283
Infants, actions by,	283
Lunatics, actions by,	283
Tenants in common, and joint tenants,	284
Penalties, actions for,	284
Misjoinder of plaintiffs, in actions for torts,	284
Non-joinder of plaintiffs, in actions for torts,	284
Defendants in actions for torts,	284
Infants, lunatics,	285
Married women,	285
Prior authority, or subsequent ratification of torts,	285
Executors and administrators,	285

PAGE.
Corporations, ... 285
Penalties, ... 286
Cannot be both plaintiff and defendant, ... 286
Joinder of defendants, ... 286
Misjoinder and non-joinder of defendants, ... 286

CHAPTER XV.

JOINDER OF CAUSES OF ACTION. 287.

Splitting single causes of action, ... 287
Several causes of action on contract, ... 288
Trespasses may be joined, ... 289
Penalties, ... 289
Contracts and torts cannot be joined, ... 289
Causes of action must be in same right, ... 289
Action must affect all the defendants in the same right, ... 290
Misjoinder of causes of action, how corrected, ... 290
Appeal does not lie, ... 290
Election as to kind of action, ... 291

CHAPTER XVI.

GENERAL RULES OF PLEADING. 292.

SECTION I.

GENERAL PRINCIPLES. 292.

Form of pleadings, ... 293
Must be pleadings and issue, ... 294
Facts are to be stated, ... 294
State enough to show cause of action or ground of defense, ... 295
Questions of fact, ... 296
Questions of law, ... 296
Questions of law and fact, ... 297
Statement of evidence, ... 298
Legal presumptions, ... 298
Fictions in pleadings, ... 299
Positively, ... 299
Hypothetical allegations, ... 299
Duplicity, ... 300
Certainty as to time, place, quantity and value, ... 301
Facts necessarily implied need not be stated, ... 302
Judicial notice, ... 303
Negativing defense, ... 304
Surplusage, ... 305
Repugnant, inconsistent, &c., ... 305
How facts ought to be stated, ... 306
Recitals, ... 307
Facts not denied are admitted, ... 307
What are material allegations, ... 308
Facts not alleged cannot be proved, ... 309
Matters in aggravation, &c., ... 310
Special damages, ... 310
Scienter, ... 310
Duly, &c., ... 310
Profert, &c., ... 311
Construction of pleadings, ... 311

SECTION II.

COMPLAINTS. 312.

PAGE.
Number of parties, ... 312
Names of parties, ... 312
Character or right in which action is brought, ... 313
Assignee for benefit of creditors, ... 313
Administrator or executor, ... 313
Complaint by infant and next friend, ... 314
Receivers, ... 314
Public officers, ... 314
General rules, ... 314
Cause of action stated in process, ... 314
Within jurisdiction, ... 314
Contract, complaint on, ... 315
Complaint, when to be special, ... 315
Inducement, ... 316
Plaintiff's interest in the subject matter of the action, ... 316
Consideration, ... 316
Promise by the defendant, ... 317
Profert, ... 317
Averments of performance by plaintiff, ... 317
Request, notice, demand, &c., ... 318
Breach of the agreement, &c., ... 318
Damages, ... 318
Conclusion of complaint, ... 319
Several counts, ... 319
Common counts, ... 319
Bill of particulars, ... 320
Complaints in actions for torts, ... 322
Plaintiff's interest in thing injured, ... 323
Motives, intent, or negligence of the defendant, ... 323
Statement of wrongful acts of defendant, ... 324
Time and place, ... 325
Scienter, ... 325
Demand, ... 326
Penalties, ... 327
Assignment of demand or right of action, ... 327
Damages, ... 327
Conclusion, ... 327

SECTION III.

ANSWERS. 327.

SECTION IV.

DEMURRERS. 330.

What a demurrer is, ... 330
In what cases a demurrer may be interposed, ... 331
Decision or judgment on demurrer, ... 332

CHAPTER XVII.

ADJOURNMENTS. 334.

On whose motion; on motion of the justice, ... 335
On motion of the plaintiff, ... 336
On motion of the defendant, ... 338

PAGE
Second or further adjournment, ... 339
When to apply, ... 343
Where to apply, ... 345
How to apply, ... 345
Form of oath, ... 349
Statutory requirements, ... 350
What is a ground of adjournment, ... 355
How long adjournment should be granted, ... 356
Adjournment in warrant cases, ... 357
When adjournment may be refused, ... 358
When an adjournment is a discontinuance of the action, ... 358

PART VI.

EVIDENCE. 361.

CHAPTER I.

GENERAL PRINCIPLES. 361.

SECTION I.

PRELIMINARY VIEW. 361.

SECTION II.

MATTERS JUDICIALLY NOTICED WITHOUT PROOF. 366.

SECTION III.

COMPETENCY OF WITNESSES. 367.

SECTION IV.

ADMISSIONS. 371.

SECTION V.

ESTOPPEL. 386.

SECTION VI.

PRESUMPTIONS. 386.

SECTION VII.

HEARSAY. 389.

SECTION VIII.

BEST EVIDENCE. 397.

SECTION IX.

SUFFICIENT TO PROVE THE SUBSTANCE OF THE ISSUE. 408.

SECTION X.

BURDEN OF PROOF. 413.

SECTION XI.

RELEVANCY OF EVIDENCE. 415.

SECTION XII.

WRITTEN EVIDENCE. 418.

SECTION XIII.

JUDICIAL DOCUMENTS. 422.

PAGE.
Judgments, verdicts, &c., ... 422

SECTION XIV.

PRIVATE DOCUMENTS OR WRITINGS. 427.

SECTION XV.

SUBSCRIBING WITNESSES. 428.

SECTION XVI.

HANDWRITING. 432.

SECTION XVII.

ALTERATION OF WRITTEN INSTRUMENTS. 434.

SECTION XVIII.

ACCOUNT BOOKS. 436.

Must be matter of book account, ... 439
Not evidence of a single charge, ... 440
Must prove some of the items charged, ... 440
Manner of keeping books, ... 441
Common to all classes of business, ... 442
Entries, by whom made, ... 444
No clerk, ... 444
Number of witnesses to prove dealings, ... 444
Credit for jury, ... 444
Credit, how impeached, ... 445
Existence of common law proof does not invalidate, ... 446
Evidence of value, ... 446
Entries, when made, ... 446
Ordinary book in daily use, ... 447
Original entries, ... 448
Ledger and daybook, ... 448
Entire set of books must be introduced, ... 449
Charges in gross, ... 449
Witness testifying from books, ... 449
Copy of books not competent evidence, ... 450
Books introduced cannot be withdrawn, ... 450
Must be received generally, ... 450
Whole contents evidence, ... 450
May waive books and resort to common law proofs, ... 451
License by person rendering service, ... 452

SECTION XIX.

PAROL EVIDENCE TO CONTRADICT WRITTEN EVIDENCE. 452.

General rule, ... 453
Aiding written evidence by parol evidence, ... 457

CONTENTS.

SECTION XX.

PAROL PROOF AS ORIGINAL AND INDEPENDENT EVIDENCE. 466.

SECTION XXI.

OBJECTIONS TO THE COMPETENCY OF WITNESSES. 470.

SECTION XXII.

OATH TO WITNESSES. 472.

SECTION XXIII.

MANNER OF TESTIFYING. 475.

SECTION XXIV.

EXAMINATION OF WITNESSES. 477.

SECTION XXV.

CROSS-EXAMINATION. 479.

SECTION XXVI.

RE-EXAMINATION. 485.

SECTION XXVII.

FURTHER EXAMINATION. 486.

SECTION XXVIII.

OPINIONS AND BELIEF, SKILL AND SCIENCE. 488.

SECTION XXIX.

EXAMINING WITNESSES SEPARATELY. 500.

SECTION XXX.

LEADING QUESTIONS. 500.

SECTION XXXI.

REFRESHING MEMORY. 505.

SECTION XXXII.

CRIMINATING ANSWERS. 508.

SECTION XXXIII.

DEGRADING ANSWERS. 511.

SECTION XXXIV.

CONFIDENTIAL COMMUNICATIONS. 511.

SECTION XXXV.

INPEACHING CREDIT OF WITNESSES. 515.

SECTION XXXVI.

IMPEACHING A PARTY'S OWN WITNESS. 523.

SECTION XXXVII.

DUTY OF A JURY IN WEIGHING EVIDENCE. 525.

PART VII.

TRIAL. 546.

CHAPTER I.

PREPARATION FOR TRIAL. 546.

SECTION I.

SUBPŒNA. 546. PAGE.
Attachment against defaulting witness, ... 555
Imposing fine upon witness, ... 559

SECTION II.

COMMISSION TO TAKE EVIDENCE. 563.

CHAPTER II.

GENERAL RULES RELATING TO TRIALS. 577.

CHAPTER III.

TRIAL WITHOUT A JURY. 583.

CHAPTER IV.

TRIAL BY JURY. 589.

SECTION I.

GENERAL PRINCIPLES. 589.
Of challenges, ... 598
Challenge to the array, ... 599
Challenge to the polls, ... 600
Time of making challenge, ... 602
Defense stated, and evidence, ... 608
Charging the jury, ... 612
The verdict, ... 623
Questions of fact for the jury, ... 627
Questions of law for the court, ... 630
Objections, exceptions, &c., ... 631
Of the justice's discretion, ... 637

SECTION II.

PROCEEDINGS AGAINST A JUROR FOR NON-ATTENDANCE. 640.

SECTION III.

CONTEMPTS OF COURT. 642.

SECTION IV.

PROCEEDINGS AGAINST A WITNESS FOR REFUSING TO BE SWORN. 646.

CHAPTER V.

DAMAGES. 648.

SECTION I.

DAMAGES IN ACTIONS ON CONTRACTS. 648.

	PAGE.
General view of the subject,	648
Nominal damages,	649
Remote and consequential damages,	651
Actions for breach of contracts,	653
Actions upon bills and notes,	658
Interest as damages in actions on contracts,	659
Sales of personal property,	659
Warranties as to quality or quantity,	663
Warranty of title,	664
Principal and surety,	666
Principal and agent,	666
Landlord and tenant,	666
Carriers,	668
Liquidated damages,	670

SECTION II.

DAMAGES IN ACTIONS FOR TORTS. 675.

Trover,	676
Replevin,	679
Trespass upon real estate,	681
Nuisance,	684
Negligence,	684
Trespass to personal property,	684
Actions against sheriffs and constables,	686

SECTION III.

ASSESSMENT OF DAMAGES. 687.

Time of assessing damages,	687
Amount of damages,	687
Interest as damages,	687
Double and treble damages,	688
Several defendants,	688
Remitting damages,	688

CHAPTER VI.

JUDGMENT. 689.

What a judgment is,	689
Kinds of judgment,	689
Judgment by default,	690
Judgment on issues of law,	691
Judgment on issues of fact,	691
Judgment on issues of law and fact,	692
Judgment of nonsuit,	692
Judgment of discontinuance,	694

PAGE.
Judgment, when to be rendered, ... 694
Judgment, how rendered, ... 696
Form of the judgment, ... 697
Judgment by confession, ... 702
Judgment, how confessed, ... 702
Stamps, ... 705
Action on judgments, ... 706
Transcripts of judgments, ... 706
Setting aside docketed judgment, ... 707

CHAPTER VII.

COSTS. 707.

Double and treble costs, ... 710

CHAPTER VIII.

EXECUTION. 714.

What it is, ... 714
Kinds of execution, ... 714
Forms of execution, ... 714
Form of execution against property, ... 714
Form of execution against body, ... 715
Indorsement on execution, ... 716
Execution, by whom issued, ... 717
When execution to be issued, ... 717
Execution, when returnable, ... 718
General requisites of an execution, ... 719
To whom directed, ... 719
Signatures, blanks, &c., ... 719
Delivery of execution to officers, ... 719
Who to execute, ... 719
How executed, ... 720
From what time the property is bound, ... 721
Priority of executions, ... 721
What kind of property may not be levied upon, ... 724
Claim of property by third person, ... 724
Fraudulent sales or mortgages, ... 727
Levy, when to be made, ... 728
Levy, where made, ... 728
Levy, how made, ... 728
Disposition of goods after levy, ... 734
Rights and liabilities of constable after levy, ... 735
Effect of a levy, ... 736
Sale of property, ... 737
Sale, when to be made, ... 738
Notice of sale, ... 738
Time and place of sale, ... 739
Postponement of sale, ... 739
Sale, how conducted, ... 739
Constable's right to fees, &c., ... 742
Execution in replevin actions, ... 742
Execution against the person, ... 744
Discharge of defendant from jail, ... 745
Escape, ... 745

PAGE.
Property exempt from execution, ... 745
Return of an execution, ... 755
Renewal of executions, ... 756

CHAPTER IX.

AMENDMENTS. 757.

Amendment of process, &c., ... 759
Amendment of pleadings, ... 760
Amendment of verdict and judgment, ... 761

PART VIII.

APPEALS. 763.

CHAPTER I.

THE PRACTICE ON APPEALS. 763.

SECTION I.

GENERAL PRINCIPLES RELATING TO APPEALS. 763.

Historical sketch, ... 763
What an appeal is, ... 765
Kinds of appeal, ... 766
Who may appeal, ... 766
From what judgment an appeal lies, ... 767
Appeal the only mode of review, ... 769
Appeal to what court, ... 770
Appeals where more than $50 is claimed, ... 770
Appeals where less than $50 is claimed, ... 770
Appeal, when to be brought, ... 771
Affidavits not necessary, ... 771

SECTION II.

NOTICE OF APPEAL. 772.

Notice of appeal must be in writing, ... 772
Notice must state the grounds of appeal, ... 773
How grounds of error ought to be stated, ... 775
Consequence of defective statement, &c., ... 779
Notice of appeal must be returned, ... 783
Defective or irregular service of notice, ... 783
Stamps, ... 786
Time of serving notice of appeal, ... 786
Manner of serving the notice of appeal, ... 787
Payment of costs, &c., ... 788
New York city, ... 789
Staying execution, ... 789
Offer to correct judgment, ... 793

SECTION III.

RETURN ON APPEAL. 798.

General object and features, ... 798
When to be made, ... 798

PAGE.
What to contain, ... 799
Who to draw return, ... 803
Conclusiveness of return, ... 805
Forms of returns, ... 806
General facts to be stated in return, ... 809
Returning a ministerial act, ... 811
Defective return, ... 811
Compelling return, ... 811
Amended or further return, ... 821

SECTION IV.

ARGUMENT OF APPEAL. 830.

Hearing at what term of the court, ... 830
Either party may bring cause to argument, ... 831
Upon what notice, ... 831
Putting cause on the calendar, ... 831
Dismissing appeal for neglect to bring it to a hearing, ... 832
Hearing to be on the original papers, ... 834
Practice on the argument, ... 835
Relief from default in the court below, ... 837
Excusing default, ... 840
Sufficient excuses, ... 842
Insufficient excuses, ... 844
Manifest injustice must be shown, ... 847
Terms of opening default, ... 850
New trial before the justice, ... 851
Error in fact, ... 853
Must be on appeal, ... 856
Assigning error in fact, ... 856
Form of affidavits, ... 857
Serving copies of affidavits, ... 857
Notice of hearing, ... 857
Practice on the hearing, ... 857
Decision of the court, ... 857
Transfer of cause to supreme court, ... 858
Re-argument of an appeal cause, ... 858

SECTION V.

NEW TRIAL. 859.

General considerations, ... 859
New trial, in what cases, ... 861
Return must be made, ... 861
What is to be returned, ... 861
Preliminaries to notice of trial, ... 862
Notice of trial, ... 863
Note of issue, ... 864
Offer of judgment, ... 864
In what actions, ... 864
Who may offer, ... 864
At what time, and in what cases offer is to be made, ... 865
Form of offer and its service, ... 867
Effect of refusing offer of judgment, ... 869
More favorable judgment, ... 869
Preparation for trial, ... 872

PAGE.
Practice on the trial in the county court, ... 873
Amendment of pleadings, ... 874
Motion for a new trial on a case or exceptions, ... 874
Amount of verdict, and its effect upon the question of costs, ... 874

SECTION VI.

JUDGMENT ON APPEAL. 874.

General considerations, ... 874
According to justice, ... 875
Reversal in whole or in part, ... 875
Reversal as to any or all the parties, ... 882
Judgment by default, ... 883
Errors not stated in the notice of appeal, ... 885
Review of discretionary decisions, ... 885
Reversal upon questions of fact, ... 886
Reversal upon questions of law, ... 902
Objections first taken on the argument, ... 903
Reversal for want of evidence, ... 904
Admitting illegal or incompetent evidence, ... 905
Excluding legal or competent evidence, ... 905
Payment of judgment below, ... 906
Intendments by appellate court, ... 907
Restitution, ... 908
Judgment roll, ... 913
Enforcement of judgment, ... 914

SECTION VII.

COSTS ON APPEAL. 915.

Appellant's costs, when case heard on return, ... 915
Respondent's costs, when case heard on return, ... 915
Costs in the discretion of the court, ... 916
Costs on new trials in the county court, ... 916
Taxation of costs, ... 916

SECTION VIII.

EXECUTION. 917.

SECTION IX.

APPEALS TO THE SUPREME COURT. 919.

Appeal, when to be taken, ... 920
From what judgments, ... 920
Authority of supreme court, ... 920
Appeals from orders of county courts, ... 922

SECTION X.

APPEALS TO THE COURT OF APPEALS. 923.

PART IX.

SPECIAL PROCEEDINGS AND PRECEDENTS. 925.

CHAPTER I.

PRECEDENTS OF PLEADINGS. 925.

SECTION I.
COMPLAINTS ON CONTRACTS. 925.

SECTION II.
COMPLAINTS FOR TORTS. 960.

SECTION III.
ANSWERS. 971.

SECTION IV.
DEMURRERS. 985.

SECTION V.
ACKNOWLEDGMENTS. 985.

SECTION VI.
ARBITRATIONS. 994.

SECTION VII.
CHATTEL MORTGAGES. 1001.

SECTION VIII.
CONTRACTS. 1003.

SECTION IX.
HIGHWAYS. 1007.

TABLE OF CASES CITED IN THIS VOLUME.

Aberhall v. Roach, 336, 343, 344, 345, 359, 557, 613.
Abernathy v. Abernathy, 37.
Acker v. Ledyard, 435.
Ackerman v. Finch, 80, 81, 84, 97, 156, 163, 226.
Ackley v. Tarbox, 274, 284, 582.
Ackworth v. Kempe, 724.
Adams v. Beach, 34.
v. Davidson, 378.
v. Hopkins, 742.
v. Hull, 464.
v. Jackson, 392.
v. Kearney, 907.
v. Rivers, 35, 252, 682.
Adamthwaite v. Synge, 419.
Addington v. Allen, 325.
Adkins v. Brewer, 14, 151.
Adsit v. Brady, 304.
v. Wilson, 27. 416, 639, 854, 857.
Agreda v. Faulberg, 759, 836.
Aikin v. Buck, 34.
Alburtis v. McCready, 222, 308, 583, 690, 702, 889.
Alderman v. Tirrell, 231.
Aldred v. Constable, 741.
Aldritch v. Ketcham, 17, 19, 784, 788.
Alexander v. Hoyt, 882.
Alexander v. Taylor, 426.
Alger v. Scoville, 290.
Allen v. Allen, 314.
v. Bates, 876.
v. Bodine, 484, 515.
v. Cook, 752.
v. Edwards, 20, 359, 565.
v. Fosgate, 281.
v. Jaquish, 470.
v. Martin, 74, 116, 120.
v. Patterson, 295, 311, 319, 334.
v. Stono, 20, 80, 170, 803, 844.
v. Suydam, 669.
v. Way, 636.
Alt v. Weidenberg, 678.
American Ins. Co. v. Oakley, 223.
Amory v. McGregor, 668.
Anderson v. Johnson, 552.
Andrews v. Bond, 309, 762.
v. Durant, 677.
v. Harrington, 47, 227, 633, 636.
v. Thorp, 19.
Anon., 356, 803.
Anthoine v. Coit, 905.
Anthony v. Smith, 607, 619, 638, 639.
Appleby v. Strang, 626, 702.
Armine v. Spencer, 276, 277.
Armorie v. Delamirie, 676.
Armstrong v. Craig, 226, 841, 843, 844, 846, 847, 849.
Arms v. Middleton, 393.
Armstrong v. Percy, 310, 652, 665, 942.
Arnold v. Maltby, 42, 760.
v. Steeves, 112, 115, 118, 120.
v. Suffolk Bank, 679.
v. Sandford, 855.
Artisan's Bank v. Treadwell, 734.
Ashby v. White, 648.
Astley v. Weldon, 675.
Atlantic Fire Ins. Co. v. Boies, 628.
Atwood v. Austin, 221.
v. Welton, 511.
Auburn, &c., Canal Co. v. Leitch, 330.
Auburn City Bank v. Leonard, 456, 461.
Auchmuty v. Ham, 287, 326.
Austin v. Burns, 586, 636, 904.
v. Searing, 273, 279.
Averill v. Williams, 387.
Avery v. Slack, 20, 245.
Aveson v. Kinnaird, 390.
Avogadro v. Bull, 635, 904.
Ayrault v. Chamberlain, 414, 609, 627, 629, 638.
Ayres v. Covill, 330, 331.
Babcock v. Hill, 345, 597.
v. Lipe, 51, 760.
v. Raymond, 901.
Bachelder v. Shapleigh, 747.
Backus v. Richardson, 333.
Bacon v. Cropsey, 49.
Bagg's Case, 588.
Bagley v. Peddie, 671.
v. Smith, 655.
Bailey v. Barnelly, 446.
v. Delplaine, 224, 337, 359.
Bain v. Globe Ins. Co., 71.
Baker v. Bonesteel, 897.
v. Braman, 17, 359.
v. Brill, 553.
v. Freeman, 685.
v. Higgins, 460, 465.
v. Simmons, 620.
v. Stackpoole. 375.
v. Wheeler, 676. 677.
v. Williams, 556.
Bakewell v. Ellsworth, 730, 737.

Baldwin v. Delevan, 888.
v. McArthur, 22.
Ball v. Gardner, 86, 162.
v. Mander, 46, 845.
v. Shell, 724.
Bank of Attica v. Wolf, 279, 697.
Bank of Commerce v. Michel, 566.
Bank of Kinderhook v. Gifford, 761.
Bank of Lansingburgh v. Crary, 184.
Bank of Lowville v. Edwards, 302.
Bank of Lyons v. Demmon, 223.
Bank of Monroe v. Culver, 385, 450.
Bank of North America v. Embury, 465.
Bank of Rome v. Curtiss, 686.
Bank of Salina v. Henry, 510.
Bank of Silver Creek v. Talcott, 387.
Bank of Utica v. Mersereau, 513.
Bank of Vergennes v. Cameron, 375.
Bank of Whitehall v. Weed, 742.
Barber v. Parker, 220.
v. Rose, 626, 698.
Barger v. Durwin, 375.
Barker v. Binninger, 374, 733.
v. Bucklin, 267.
v. Cassidy, 278, 282.
v. Webster, 824.
Barlow v. Scott, 465.
Barnard v. Pierce, 795.
v. Viele, 163.
Barnes v. Allen, 382.
v. Badger, 588, 695.
v. Tarpenny, 21.
Barnes v. Harris, 7, 62.
v. Perine, 411, 634, 636.
Barrick v. Austin, 266, 269, 375, 637.
Barry v. Ransom, 469.
Bartle v. Gilman, 711.
Barton v. McKelway, 389.
Batchelor v. Vyse, 741.
Bates v. Conkling, 805.
v. James, 717, 731.
v. Loomis, 309, 310, 324.
v. Relyea, 159, 167.
Battle v. Rochester City Bank, 468.
Batthews v. Galindo, 370.
Baum v. Tarpenny, 624, 824, 908.
Bayard v. Smith, 303.
Bayley v. Onondaga, &c., Co., 306.
Beach v. Chamberlain, 614, 762.
Bearsa v. Copley, 382, 499, 515.
Beach v. Crains, 655.
v. Fulton Bank, 285.
v. Gregory, 767.
v. McCann, 578, 769, 843.
v. Nixon, 15, 635.
v. Wise, 377.
Beale v. Hayes, 675.
Beal v. Finch, 290, 639, 688.
Beall v. Dey, 565, 566.
Beals v. Guernsey, 396.
v. Terry, 459, 464.
Beattie v. Larkin, 7.
v. Qua, 444, 695, 907, 917.
Beaver v. Van Every, 227.
Bedell v. Powell, 638.
Bedford v. Terhune, 762.
Beebe v. Roberts, 806, 845.
Beecher v. Crouse, 270.
Beekman v. Platner, 495.
Beekman v. Wright, 356.
Beers v. Reynolds, 379.
Beirne v. Dord, 581.
Belden v. Devoe, 129.
v. N. Y. & Harlem R. R., 20, 59, 79.
v. Nicolay, 660, 905.
Belknap v. Sealey, 411.
Bell v. Davis, 310, 388.
v. Holford, 463.
Bellinger v. Craigue, 302.
v. Ford, 314, 319, 718.
v. Kitts, 461.
v. People, 483.
Bellony v. Alexander, 883.
Bellows v. Pearson, 26.
v. Sackett, 34, 35, 634, 907.
v. Shannon, 115.
Belmore v. Anderson, 576.
Belshaw v. Colie, 351, 356, 800.
Bement v. Smith, 662.
Benjamin v. Coventry, 513.
v. De Groot, 298.
v. Smith, 723.
Bendernagle v. Cocks, 287.
Benn v. Borst, 21.
Bennet v. Davis, 718.
Bennett v. Brown, 14, 80, 86, 127, 159, 162, 167, 169.
v. Burch, 383.
v. Francis, 384.
Bennet v. Fuller, 111.
v. Hurd, 305.
Bennett v. Ingersoll, 810.
v. Judson, 306.
v. Rathbun, 251.
v. Smith, 390.
Benson v. Clark, 621.
v. Schneider, 554.
v. Paine, 288.
Bentley v. Phelps, 38, 392.
v. Smith, 44, 313.
Berley v. Rampacher, 280.
Berly v. Taylor, 291.
Bernard v. Wilcox, 275.
Bernhardt v. Rens. & Sar. R. R., 629.
Berrien v. Olmstead, 667, 694.
Berry, in the matter of, 178, 792.
Berryman v. Wise, 392.
Berwick v. Horsfall, 452.
Betts v. Badger, 429.
Biays v. Merrihew, 563.
Bidwell v. Weeks, 579.
Bierce v. Smith, 47.
Bigelow v. Provost, 737.
v. Grannis, 279.
v. Stearns, 12, 120.
Biglow v. Sanders, 451, 854.
Billings v. Vanderbeck, 660, 662.
v. Jane, 266.
Binney v. Le Gal, 702.
Bird v. Silsbie, 825.
Birdseye v. Ray, 737.
Bissell v. Bissell, 45, 694.
v. Dean, 843, 848, 851.
v. Hopkins, 677.
v. Marshall, 636, 767, 905.
v. Pearce, 420.
Bitting v. Vandenburgh, 748.
Blackley v. Sheldon, 621, 626.

Black v. Foster, 417, 634, 637.
Blake v. Millspaugh, 601.
Blanchard v. Ely, 651.
v. Isaacs, 889.
v. Richly, 578, 596, 609.
v. Strait, 314.
Blasdale v. Babcock, 665.
Blatchley v. Moser, 392.
Blewett v. Tregonning, 486.
Blin v. Campbell, 15.
Blivin v. Bleakley, 735.
Bloodgood v. Overseers of Jamaica, 19.
Blossom v. Griffin, 463.
Blot v. Boiceau, 670.
Blydenburgh v. Cotheal, 57.
Blythe v. Tompkins, 12.
Board, &c., of Saratoga Co. v. Doherty, 64, 284.
Bogart v. O'Regan, 267, 271.
Bogert v. Burkhalter, 310.
v. Furman, 25.
v. Morse, 387.
v. Perry, 724.
Bohun v. Tayler, 688.
Boice v. Main, 753.
Bond v. Willet, 733.
Bonesteel v. Lynde, 549.
Bonner v. McPhail, 6.
Boomer v. Laine, 402.
Boorman v. Nash, 663.
Booth v. Smith, 333.
v. Sweezey, 377.
Borrodaile v. Leek, 42, 72, 628.
Bort v. Smith, 633.
Bortle v Ostrander, 754.
Bostwick v. Abbott, 582.
Bowen v. Ferne, 46.
Bowles v. Johnson, 552.
Bowman v. Cornell, 792.
v. Earle, 321.
v. Quackenboss, 753.
v. Sheldon, 838.
Bowne & Millard v. Mellor, 8, 146, 152, 165, 171.
Bowne v. Witt, 747.
Boyce v. Brown, 299, 306.
v. Morgan, 57.
Boyd v. Colt, 898.
v. Weeks, 414.
Boyle v. Colman, 433.
Boynton v. Boynton, 406.
Boys v. Ancell, 675.
Brace v. Benson, 13, 42, 51, 759.
Brackett v. Watkins, 746.
Brady v. Bissell, 269.
Bradley v. Fay, 712.
v. Ricardo, 524.
Brain v. Rodericks, 576.
Brainard v. Jones, 331.
Brahe v. Kimball, 450.
Bramer v. Cooper, 279.
Bray v. Andreas, 17, 19.
v. Redman, 788.
Braydon v. Goulman, 477.
Brehm v. Great Western Railway Co., 500.
Breidert v. Vincent, 637.
Brewer v. Temple, 310.
Brewster v. Countryman, 399, 426.
v. Doane, 450.
Brewster v. Michigan R. R., 71.
v. Silence, 281, 290.
Bridge v. Payson, 308, 371.
Bridgeport City Bank v. Empire Stone Co., 629.
Briggs v. N. Y. C. R. R., 669.
v. Vanderbilt, 310.
v. Vose, 278.
Brigham v. Bush, 747.
Bright v. Currie, 270, 317.
Brill v. Flagler. 495.
Brill v. Lord, 358.
Brinkerhoff v. Olp, 674.
Brintnall v. Foster, 587, 693.
Brisbane v. Pratt, 377.
Bristol, matter of, 767.
Britton v. South Wales R. R. Co., 684.
Brizsee v. Maybee, 676, 680, 681.
Bromaghim v. Throop, 703.
Bromley v. Smith, 74.
Bronner v. Frauenthal, 552.
Bronson v. Earl, 57.
v. Gleason, 304, 367.
v. Mann, 708.
v. Wiman, 367, 417.
Brooks v. Hubbard, 658.
Broome v. Beardsley, 583.
Brotherton v. Wright, 251, 253, 402.
Brown v. Bristol, 624.
v. Bowen, 553.
v. Brown, 244, 251, 464.
v. Buffalo & State Line R. R., 630.
v. Cayuga & Susq. R. R., 634.
v. Feeter, 679, 717.
v. Harmon, 297, 303, 631
v. Hull, 460.
v. Kimball, 573.
v. Mailler, 377.
v. McCune, 637.
v. N. Y. Cent. R. R., 629.
v. Richardson, 303, 952.
v. Sax, 676.
v. Smith, 708.
v. Torrey, 387.
v. Williams, 322.
v. Wilmerding, 629.
Brownson v. Gifford, 274, 331.
Browne v. Scofield, 366, 367.
Brownell v. McEwen, 856.
v. Slocum, 618.
v. Winne, 880, 976.
Browne v. Scofield, 35, 303.
Browning v. Hanford, 735.
Bruce v. Westervelt, 740.
Brumskill v. James, 572, 573, 574.
Brunt v. Thompson, 367.
Brush v. Lee, 917.
Buck v. Waterbury, 633, 635.
Buckley v. Leonard, 326, 892.
Buckingham v. Billings, 747.
Budd v. Jackson, 870.
Budlong v. Van Nostrand, 374, 385, 504, 521, 639.
Buel v. Trustees of Lockport, 17, 359, 587.
Bull v. Colton, 36, 39, 314, 319.
Bullard v. Spoor, 231, 600.
Bumpus v. Maynard, 747.
Bumstead v. Div. Mut. Ins. Co., 634.
Bunker v. Latson, 844.

Bunn v. Croul, 621.
v. Hoyt, 626.
Burdick v. Green, 57.
v. Worrall, 315.
Burger v. White, 274, 614, 639.
Burger v. Kortright, 626, 698.
Burges v. Abbott, 277, 282.
Burgess v. Tucker, 675.
Burghart v. Rice, 60, 61, 78.
Burlingame v. Burlingame, 658.
Burnett v. Phalon, 485.
v. Westfall, 872.
Burns v. Robbins, 196.
Burrall v. De Groot, 303.
Burrows v. Unwin, 622.
Burt v. Dewey, 652, 665, 942.
v. Walker, 431.
Burtnett v. Gwynne, 270.
Bush v. Dennison, 779, 783, 805.
v. Miller, 226, 387.
Bussey v. Donaldson, 648.
Butler v. Benson, 489.
v. Kelsey, 618.
v. Maynard, 721.
v. McIntyre, 825.
v. Morris, 279, 697.
Buzzard v. Knapp, 298.
Byass v. Sullivan, 509, 647.
Byxbie v. Wood, 269.
Cable v. Dakin, 681.
Cabre v. Sturges, 636, 783, 801.
Cady v. Allen, 306.
Cahoon Bank v. Utica, 185.
Cain v. Ingham, 25, 26.
Caldwell v. Murphy, 390.
Calligan v. Stiles, 800.
Calvit v. McFadden, 660.
Camcemi v. People, 601.
Camp v. Bennett, 855.
v. Chamberlain, 722, 725, 732.
v. Stewart, 842, 849, 851.
v. Tibbetts, 20, 137.
Canham v. Barry, 465.
Campbell v. Hayt, 420.
v. Ruger, 722.
v. Stakes, 285, 324.
v. Woodworth, 496, 686.
Caniff v. Myers, 226.
Capewell v. Ormsby, 806, 824.
Carland v. Day, 381, 615, 627, 629.
Carman v. Newell, 26, 593.
Carnrick v. Myers, 739, 752.
Carpenter v. Herrington, 746, 747.
v. Nixon, 369, 517.
v. Smith, 581.
v. Spooner, 51.
v. Stilwell, 720, 737.
Carrington v. Andrews, 22.
Carris v. Ingalls, 303.
Carroll v. Goslin, 68, 843, 849.
v. Upton, 298.
Carter v. Dallimore, 308, 583, 690, 889.
v. Werner, 921.
Carver v. Tracy, 382.
Cary v. Gruman, 663.
v. Hotailing, 417.
Case v. Hall, 942.
Cass v. N. Y. & N. H. R. R., 416.
Case v. Potter, 439.
Case v. Price, 552.
v. Redfield, 183.
v. Van Ness, 345, 577.
Castle v. Duryea, 580.
Caswell v. Coare, 666.
Catlin v. Gunter, 295.
Chadwick v. Lamb, 678.
Chaffee v. Cox, 396, 407.
Chalmers v. Melville, 551.
Chamberlain v. Beller, 725.
Chambers v. Mason, 374.
Champlin v. Johnson, 730.
Chancel v. Barclay, 639.
Chapin v. Churchill, 915.
v. Potter, 452.
Chapman v. Bluck, 465.
Chapman v. Carolin, 310, 411.
v. Fuller, 612, 756.
v. Hatt, 745.
v. Smith, 305.
v. West, 332.
v. Wilber, 304, 367.
Chappell v. Bissell, 303.
Cheeney v. Arnold, 504, 639.
Cheetham v. Lewis, 315.
Chester v. Bank of Kingston, 466.
Chesterman v. Lamb, 666.
Child v. Grace, 380.
Childs v. Hart, 297.
Chinery v. Viall, 679.
Church v. Brown, 280.
Churchill v. Churchill, 300.
v. Marsh, 760.
City of Buffalo v. Holloway, 296, 325.
Clapp v. Graves, 19, 77, 924.
v. Wilson, 519, 522.
Clark v. Atkinson, 305.
v. Dales, 301, 660.
v. Dearborn, 628.
v. Denure, 626, 698, 888.
v. Fairchild, 320, 941.
v. Garrison, 577, 907.
v. Gilbert, 657.
v. Grant, 113.
v. Hallock, 685.
v. Luce, 97.
v. Marsiglia, 654.
v. Miller, 670.
v. Ostrander, 906.
v. Pinney, 658, 660.
v. Saunderson, 431.
v. Van Vrancken, 586, 594, 603, 635, 904.
v. Vorce, 396.
Clary v. Hoagland, 4,
Clayton v. Per Dun, 28.
Clements v. Benjamin, 21, 615.
Clement v. Cash, 673.
Clickman v. Clickman, 838.
Clifford v. Burton, 373.
Clinton v. Estes, 385.
v. Rowland, 450.
Close v. Olney, 509.
Cloyes v. Thayer, 509.
Clum v. Smith, 856.
Clute v. Fitch, 391.
Cobb v. Curtiss, 237.
v. Dows, 289.
v. Frazee, 332.

Cobb v. West, 412.
Coddington v. Davis, 466,
Coffin v. Tracy, 15.
Coggins v. Bulwinkle, 287.
Coit v. Beard, 582.
Cole v. Hindson, 719.
v. McClellan, 113, 555.
v. Reynolds, 275.
v. Stevens, 749.
v. Stone, 388,
Colegate v. Marsh, 129.
Colegrove v. Breed, 282, 615.
Colegrove v. Harlem, & N. H. R. R., 581.
Colledge v. Horn, 374.
Collier v. Simpson, 494.
Collins v. Albany & Schenectady R. R., 901.
Columbia Turnpike v. Haywood, 46, 57.
Colver v. Van Valen, 130, 142, 143, 151.
Colvin v. Luther, 12, 119, 222, 703.
Colwell v. N. Y. & Erie R. R., 289.
Comfort v. Gillespie, 128, 142, 148, 160.
Commercial Bank of Buffalo v. Kortwright, 676.
Commercial Bank of Pennsylvania v. Union Bank of New York, 574, 576.
Com. of Excise of Saratoga Co. v. Doherty, 6, 66, 242.
Commonwealth v. Derby, 878.
Comstock v. Hutchinson, 663.
Cook v. Brockway, 493.
v. Clark, 876.
v. Gen. Mut. Ins. Co., 275.
v. Husted, 430.
v. Litchfield, 627, 630.
v. Nellis, 251.
v. Ritter, 614, 876.
v. Swift, 27, 836, 857.
v. Staats, 148.
Cooke v. Birt, 721.
Coon v. Knapp, 469,
v. Snyder, 596.
v. Syracuse & Utica R. R., 634.
Coons v. Chambers, 629.
Cooper v. Ball, 7, 635.
Cooper v. Barber, 418, 639.
Conger v. Hudson River R. R., 668.
v. Johnston, 299.
Congreve v. Morgan, 325.
v. Smith, 630.
Conklin v. Stamler, 441.
v. Thompson, 285.
Conkling v. King, 17, 359.
Connah v. Hale, 733.
Connell v. Lasscells, 147.
Connoss v. Meir, 302, 414.
Conrad v. Williams, 616, 628.
Considerant v. Brisbane, 268. 271.
Converse v. McArthur, 22, 635.
Conway v. Hitchins, 152, 172, 183, 792.
Cooper v. Bigalow, 745.
v. Dedrick, 389.
v. Kinney, 760.
Cope v. Sibley, 504.
Corey v. Russell, 112, 114.
Cornell v. Barnes, 49, 753.
v. Bennett, 15, 46, 219, 220, 314.
v. Cook. 391. 705.
v. Moulton, 56, 69, 94, 402, 803.
v. Potter, 552.
Cornell v. Smith, 17.
Cornes v. Harris, 315.
Corning v. Ashley, 440.
v. Corning, 418, 517, 639.
Corwein v. Hames, 24.
Cory v. Bretton, 378.
Coster v. Merest, 620.
v. N. Y. & Erie R. R. Co., 268, 275.
Costigan v. Mohawk & Hudson R. R., 655.
Cotes v. Davis, 373.
Cotheal v. Talmadge, 672.
Cotton v. Wood, 545.
Cottrell v. Conklin, 411.
Coughnet v. Eastenbrook, 618.
Courtney v. Baker, 553.
Covell v. Hill, 296.
Coveney v. Tannahill, 549.
Cowperthwaite v. Sheffield, 634.
Cox v. Stafford, 752.
Craft v. Curtiss, 749.
v. Merrill, 742.
Craig v. Ward, 411.
Crandall v. Rodgers, 858.
Crane v. French, 722.
v. Maynard, 470.
Crary v. Sprague, 386.
Craw v. Daly, 856.
Crawford v. Loper, 396, 573.
v. Williams, 62.
Creamer v. Jackson, 576.
Credit v. Brown, 382.
Cresson v. Stout, 737, 739.
Crim v. Cronkhite, 37.
Crist v. Armour, 661, 663.
Cristman v. Paul, 780.
Crofut v. Brooklyn Ferry Co., 493.
Crooke v. Mali, 634.
Cropsey v. Murphy, 628.
v Sweeney, 292, 302, 317.
Crosbie v. Leary, 371, 381.
Crosby v. Berger, 513.
v. Percy, 431.
Cruikshank v. Gardner, 855.
Cudlipp v. Whipple, 319.
Cummings v. Morris, 265, 266.
v. Vorce, 291.
Cunningham v. Goelet, 20, 138, 188.
v. Hudson River Bank, 387.
v. McGregor, 313.
v. Phillips, 19.
Curtis v. Fay, 516.
v. Gano, 499.
v. Hannay, 666.
v. Hubbard, 115, 720.
v. Patterson, 724.
Cutler v. Biggs, 129.
v. Carpenter, 489.
v. Rathbone, 189, 193.
Cuyler v. McCartney, 377.
Dains v. Prosser. 748, 750.
Dakin v. Williams, 675.
Dalton v. Daniels, 389.
Dana v. Fiedler, 268, 462, 660, 661.
v. Tucker, 620, 856.
Danforth v. Woodworth, 747.
Daniels v. Patterson, 637.
v. Potter, 385.
Dauchy v. Brown, 222, 702, 712.
Davenport v. Doady, 45, 134.

Davidson v. Hutchins, 80, 375, 586, 635, 905.
Davies v. Penton, 674.
Davis v. Carpenter, 271, 273.
v. Duffie, 20.
v. Jones, 249, 466.
v. Marshall, 14, 97, 151, 159, 167, 169.
v. Peabody, 749.
v. Rich, 148.
v. Shields, 660.
v. Stone, 858.
v. Talcott, 652.
Davison v. Savage, 925.
Day v. Brett, 113.
v. Rice, 718.
v. Roth, 637.
v. Wilber, 19, 344, 596, 598.
Dayharsh v. Enos, 593, 634.
Dean v. Gridley, 392.
v. Roesler, 667.
Dearborn v. Kent, 77.
Deas v. Smith, 548.
De Beneditti v. Manchin, 375, 385.
Decker v. Bryant, 487.
v. Hassel, 907.
v. Judson, 161, 164, 197.
v. Livingston, 388.
v. Mathews, 297, 679.
De Freest v. Bloomingdale, 387.
Delacroix v. Bulkley, 470.
Delancey v. Nagle, 15, 46, 314, 612.
Deland v. Richardson, 16, 347, 359, 635.
Delaware Bank v. Jarvis, 942.
Demar v. Van Zandt, 565, 566.
Dempsey v. Paige, 19.
Demyer v. Souzer, 581.
Denbawd v. Woodley, 598.
Denham v. Hayden, 20.
Dennett v. Dow, 524.
Dennison v. Carnahan, 308.
v. Collins, 708.
Denvrey v. Fox, 733.
Denton v. Livingston, 724.
v. Noyes, 844.
Depew v. Leal, 190, 193.
Derby v. Hannin, 776, 779.
De Ridder v. Schermerhorn, 280.
Deshor v. Merchants' Bank, 499.
Deuchars v. Wheaton, 776, 779.
Deuel v. Rust, 769, 921.
Devoy v. Mayor of N. Y., 435.
Dewey v. Derby, 470.
Dewey v. Greene, 14, 20, 137, 151.
De Witt v. Barly, 492, 499.
v. Morris, 203, 681.
Dewitt v. Brisbane, 269.
v. Post, 855.
Dexter v. Broat, 286.
v. Spear, 649.
Dey v. Dox, 660.
Dezell v. Odell, 734.
Dias v. Short, 631.
Dickens v. N. Y. Cent. R. R., 300.
Dickerson v. Van Tine, 751.
Dickinson v. Shee, 502.
v. Smith, 706.
Diefendorff v. Gage, 409.
Dillenback v. Jerome, 676.
Dinehart v. Wells, 34.
v. Wilson, 731.
D'Ivernois v. Leavitt, 4, 5, 358.
Dob v. Halsey, 276, 277.
Dockstader v. Sammons, 711.
Dodge, Ex parte, 45, 694.
Dolittle v. Eddy, 31, 405.
Dollfus v. Frosch, 367.
Dollner v. Gibson, 306.
Dolsen v. Arnold, 900.
Dominick v. Eacker, 286, 581, 696.
Donnell v. Carroll, 837.
Donohue v. Henry, 880, 904.
Dorlon v. Douglass, 382, 383.
Dorman v. Kellum, 288.
Dorr v. Birge, 884, 920.
Dorwin v. Potter, 652.
Doty v. Brown, 288.
v. Michigan Cent. R. R., 71.
Doughty v. Crozier, 291, 309.
Douglass v. Blackman, 4, 16, 618, 624, 693, 803.
v. Tousey, 517, 620.
Dovan v. Dinsmore, 299.
Downs v. McGlynn, 48, 50, 554, 719, 753.
Dows v. Cobb, 271.
Dox v. Dey, 688.
Draper v. Snow, 280.
Dresser v. Ainsworth, 633, 732.
v. Van Pelt, 900.
Driggs v. Dwight, 667.
Drucker v. Patterson, 859, 924.
Dubois v. Baker, 434.
v. Delaware & Hudson Canal Co., 657.
v. Dubois, 730.
Ducoign v. Schreppel, 446.
Dudley v. Bolles, 523.
v. Mayhew, 15, 635.
v. Staples, 69, 145, 151, 174.
Duff v. Lyon, 484, 495.
Duffy v. Morgan, 787.
Duguid v. Ogilvie, 387.
Dumont v. Smith, 685.
Dunkle v. Kocker, 326, 614, 639.
Dunderdale v. Grymes, 290.
v. Sanvestre, 723.
Dunham v. Dey, 629.
v. Simmons, 290, 637.
Dunlop v. Hunting, 379.
v. Snyder, 495.
Dunn v. Hewitt, 399, 400, 487.
v. Slee, 376.
Dunham v. Heyden, 20, 359.
v. Murdock, 722.
Dunning v. Humphrey, 162, 164.
v. Thomas, 300.
Durfee v. Eveland, 621.
Durkee v. Mott, 655.
Durrell v. Mosher, 601.
Dutton v. Kelsey, 755.
Duval v. Covenhoven, 373.
Dwinelle v. Howland, 569.
Dyer v. Ashton, 384.
Dygert v. Schenck, 630.
Dykers v. Townsend, 461.
Eagle v. Fox, 270.
Eakin v. Brown, 607, 636.
Earl v. Camp, 391, 752.
v. Spooner, 165.
v. Crane, 267, 464.
Earll v. Chapman, 788.

Eastman v. Caswell, 748, 750.
Easton v. Coe, 355.
Eaton v. North, 11, 348, 358, 565, 566.
Eaves v. Henderson, 460.
E. B. v. E. C. B., 767.
Eddy v. Graves, 470.
Edgell v. Hart, 630.
Edgerton v. Russ, 214.
v. Thomas, 373.
Edmonds v. Pearson, 554.
Edmonstone v. Hartshorn, 407.
Edwards v. Bonneau, 404.
v. Campbell, 270.
v. Drew, 350, 844.
v. Russell, 25, 27, 768.
Eggleston v. Smiley, 26, 586, 594, 603, 904.
Egleston v. Knickerbacker, 469.
Ehle v. Quackenboss, 30.
Elder v. Morrison, 205.
Eldridge v. Bell, 331, 332.
Ellis v. Chinnock, 666.
v. Willard, 381, 469
Elsam v. Faucett, 390.
Elsey v. Metcalf, 629.
Elton v. Larkin, 519.
Elwell v. McQueen, 579, 582, 586, 693.
Ely v. Kilborn, 460, 465.
v. O'Leary, 687.
Emblen v. Myers, 684.
Englis v. Furniss, 275, 762.
Ensign v. Sherman, 297.
v. Webster, 468.
Erben v. Lorillard, 633, 658.
Erickson v. Compton, 265, 267.
Ernst v. Hudson River R. R., 580, 628.
Erwin v. Saunders, 470.
v. Smaller, 369.
v. Voorhees, 296, 628, 630.
Esmond v. Van Benschoten, 470, 672, 674.
Esselstyne v. Weeks, 305.
Estus v. Baldwin, 908, 915.
Eustace v. Tuthill, 33.
Evans v. Beattie, 376.
Everson v. Gehrman, 702.
Evertson v. Sutton, 13.
Fahy v. North, 318.
Fairbanks v. Bloomfield, 307, 323.
v. Corlies, 343, 635, 638.
Fairchild v. Bentley, 326.
Fales v. McKeon, 663, 892.
Fanning v. Lent & Mulford, 890.
v. Trowbridge, 217, 227, 294.
Farmers' & Manufacturers' Bank v. Whinfield, 616, 638.
Farnham v. Hildreth, 719.
Farr v. Newman, 724.
Farrant v. Thompson, 741.
Farrell v. Calkins, 882.
v. Higley, 746.
v. Hildreth, 730.
Farren v. Sherwood, 941.
Farrington v. Payne, 288, 326.
Farron v. Sherwood, 307, 317, 319, 320.
Fash v. Byrnes, 619.
Faulkner v. McClure, 223, 273.
Fellows v Hyring, 407, 420.
Felter v. Mulliner, 625.
Fenly v. Stewart, 461.
Fenn v. Timpson, 904.
Fenner v. Lewis, 376.
Fenno v. Dickinson, 85, 106, 163.
Fenwick v. Parker, 604.
Fero v. Buffalo & State Line R. R., 630.
Fettritch v. Dickenson, 902.
Fidler v. Delevan, 298.
Fielding v. Mills, 870.
Field v. Mayor of N. Y., 275.
v. McVickar, 152.
Fields v. Moul, 748, 879.
Fiero v. Betts, 730.
v. Reynolds, 344, 623.
Figaniere v. Jackson, 771, 786.
Filkins v. Whyland, 399, 457, 460, 470.
Finch v. McDowall, 586, 635, 905.
Finehout v. Crain, 201.
Fink v. Hall, 343, 618.
First Baptist Church of Brooklyn v. Brooklyn Fire Ins. Co., 416.
Fish v. DeWolf, 269.
v. Dodge, 495, 688.
v. Ferris. 285, 324, 822.
v. Skut, 326. 387, 894, 902.
Fisher v. Dale, 576.
v. Fredenhall, 410.
Fitch v. Devlin, 16, 74, 769.
Fleet v. Youngs, 34.
Fleming v. Gilbert, 470.
v. Hollenbeck, 574, 575.
v. Slocum, 337.
Fletcher v. Derrickson, 658, 659.
v. Tayleur, 652.
Flynn v. McKeon, 461, 470.
Foers v. Blackwell, 469.
Fogg v. Child, 73, 374.
Foley v. Alger, 802, 822.
Foot v. Morgan, 22, 25, 27.
Ford v. David, 637.
v. Johnson, 747.
v. Smith, 225.
Forman v. Forman, 779, 780.
Forrest v. Forrest, 405, 576.
v. Kissam, 485, 615.
Forster v. Capewell, 845, 849, 850.
Forsyth v. Ferguson, 795, 796.
Fort v. Collins, 580.
Foster v. Cleveland, 711.
v. Coleman, 441, 442.
v. Hazen, 7.
v. McAdams, 6.
v. Rodgers, 664.
Fourdrinier v. Bradbury, 356.
Fowler v. Abrams, 410.
v. Clearwater. 634.
v. Colyer, 845, 847.
v. N. Y. Ind. Ins. Co., 303, 311.
v. Westervelt, 778.
Fox v. Decker, 545, 581, 889.
v. Jackson, 225, 285, 286, 417, 634, 637.
v. Johnson, 804.
v. Nellis, 795.
v. Reil, 428.
v. Smith, 627.
Franchot v. Leach, 470.
Francis v. Ocean Ins. Co., 367.
Franklin v. Talmadge, 43.
Fredonia, &c., Plank Road Co., v. Wait, 30, 248.
Freeman v. Clute, 651.

Freeman v. Orser, 274.
v. People, 602, 603.
Fregard v. Barnes, 43.
French v. Carhart, 465.
v. White, 269.
Frink v. Morrison, 718.
Frost v. Benedict, 497.
Fry v. Bennett, 308, 414, 484, 617.
Frost v. Duncan, 305.
v. Thomas, 115.
v. Willard, 138, 140.
Fuller v. Mattice, 554.
v. Prentice, 552.
v. Wilcox, 21, 711, 712, 908.
Fulton, Ex parte, 161.
v. Heaton, 49, 51, 138, 143, 144, 146, 759.
Gage v. Parker, 628, 630.
Gale v. Hoysradt, 582.
Galen v. Brown, 463.
Galsworthy v. Strutt, 671.
Gamage v. Law, 16, 336, 359.
Gardner v. Bartholemew, 522.
v. Clark, 972.
v. Finley, 184.
v. Gardner, 387.
v. McEwen, 628.
v. Turner, 604.
v. Wight, 843, 850.
Garey v. Nicholson, 383.
Garrique v. Loescher, 266, 392.
Garrison v. Akin, 381.
Gates v. Brower, 373, 628.
v. Ward, 277, 704, 759.
Gaul v. Groat, 225, 226, 228.
Gay v. Cary, 282.
v. Rogers, 112.
Gelhaar v. Ross, 904.
Gellatly v. Lower, 576.
Genter v. Morrison, 629.
Geraghty v. Malone, 883.
Gerard v. Prouty, 661.
Gerry v. Post, 718.
Gibbs v. Loomis, 112.
Giberton v. Ginochio, 428.
Gilbert v. Chase, 921.
v. Rounds, 309, 310, 324.
v. Sheldon, 517, 518.
Gildersleeve v. Mahony, 383, 638.
Giles v. Comstock, 465.
v. O'Toole, 492, 667.
Gilleshie v. Torrance, 635.
Gillett v. Fairchild, 301, 311.
Gilliland v. Campbell, 37.
Giraud v. Stagg, 882.
Glasse v. Keulsen, 333.
Glassner v. Wheaton, 767.
Glover v. Whittenhall, 115, 720.
Glubb v. Edwards, 430.
Godard v. Gould, 184.
Goelet v. Cowdrey, 303.
Gold v. Bissell, 11, 13, 95, 97, 111.
Goldsmith v. Obermier, 895, 902.
Goodenow v. Travis, 625.
Goodwin v. West, 552.
Goodsell v. Myers, 279.
Gorham v. Gale, 405.
Gormly v. McIntosh, 915.
Goss v. Watlington, 376.
Gossling v. Broach, 19
Gottsberger v. Harned, 843, 849, 850.
Gould v. Glass, 272, 284, 314, 319, 926.
v. Warner, 196.
Goulet v. Assler, 678.
Goupil v. Simonson, 51.
Graham v. Gammon, 319.
v. Wells, 214.
Grannis v. Clark, 306.
Grant v. City of Brooklyn, 417.
Graves v. Dash, 649.
v. Dudley, 185.
Gray v. Goodrich, 393.
Grazebrook v. McCreedie, 844.
Great Western Turnpike Co. v. Loomis, 515.
Green v. Angel, 224, 343, 359.
v. Armstrong, 184.
v. Bliss, 627.
v. Brown, 525, 639.
v. Burke. 39, 732, 733, 736.
Greenleaf v. Low, 38, 626, 698.
Green v. Telfair, 623.
Greene v. Waggoner, 655.
Gregory v. McDowel, 661.
v. Parker, 373.
Greenough v. Eccles, 524.
v. Gaskell, 512.
Greville v. Chapman, 486.
Griffin v. Colver, 651, 656.
v. Sutherland, 746, 750, 752.
Griffiths v. De Forest, 864.
Griffith v. Follett, 304.
Grimm v. Hamel, 395, 405, 518.
Grinnell v. Schmidt, 267, 271.
Griswold v. Sedgwick, 100, 719.
v. Sheldon, 628.
v. Stewart, 718.
v. Van Deusen, 786, 788.
Groat v. Gillespie, 164.
Groff v. Griswold, 401.
Guille v. Swann, 652.
Gurney v. Kenny, 522.
Gurnsey v. Carver, 287.
v. Lovell, 10.
Gutteridge v. Smith, 384.
Guy v. Mead, 508.
Gyles v. Hill, 419.
Hackett v. Richards, 302.
Hackley v. Ogmun, 306.
Hadley v. Baxendale, 652, 656.
Hager v. Danforth, 66, 551.
Haggerty v. Wilber, 116, 721.
Hahn v. Van Doren, 905, 915.
Haines v. Judges of Westchester, 806.
Haight v. Badgeley, 91, 683.
Hale v. Boardman, 267.
Hall v. Barton, 11, 504, 569, 572, 573, 574.
v. Earnest, 400, 487.
v. Fisher, 289, 290.
v. Luther, 431.
v. McKechnie, 286, 295, 300, 310, 327, 330, 331, 903.
v. Naylor, 417.
v. Peoney, 746.
v. Phelps, 428.
v. Robinson, 326.
v. Tuttle, 695, 696, 698, 786, 787.
Hallagan v. Golden, 761.
Haller v. Worman, 374.

Halleran v. Field. 572, 573.
Hallet v. Mears, 554.
Halsey v. Jarvis, 383.
v. Sinsebaugh, 396, 507.
Hamilton v. Ganyard, 661.
Hammond v. Hopping, 404.
v. Stewart, 551.
Hance v. Cayuga & Susq. R. R., 800.
Hancock v. Salmon, 622.
Handy v. Dobbin, 729.
Hanmer v. Wilsey, 679.
Hanna v. Curtis, 377.
v. Mills, 662.
Hard v. Shipman, 16, 21. 74, 358, 403.
Harden v. Woodside, 222.
Hardenbrook's Case, 113, 555.
Harding v. Kretsinger, 404.
Hardrop v. Gallager, 33.
Hardy v. Seelye, 626, 702.
Hare v. Van Deusen, 315.
Harger v. Edmonds, 416, 491.
Hargous v. Ablon, 664.
Haring v. N. Y. & Erie R. R., 581.
Harker v. Mayor of N. Y., 304, 367.
Harlow v. Humiston, 285, 630.
Harnor v. Groves. 460.
Harpell v. Curtis, 587, 639.
Harpending v. Shoemaker, 410, 493.
Harrington v. Ensign, 355.
v. People, 6, 21.
Harriott v. Van Cott, 8, 11, 60.
Harris v. Bernard, 880.
v. Panama R. R., 494, 637.
v. Story, 410.
Harrison v. Borwell, 419.
v. Wilson, 563.
Hart v. Cleis, 305.
Hartford Bridge Co. v. Granger, 378.
v. Palmer, 368.
Harthouse v. Rikers, 748.
Hartness v. Thompson, 279.
Hartwell v. Root, 387.
Harvey v. Jacob, 20.
v. Lane, 174, 735.
v. Rickett, 620, 856.
v. Rickman, 27.
Hasbrouck v. Baker, 398, 553.
v. Vandervoort, 369.
Hastings v. Glenn, 34.
v. McKinley, 268.
Haswell v. Bussing, 636.
Hatch v. Adams, 317.
v. Mann, 50, 554, 618, 803.
v. Peet, 296, 318.
Hathaway v. Helmer, 601, 604, 605.
Haughey v. Wilson, 837.
Haulenbeck v. Gillies, 768.
Havemeyer v. Cunningham, 660.
Hawkins v. Mayor of N. Y., 793.
Hay v. Cohoes Co., 324.
Hayley v. Grant, 356.
Hays v. Riddle, 404.
Hayslep v. Gymer, 380.
Healey v. Thatcher, 378.
Heane v. Rogers, 384.
Heeley v. Barnes, 400, 488, 636.
Heermans v. Williams, 401, 553.
Heidenheimer v. Lyon, 294, 589.
v. Wilson, 271, 614, 639, 694.
Hemstract v. Youngs, 356.
Henlow v. Leonard, 621.
Henry v. Bank of Salina, 509.
v. Bishop, 428, 429.
Herkimer Co. Bank v. Brown, 723
Hernaman v. Bowker, 737.
Heroy v. Kerr, 416, 906.
v. Van Pelt, 499.
Hess v. Beekman, 586, 693.
v. Buffalo, &c., R. R., 332.
Hewit v. Prime, 514, 687.
Hewlett v. Brown, 552.
Hibbard v. N. Y. & E. R. R., 285.
v. Stewart, 679.
Hicks v. Brennan, 552.
Hikox v. Fay, 749.
Higbe v. Leonard, 24, 26.
Higby v. N. Y. & Harlem R. R., 465, 468
Higgins v. Rockwell. 279.
Hildreth v. Ellice, 742.
Hill v. Lott, 113.
v. Board of Supervisors, &c., 281.
v. Downer, 20, 360.
v. Philips, 431.
v. Scott. 448.
v. Thacter, 313.
Hilliard v. Austin, 303, 333, 615.
Hilts v. Colvin, 369.
Hinds v. Barton, 493.
v. Tweddle, 291.
Hinman v. Borden, 744.
Hinton v. Locke, 464.
Hoag v. McGinnis, 675.
Hodges v. Hunt, 307, 328.
Hogan v. Baker, 19.
v. Cuyler, 57, 58.
Hoghtaling v. Osborn, 627, 696.
Holbrook v. Wilson, 637.
Hollenbeck v. Fleming, 428, 429.
Hollingham v. Head, 483.
Hollinsead v. Mactier, 657.
Hollister v. Johnson, 744.
Holmes v. Anderson, 519.
v. Broughton, 304, 367, 388.
v. D'Camp, 275.
v. Holmes, 412.
Homan v. Brinckerhoof, 86, 160, 178.
Home v. Smith, 551.
Hone v. Mutual Safety Ins. Co., 459, 464.
Hood v. Reeves, 372.
Hoodless v. Brundage, 37.
Hooper v. Taylor, 399.
Hoose v. Sherrill, 11, 151.
Hopkins v. Cabrey, 240, 241, 242, 244.
v. Mollinieux, 373.
Horn v. Swinford, 555.
Horner v. Wood, 303.
Horton v. Auchmoody, 4, 337, 358, 359, 424.
Hosford v. Nichols. 367.
Hosley v. Beach, 465.
Hosley v. Black, 416, 634.
Hosmer v. True, 672.
Houghtaling v. Houghtaling, 250, 305.
v. Kelderhouse, 369.
Houghton v. Dodge, 266.
v. Gilbart, 494.
v. Swarthout, 208, 323.
House v Low, 468, 907.
Howard v. Brown, 308, 690, 889.

Howard v. Farley, 871.
v. Sexton, 618.
Howe v. Cook, 289, 290.
v. Julien, 789.
v. Willson, 305.
Howell v. City of Buffalo, 325.
Howland v. Miller. 824.
Howland v. Willetts, 621, 635.
Hoyt v. Lynch, 472, 517.
v. Stuart, 434.
v. Van Alstine, 748, 750.
Hubbell v. Rochester, 34.
Hubbard v. Mace, 115.
v. Russell, 407, 634.
Huff v. Bennett, 395, 396, 505.
Hughes v. Hampton, 449.
v. Mulvey, 224. 227, 639.
v. Stickney, 767.
Hulbert v. Carver, 462.
v. Hope Mut. Ins. Co., 6.
Humphrey v. Cottleyou, 322.
v. Cumming, 112.
v. Hathorn, 687.
v. Persons, 15, 46, 48, 304, 358, 583. 584, 691, 698.
Hunt v. Bloomer, 460, 470.
v. Fish, 524.
v. Hoboken Land Improvement Co., 684.
v. Hudson River Fire Ins. Co., 304.
v. Hudson River R. R., 637.
v. Maybee, 391.
v. Westervelt, 841, 909.
v. Wickwire, 218, 219, 344.
Hunter v. Allen, 550.
v. Burtis, 54, 100, 102.
v. Graves. 804.
v. Hudson River, &c., Co., 297, 374.
v. Powell, 289.
v. Osterhout, 634.
Huntington v. Conkey, 414, 638.
Hurd v. Beeman, 27, 854, 857.
v. Pendrigh, 573, 574.
v. Swan, 552, 553.
v. West, 377.
Hurlbut v. Post, 278.
Hutchinson v. Birch, 721.
Hyde v. Cookson, 677.
v. Stone, 677.
Hyland v. Sherman, 581, 806.
Ide v. Sadler, 465.
Ingalls v. Lord, 679, 724.
Ingersoll v. Skinner, 286.
v. Wilson, 232, 856.
Ingraham v. Baldwin. 329.
v. Hammond, 186.
Ireland v. Litchfield, 718.
Irroy v. Nathan, 348.
Irvine v. Cook, 905.
v. Forbes, 333.
v. Wortendyke, 388, 410, 439.
Irwin v. Muir, 776, 783, 788.
Isles v. Tucker, 374.
Israel v. Benjamin, 384.
Ives v. Humphreys, 296, 307, 683.
Jack v. Martin, 307, 333.
Jacks v. Darrin. 900, 908, 909.
Jackson v. Anderson, 742.
v. Betts, 393.
Jackson v. Browner, 41, 696, 707.
v. Burtis, 514.
v. Christman, 431.
v. Denison, 514, 549.
v. French, 513.
v. Gager, 431.
v. Griswold, 376.
v. Jones, 706.
v. Kingsley, 429.
v. Law, 737.
v. Le Grange, 431.
v. Osborn, 435.
v. Purchase, 924.
v. Rowland, 706.
v. Smith, 792, 793.
v. Shearman, 408.
v. Tuttle, 706.
v. Virgil, 148.
v. Waldron, 432.
Jacobs v. Kolff, 891.
James v. Chalmers, 269, 377.
v. Hartney, 698.
v. Morgan, 654.
Jansen v. Acker, 580.
v. Ball, 656.
Jardine v. Sheridan, 378.
Jay v. Martine, 718.
Jefferson Ins. Co. v. Cotheal, 491, 496.
Jencks v. Smith, 586, 634, 636, 904.
Jenkins v. Brown, 221, 222.
Jenner v. Joliffe, 398.
Jermain v. Booth, 688.
v. Denniston, 377, 440.
Jeter v. Glenn, 665.
Jewett v. Jewett, 250.
Jone v. Felch, 270, 275.
Jones v. Atherton, 737.
v. Judd, 318.
v. McCarl, 793.
v. Methodist Church, 377.
v. Morrell, 380.
v. N. Y. & Erie R. R., 668.
v. Reed, 39.
v. Pridham, 308, 583, 690, 889.
v. Thompson, 333. 334.
v. Underwood, 428.
Johnson v. Cayuga &c. R. R., 59, 79.
v. Hudson River R. R., 367, 629.
v. Leigh, 721.
v. Moss, 138, 145, 152, 181.
v. People, 518.
v. Weed, 468.
Joy v. Hopkins, 496.
Judd v. Fulton, 45.
Justison v. Crawford, 901.
Kammer v. Wanner, 177.
Kasson v. Mills, 374, 878, 879.
Keeler v. Adams, 802, 823, 825.
v. Clark, 90, 744.
v. Delavan, 593, 616, 638.
v. Lockwood, 622.
v. Salisbury, 470.
v. Vanderpool, 574.
Keene v. Dillie, 685.
Keese v. Wyman, 872.
Keightley v. Birch, 741.
Kelley v. Upton, 318, 465.
Kellogg, Ex parte, 799.
v. Griffin, 723.

Kellogg v. Kellogg, 549.
v. Wilkie, 628.
Kellogg, &c., v. Paine, 322.
Kelly v. Kelly, 60.
Kelsey v. Bradbury, 278.
v. Bush, 382.
Kelty v. Jenkins, 775.
Kemble v. Farrer, 674.
Kemeys v. Richards, 296.
Kendall v. Grey, 514, 636.
Kennedy v. Cotton, 636.
v. O'Brien, 909.
v. Strong, 676.
Kent v. Harcourt, 637.
v. Hudson River R. R., 669.
v. Walton, 377.
Kerr v. McGuire, 406, 495.
Ketcham v. Zerega, 332.
Keteltas v. Myers, 303, 307, 334.
Keutgen v. Parks, 525.
Keyser v. Waterbury, 178.
Kilburn v. Deming, 747.
Killmer v. Crary, 346.
Kilmore v. Sudam, 20, 336, 338, 359.
Killmore v. Culver, 265, 266.
Kilpatrick v. Carr, 806.
Kiltz v. Seeber, 870.
Kimball v. Huntington, 385.
v. Mack, 359.
v. Munger, 723.
King v. Brown, 658.
v. Dowdall, 46, 63.
v. Edmonds, 602.
King v. Garkin, 588.
v. Havens, 688.
v. Orser, 216, 678.
v. Paddock, 663.
v. Phillips, 417.
Kipp v. Wiles, 629, 660.
Kirby v. Hewitt, 375.
Kissam v. Roberts, 409.
Kissock v. Grant, 14, 144.
Kittle v. Baker, 336, 594.
Klock v. Robinson, 659.
Kloppenberg v. Neefus, 745.
Knapp v. Maltby, 672.
Kneettle v. Newcomb, 752.
Knehue v. Williams, 185, 193.
Knight v. Odell, 224, 225.
Knower v. Barnard, 723.
Knowles v. Gee. 292.
Koon v. Greenman, 57, 657.
v. Mazuzan, 34. 35.
Koop v. Handy, 457. 460.
Krom v. Schoonmaker, 285.
Labar v. Coplin, 627, 697.
Lacey v. Forrester, 414.
Ladd v. Moore, 326.
La Farge, Ex parte, 789.
v. Chilson, 256.
v. La Farge Fire Ins. Co., 550.
Lake v. People, 369.
v. Tysen, 387.
Lakeman v Grinnell, 668.
Lambert v. Seely, 469, 637, 896.
La Motte v. Archer, 880.
Lamoure v. Caryl, 38, 490, 625.
Lampman v. Cochrane, 672, 674.
Landsberger v. Magnetic Telegraph Co., 656.
Lane v. Cole, 549, 553.
v. Moss, 148.
v. Schermerhorn, 44, 223, 273, 283.
Lansing v. Coley, 577.
v. Stone. 902.
Larue v. Rowland, 445.
Latham v. Westerwelt, 686.
Lattin v. Davis, 664.
Launits v. Barnum, 31.
Law v. Merrills, 381, 640.
Lawrence v. Fox, 267,
Lawrence v. Wright, 295.
Lay Grae v. Peterson, 370
Leach v. Kelsey, 628.
Ledyard v. Jones, 686.
Lee v. Bennett, 385.
v. Elias, 305.
v. Gansel, 720.
v. Schmidt, 636, 776, 779.
v. Stanley, 62.
Lefferts v Hollister, 584.
Leggett v. Boyd, 393, 394.
v. Cooper, 384.
Leigh v. Patterson, 662.
Lemon v. Staats, 722.
Leonori v. Bishop, 522.
Lent v. Jones, 842, 849.
Leonard v. Sunderlin, 823.
LeRoy v. Shaw, 281.
Lester v. Crary, 55.
Lewando v. Dunham, 275.
Lewis v. Fox, 916.
v. Palmer, 387.
v. Peake, 665.
v. Ryder, 581, 639.
v. Trickey, 496.
Lexington, &c., R. R. v. Goodman, 290.
Lienan v. Lincoln, 307.
Lightfoot v. Cameron, 555.
Lincoln v. Battelle, 367, 572.
Linnell v. Sutherland. 79, 103, 441.
Linnendoll v. Doe, 740.
Lipe v. Becker, 330.
Lipscombe v. Holmes, 384.
Litchfield v. Burwell, 6.
Little v. McKeon, 370.
Livingston v. Bain, 942.
v. Bishop, 286.
v. Harrison, 306.
v. Kiersted, 368.
v. Platner, 624, 688.
v. Rogers, 404.
v. Smith, 303, 306.
v. Stoessel, 379.
Lockwood v. Thorne, 379, 380.
v. Younglove, 748, 751.
Loder v. Phelps, 97, 98, 101.
Loescher v. Nordmeyer, 787, 789.
Logan v. Thomas, 552.
Logue v. Gillick, 384, 802. 915.
v. Link, 374.
Lohman v. People, 511, 522.
Lomer v. Meeker, 581.
Long v. Hitchcock, 545.
Loomis v. Higbie, 795, 797.
Lores v. DeTastet, 554.
Lord v. Brown, 601.
v. Mayor of N. Y., 659.
Losee v. Losee, 432.

Lott v. Swezey, 957.
Lounsbury v. Depew, 270.
Love v. Humphrey, 333.
Lovell v. Evertson, 768.
v. Cowman, 761.
v. Pell, 290.
Low v. Archer, 309, 310.
v. Payne. 439, 451.
Lowber v. Childs, 759.
v. Le Roy, 465.
Lowenstein v. Chappell, 667.
Lowther v. Crummie, 221.
Loyd v. Fox, 761.
Lucas v. N. Y. Central R. R., 289, 290.
Lund v. Seaman's Bank, 332.
Lush v. Druse, 432.
Lusk v. Smith, 375.
Lyke v. Van Leuven, 326.
Lynch v. McBeth, 384, 461, 854, 857, 891.
Lynch's Admr's ads. Petrie, 449.
Lynde v. Montgomery, 145.
Lyne, Ex parte, 555.
Lynes v. State, 385.
Lynsky v. Pendegrast, 350, 806, 822.
Mabbett v. White, 634.
Macdonnell v. Evans, 483.
Macondray v. Wardle, 370.
Magee v. Osborn, 432.
Magne v. Seymour, 724.
Mahoney v. Penman, 19.
Main v. Cooper, 33, 34, 252.
v. Eagle, 905, 915.
v. King, 674.
v. Prosser, 36.
v. Stephens, 280.
Mallory v. Benjamin, 549, 645.
v. Norton, 291.
Malone v. Clark, 17, 19, 768, 810.
Manahan v. Gibbons, 282.
Manchester v. Herrington, 282, 615.
Mandeville v. Guernsey, 514.
Mann v. Carley, 313.
v. Glover, 603.
v. Morewood, 295.
v. Swift, 802.
Manning v. Johnson, 852.
v. Monahan, 740.
Manny v. Dobie, 589.
Marquart v. La Farge, 668.
Marriott v. Hampton, 957.
Marselis v. Seaman, 47, 373, 894, 899.
Marsh v. Berry, 286.
v. Lawrence, 722.
v. Potter, 285, 370.
Marston v. Vultee, 902.
Martin v. Kanouse, 767.
v. Mayor of Brooklyn, 289.
v. Moss, 703.
Marvin v. Richmond, 378.
Mason v. Denison, 61, 231, 855.
Masterton v. Mayor of Brooklyn, 656.
Mather v. Hood, 424, 645.
Matteson v. Bloomfield, 37.
Matthews v. Fiestel, 285, 343, 613, 683, 801, 822.
Mattice v. Allen, 524.
Mattison v. Baucus, 15, 135.
v. Jones, 766.
Maugham v. Hubbard, 508.
Maybee v. Sniffen, 435.
Maynard v. Downer, 232, 855.
v. Talcott, 315.
v. Thompson, 403, 422, 706.
Mayor, &c., of Albany v. Cunliff, 309.
Mayor of N. Y. v. Baily, 285, 325.
Mayor, &c., v. Doody, 311.
Mayor of N. Y. v. Green, 776, 845, 847.
Mayor, &c., of N. Y. v. Mason, 295, 330, 415, 581, 603, 615.
Maxson v. Annas, 46, 696.
McAllister v. Reab, 637.
v. Sexton, 802, 905.
McCabe v. Doe, 45, 134, 767.
McCafferty v. Kelley, 800.
McCahill v. Kipp, 285.
McCarty v. Edwards, 570.
v. Ely, 896.
v. McPherson, 218.
v. Sherman, 402.
McCaughey v. Smith, 976.
McCleary v. Edwards. 574, 576.
McClure v. Erwin, 329.
McCollough v. Colby, 315.
McCollum, Ex parte, 10.
v. McClave, 583, 852, 853.
McCormick v. Mulvihill, 450, 478.
v. Pickering, 299.
McCoy v. Curtice, 392.
v. Hyde, 128, 129.
McCrea v. Purmost, 464.
McCunn v. Barnett, 707.
McCurdy v. Brown, 692.
McDoel v. Cook, 181.
McDonald v. Neilson, 324, 739.
McDowell v. Van Deusen, 22.
McDuffie v. Beddoe. 90.
McEachron v. Rawdles, 625, 780, 908.
McElwain v. Corning. 614.
McGrath v. Hudson River R. R., 580, 628.
McGraw v. Walker, 56, 402, 803.
McGregor v. Brown, 494.
McGuinty v. Herrick, 745.
McKee v. Judd, 327.
McKenzie v. Hancock. 666.
McKillip v. McKillip, 44, 223, 273, 283, 284.
McKinney v. McKinney, 322.
McKinster v. Babcock, 464.
McKinstry v. Pearsall, 468.
McKnight v. Dunlop, 291, 636, 660, 661.
v. Lewis, 394.
McLaughlin v. Barnard, 628.
McLean v. Jagger, 373.
v. Hugarin. 403.
McMartin v. Taylor, 581.
McMurray v. Gifford, 299, 325.
McNeil v. Scoffield, 621.
McNutt v. Johnson, 86, 635, 905.
McNulty v. Prentice, 468.
McPherson v. Cheadell, 452.
v. Rathbone, 375, 376, 430.
Meacham v. Dudley. 844.
Mead v. Darragh, 222, 589, 594.
v. Haws, 44, 100, 719.
Meade v. McDowell, 376.
Meakim v. Anderson, 639.
Medbury v. N. Y. & Erie R. R., 669.
Meech v. Brown, 589.
Meeks v. Noxon, 47.

Mechanics', &c., Bank v. Gibson, 304.
Melen v. Andrews, 380.
Mellen v. Hamilton Fire Ins. Co., 268, 271.
Mercer v. Sayre, 581, 614.
Merest v. Harvey, 682.
Merritt v. Lyon, 587, 628.
v. Read, 43.
v. Seaman, 270, 493, 634, 636.
Merrill v. George, 555.
Mersereau v. Norton, 730.
Merwin v. Hamilton, 319.
Metcalf v. Van Benthuysen, 407.
v. Clark, 51.
Meyers v. Betts, 636.
Meth. E. Church v. Pickett, 303, 366.
Miekles v. Tousley, 752.
Middleton v. Melton, 376.
Milburn v. Belloni, 374, 664.
Milk v. Christie, 43.
Millard v. Canfield, 120.
Miller v. Brinkerhoof, 14, 141, 142, 143, 144, 146, 147.
v. Cook, 316.
v. Foley, 44, 719.
v. Gambie, 465.
v. Garling, 310.
v. Scherder, 745.
v. Van Anken, 790.
Milliken v. Selye, 189.
Millius v. Shafer, 148, 156, 158, 161.
Mills v. Carnly, 525.
v. Fox, 675, 876.
v. Kennedy, 10, 65, 728.
v. Pearson, 267, 268.
v. Shult, 783.
v. Twist, 430.
v. Young, 720.
Miln v. Russell, 48.
Milton v. Green, 6.
Minturn v. Main, 267.
Mitchell v. Borden, 617.
Mitchell's Case, 549, 550.
Mitchell v. Ehle, 620.
v. Menkle, 851.
v. Ostrom, 375.
Mix v. White, 847.
Mockey v. Grey, 231.
Moloney v. Dows, 309, 310, 324.
Monahan v. Story, 268.
Money v. Tobias, 80, 81, 84, 86, 99, 106, 139, 151.
Monnell v. Weller, 768.
Monroe v. Douglass, 304, 367.
v. Monroe, 921.
Monteith v. Cash, 19, 48.
Montfort v. Hughes, 222, 286, 613, 615.
Moody v. Pomeroy, 621.
Moon v. Eldred, 696, 697.
Moor v. Ames, 562.
Moore v. McKibbin, 411.
v. Meacham, 385, 463.
v. Smith, 290, 753.
v. Somerindyke, 166, 633, 780.
v. Willet, 270.
Morange v. Edwards, 175, 176, 755.
Morehouse v. Ballou, 279.
v. Mathews, 492.
Morgan v. Frees, 511.
v. King, 630.
Morgan v. Lyon, 301.
v. Reid, 267, 271.
Morley v. Attenborough, 665, 741.
Morrell v. Near, 345, 577.
Morrill v. Whitehead, 441, 444, 446.
Morris v. Bleakley, 219.
v. Keyes, 420.
v. Whitcher, 461.
Morrison v. Currie, 277.
v. Lennard, 368, 474.
v. N. Y. & N. H. R. R., 581.
Morse v. Bogart, 629.
v. Cloyes, 570, 575.
v. Goold, 717.
v. Keyes, 748.
Morss v. Morss, 237, 578.
v. Stone, 488, 638.
Mosher v. Lawrence 51, 411, 760.
Mosier v. McKay, 352.
Mott v. Burnett, 306.
v. Hudson River R. R., 418, 500.
v. Kipp, 374.
v. Lawrence, 138, 141, 146, 152.
v. Mott, 672.
v. Palmer, 184.
Muber v. Held, 346, 841.
Mulhern v. Hyde, 844.
Muller v. Eno, 663, 664.
v. Maxwell, 267.
Mundy v. Culver, 672.
Munn v. Barnum, 332.
Munro v. Potter, 582, 635.
Munson v. Hegeman, 636.
v. Riley, 268.
Murden v. Priment, 329.
Murling v. Grote, 577, 844.
Murphy v. Mooney, 60.
Murray v. Bethune, 498.
v. Coster, 378.
v. Hendrickson, 313.
v. House, 225.
v. Kirkpatrick, 565.
v. Mumford, 275, 376.
v. Smith, 633.
v. Vanderbilt, 223.
Murtha v. Walters, 242.
Muscott v. Woolworth, 730.
Myer v. Fisher, 219.
Myers v. McCarthy, 479.
Nash v. Russell, 273.
National Bank v. Norton, 375.
Near v. Van Alstyne, 13, 42, 166, 760.
Nearing v. Bell, 418, 607.
Neary v. Bostwick, 469, 896.
Needles v. Howard, 670.
Neff v. Clute, 310, 330, 331.
Neil v. Abel, 621.
Neile v. Jakle, 380.
Nellis v. De Forest, 305.
v. Tucker, 768.
v. Turner, 768.
v. McCairn, 20, 219, 336, 337, 492.
Nelson v. Cowing, 374.
v. Sharp, 461, 470.
Nesbit v. Stringer, 382, 383.
Nesmith v. Clinton Fire Ins. Co., 622.
Newcomb v. Clark, 582, 635.
v. Griswold, 483, 510.
Newell v. Salmons, 435.

Newland v. Baker, 754.
v. Willotts, 197.
Newman v. Otto, 308.
Newton v. Belcher, 384.
v. Harris, 415, 416, 637.
v. Pope, 899.
v. Liddiard, 384.
New York, &c., Bank v. Gibson, 417.
New York & Erie R. R. v. Purdy, 73, 74.
N. Y. & H. R. R. Co. v. Schuyler, 331.
New York Dry Dock Co. v. McIntosh, 414.
v. Treadwell, 278.
New York Car Oil Co. v. Richmond, 398, 404.
New York Marbled Iron Works v. Smith, 273.
Niblo v. Harrison, 299, 303.
Nichols v. Bain, 35.
v. Goldsmith, 394.
v. Ketcham, 737.
v. Tracy, 60.
Nickley v. Thomas, 496.
Niles v. Culver, 399.
v. Totman, 403.
Nixon v. Jenkins, 882.
Nolton v. Moses, 525, 607, 639.
Nones v. Homer, 657.
Norris v. Beach, 555.
v. Bleakley, 224, 359, 579.
Northrop v. Burrows, 898.
v. Jackson, 586, 635, 690, 905.
Norton v. Coons, 469.
Noyes v. Butler, 6, 16, 21, 74.
v. Hewitt, 696, 697.
Nye v. Ayres, 781.
Oakley v. Aspinwall, 16, 27.
v. Morton, 417.
v. Van Horne, 21, 625, 908.
v. Working Men's, &c., Society, 223.
Ocean Ins. Co. v. Francis, 575.
O'Callaghan v. Carroll, 917.
O'Dougherty v. Aldrich, 767.
Oechs v. Cook, 309.
Ogden v. Marshall, 669.
v. Parks, 604.
v. Peters, 377.
v. Sanderson, 802.
Olmstead v. Webster, 288.
Oliver v. Trustees, &c., of Springfield, 620.
O'Maley v. Reese, 327.
Onderdonk v. Emmons, 790, 792, 914.
v. Ranlett, 17, 19, 54, 84, 102, 348, 617, 633, 823.
O'Neil v. Martin, 38, 277.
O'Reilly v. Davies, 31.
Orcutt v. Cahill, 800.
Orguerre v. Luling, 461.
Osborn v. Bank of U. S., 223.
v. Bell, 291, 395.
Osgood v. Whittlesey, 761.
O'Shea v. Kirker 290, 688,
Osterhout v. Roberts, 286.
Ostrander v. Walker, 756.
Otis v. Jones, 165, 679.
Outwater v. Nelson, 462.
Ovenston v. Wilson, 388.
Packer v. French, 614, 762.
Paddock v. Forrester, 378.
v. Wells, 24, 26.
Page v. Boyd, 298.
Paige v. Cagwin, 377.
Paige v. Fazackerly, 636, 904, 926.
Palethorp v. Furnish, 373.
Palmer v. Aldridge, 367.
v. Avery, 921.
v. Couly, 286.
v. Haight, 521.
v. Manning, 384, 428, 888.
v. Peck, 823.
Palmerton v. Huxford, 469.
Parish v. Wheeler, 678.
Park v. Hitchcock, 314.
Parker v. Eaton, 38, 139.
v. Van Houten, 34.
v. Jackson, 697.
v. Newland, 767.
v. Rens. and Saratoga R. R., 409.
v. Walrod, 49.
Parmelee v. Dann, 269.
v. Thompson, 28, 343, 358, 566.
Parsons v. Bowdoin, 742.
v. Brown, 296, 496.
v. Suydam, 525.
Partenheimer v. Van Order, 286.
Partridge v. Thayer, 774, 781.
Patcher v. Sprague, 329.
Patchin v. Astor Mut. Ins. Co., 519.
v. Parkhurst, 711.
Patterson v. Parker, 249.
v. Westervelt, 686.
Pattison v. Richards, 329.
v. Taylor, 298, 306.
Patton v. Ohio, 385.
Paulding v. Hudson Manuf. Co., 19, 70.
Payne v. Cave, 741.
v. Wheeler, 337, 359.
Pearce v. Whale, 452.
Pearson v. Fiske, 899.
v. Williams' adm., 673.
Pease v. Gleason, 343.
Peck v. Andrews, 336, 350, 351, 359.
v. McAlpine, 360.
v. Cowing, 333.
v. Richmond, 450, 484, 633, 634, 806.
v. Tiffany, 736.
v. Williams, 550.
Peckham v. Leary, 638.
Peets v. Bratt, 303.
Pennell v. Woodburn, 665.
Pendell v. Coon, 574.
Pendleton v. Empire Stone Dressing Co., 521, 629.
v. Weed, 449.
Penfield v. Carpender, 633, 636, 708, 905.
v. Jacobs, 245, 584.
Pentz v. Winterbottom, 384, 428.
People v. Albany Com. Pleas, 251.
v. Benjamin, 514.
v. Bennett, 327.
v. Breese, 304, 367.
v. Brooks, 43, 49, 50, 187, 244, 327, 586.
v. Calhoun, 356.
v. Carter, 10.
v. Clark, 22.
v. Columbia Com. Pleas, 773, 774.
v. Coon, 586.
v. Co. Judge of Rensselaer, 40, 769.
v. Delaware Com. Pleas, 222, 626, 702.
v. Eastwood, 498.

People v. Eldridge, 773, 783, 786, 788.
v. Freeman, 604.
v. Garey, 10.
v. Gates, 514.
v. Gay, 522.
v. Herkimer, 303, 366.
v. Herrick, 369.
v. Hopson, 38, 736, 756.
v. Hubbard, 115, 720.
v. Hulse, 522.
v. Co. Judge of Clinton Co., 823.
v. Judges of Dutchess Com. Pleas, 788.
v. Keeler, 10.
v. Kelly, 647.
v. Lake, 499.
v. Loomis, 185.
v. Lott, 686.
v. Lynde, 702, 707.
v. Mather, 502, 604.
v. Mayor of N. Y., 331.
v. McNair, 369.
v. Monroe, C. P., 321.
v. Moore, 524.
People ex rel. Newell v. Mont. Com. Pleas, 5.
v. N. Y. Com. Pleas, 31, 231.
v. Nevins, 367.
v. Onondaga Com. Pleas, 773, 774.
v. Parish, 385.
v. Peabody, 39.
v. Reeder, 174.
v. Rensselaer Common Pleas, 766.
v. Rowland, 430, 431.
v. Ryder, 301.
v. Safford, 520.
v. Saratoga Common Pleas, 788.
v. Sheriff of N. Y., 550, 647.
v. Smith, 43.
v. Spooner, 433.
v. Sturtevant, 4
v. Suffolk Common Pleas, 773.
v. Ulster Common Pleas, 788.
v. Vermilyea, 358, 566, 603, 604.
v. Warren, 49.
v. Washington Com. Pleas, 707.
v. Webster, 560, 647.
v. Wilgus, 217.
Pendleton v. Empire Stone Co., 629.
Penley v. Watts, 666.
Pepper v. Haight, 582, 635.
Percival v. Hickey, 570.
Perego v. Purdy, 382, 901.
Perkins v. Stebbins, 635, 905, 586. 308, 374, 583, 690.
v. Washington Ins. Co., 223.
Perry v. Smith, 658.
v. Tynen, 47, 760.
v. Weyman, 237, 578.
Person v. Warren, 271, 273.
Persons v. Parker, 249.
Peters v. Dossy, 579, 693, 801, 907.
v. Whitney, 657.
Petrie v. Shoemaker, 273, 283.
Pettis v. Bloomer, 674.
Pettit v. Ide, 612.
Petty v. Anderson, 373.
Phalen v. Dingee, 281, 282, 290.
Phelps v. Bostwick, 466.
Philips v. Brainard, 774.
v. Caswell, 804.
Phillips v. Berick, 287, 403.
v. Cole, 394.
v. Cook, 731.
v. Hagadon, 331.
Phillpot v. Evans, 663.
Phincle v. Vaughan, 637.
Phinney v. Earle, 594.
Phœnix Fire Ins. Co. v. Philip, 499.
Pickard v. Collins, 372, 519, 524, 525.
Pickert v. Dexter, 221.
Pier v. Finch, 388.
Pierce v. Dart, 628.
v. Kingsmill, 178.
v. Pierce, 469, 629.
v. Powell, 469.
v. Sheldon, 26.
v. Thomas, 852.
Pierrepont v. Barnard, 31.
Pillow v. Bushnell, 370.
Pinckney v. Keyler, 876.
v. Wallace, 331.
Pindar v. Black, 189.
Pinney v. Gleason, 658.
Piper v. Elwood, 736.
Piser v. Stearns, 329.
Pittstown v. Plattsburgh, 333.
Pixley v. Butts, 225.
Place v. Butternuts Woolen Co., 25, 27.
Plato v. Reynolds, 481, 515.
Platt v. Sherry, 724.
v. Storer, 578.
Plimmer v. Sells, 373.
Poirer v. Fisher, 410.
Pollock v. Aldrich, 8, 703.
v. Ehle, 343, 613.
v. Hoag, 402, 876.
Pomeroy v. Sperry, 64, 284.
Pope v. Hart, 98, 102, 119, 357, 497.
Porter v. Bleiler, 273, 275.
Post v. Black, 25, 27, 635.
v. N. Y. C. R. R., 872.
v. Wright, 356.
Potter v. Baker, 85, 164.
v. Deyo, 415, 637.
v. Luther, 392.
v. Whittaker, 6, 63, 66, 907.
Powell v. Rust, 33.
v. Waters, 396.
Powers v. Lockwood, 355.
Prall v. Hinchman, 630.
Pratt v. Foote, 636.
Pratt v. Hill, 117.
v. Peckham, 402.
v. Potter, 285.
Prentice v. Dike, 664, 942.
v. Sprague, 587.
Price v. Green, 671.
v. McClave, 311.
v. McGown, 461.
v. Peters, 985.
v. Powell, 374, 469.
v. Shipps, 718, 721, 724, 732.
Prince v. Case, 31.
v. Samo, 383.
Prindle v. Caruthers, 269, 296, 302, 307, 316, 317.
Pringle v. Chambers, 629.
v. Hulse, 603, 604.
Proudfit v. Henman, 16, 337, 359.

Pryne v. Westfall, 889.
Pym v. Campbell, 465, 468.
Pugsley v. Kesselburgh, 251.
Pulling v. People, 47, 618.
Purchase v. Bellows, 745.
v. Mattison, 418.
Purvis v. Coleman, 298.
Putnam v. Lewis, 468.
v. Man, 52, 65, 74, 111, 391.
v. Shelop, 626, 698.
v. Wise, 291.
Queens Case, The, 400, 481.
Quimby v. Hart, 246.
Quin v. Moore, 650.
Radcliff v. Wood, 748.
Radde v. Whitney, 736.
Randall v. Crandall, 34, 120, 247, 248.
v. Gurney, 555.
v. Hall, 25, 27, 768.
v. Lynch, 384.
v. Sweet, 279.
Raney v. Weed, 575.
Ranney v. Gwynne, 356, 634, 904.
Ransom v. Miner, 724.
v. Wetmore, 582, 760.
Rapelye v. Prince, 557.
Rathbone v. McConnell, 31.
v. Morris, 178, 792.
v. Stanton, 890.
Rathbun v. Acker, 406.
v. Woodworth, 742.
Rawdon v. Barton, 660.
Rawson v. Adams, 806.
v. Grow, 350, 806, 824, 841, 876.
Ray v. Harcourt, 732.
Raymond v. Wheeler, 307.
Reale v. Moore, 408.
Read v. Brookman, 404.
v. Hurd, 395.
Reddington v. Gilman, 399.
Redfield v. Florence, 359.
Reed v. Drake, 161.
v. Gillett, 93, 95, 578, 609.
v. Pruyn, 737.
v. Warth, 6.
Reggin v. Braggiotti, 664, 665.
Regina v. Garbett, 372, 379, 510.
v. Pilkington, 614.
v. Rishworth, 393.
Relyea v. Beaver, 409.
v. Ramsay, 5, 16, 625.
Renaud v. Peck, 664.
Renard v. Sampson, 461.
Reno v. Pinder, 42, 72.
Rerick v. Kern, 31.
Ressequie v. Brownson, 20, 583.
Reynolds v. Bridge, 674.
v. Brown, 402, 698.
v. Champlain Transp. Co., 620.
v. Orvis, 11, 13, 111.
Requa v. Requa, 472.
Rex v. Appleby, 380.
v. Erith, 393.
v. Inhabs. of Harborne, 389.
v. Inhabs. of Twyning, 389.
v. Frystone, 391.
v. Nuneham, 391.
v. Slater, 488.
Rhoads v. Woods, 654, 678.
Rice v. Baxendale, 668.
v. Buchanan, 594.
v. Hollenbeck, 284, 582, 677.
v. Mead, 696.
v. Milks, 28.
v. O'Connor, 332.
Rich v. Hogeboom, 36.
v. Jakway, 498.
Richards v. Edick, 674.
Richardson v. Brown, 342, 351.
v. Mead, 270, 303.
v. Wilkins, 637.
Richmond v. Bronson, 417, 668.
v. Dayton, 562.
Richmond Turnpike Co. v. Vanderbilt, 285.
Rickey v. Bowne, 708.
Riddle v. Bedford, 39.
Rider v. Pond, 318.
Rightmyer v. Raymond, 301.
Riley v. Suydam, 373.
Ripley v. Mason, 374.
Rinehart v. Olwine, 662.
Ring v. Grout, 392.
Rob. v. Moffat, 46.
Robbins v. Dillaye, 627, 629.
v. Codman, 767.
v. Gorham, 5, 51, 424, 560, 562, 640, 641, 642, 645.
v. Hudson River R. R., 628, 687, 901.
Roberts v. Carter, 664.
v. Failis, 27, 856.
v. Gee, 382.
v. Willard, 192.
Robertson v. Ketchum, 893.
v. Smith, 288.
Robinson's Case, 746, 747, 753.
Robinson v. Dauchy, 370, 388.
Robinson Ex parte, 145.
Robinson v. Sinclair, 129.
v. West, 17, 18, 19, 635.
Robison v. Lyle, 462.
Rochester & Syracuse R. R. v. Budlong, 495.
Rockwell v. Saunders, 186.
Rockwood v. Allen, 648.
Rodgers v. Fletcher, 495.
Roe v. Day, 380.
Rogers v. Ackerman, 496.
v. Beard, 656.
v. Brewster, 324, 685.
v. Jackson, 422.
v. Mulliner, 11, 12, 13, 96, 97, 151.
v. Rogers, 566, 601.
v. Van Hoesen, 405.
v. Verona, 409.
Rose v. Smith, 27, 856.
Roosevelt v. Gardinier, 43.
Root v. Sherwood, 626.
v. Foster, 309, 310, 324.
Roseboom v. Billington, 395.
Rosekrans v. Van Antwerp, 227.
Ross v. Hamilton, 311.
v. Luther, 57.
Rosenfield v. Howard, 143, 152, 155, 180.
Rose v. Oliver, 286.
v. Stuyvesant, 336, 355, 886.
Roth v. Schloss, 637.
v. Wells, 543, 732, 735.
Rouse v. Whited, 383.
Rouillier v. Wernicki. 904.

Roulston v. McClelland, 801.
Rowe v. Richardson, 722.
Rowley v. Gibbs, 680.
Roy v. Targee, 416.
Rudd v. Baker, 804, 825.
v. Davis, 580, 581.
Ruggles v. Fogg, 870.
Rundell v. Butler, 488.
Russell v. Butterfield, 678.
v. Conn., 614, 762.
v. Cronkhite, 580, 628.
v. Gibbs, 723, 737.
v. Hubbard, 43.
v. Hudson River R. R. Co., 396, 507.
Ryckman v. Haight, 322.
Sackett v. Spencer, 499.
Sagendorph v. Shult, 13, 45.
Salters v. Ralph, 674.
Saltus v. Genin, 411.
Sammis v. Brice, 221, 222, 837.
Sandford v. Roosa, 722.
v. Chase, 555.
Sandland v. Adams, 148.
Saul v. Kruger, 730.
Saunders v. Keough, 780.
Savacool v. Boughton, 49.
Savage v. Cock, 260, 334, 874.
Sayer v. Finck, 356.
Schaffner v. Reuter, 370.
Schenck v. Lincoln, 907.
v. Wilson, 452.
Schenectady & Saratoga R. R. v. Thatcher, 581.
Scheffield v. Rochester & Syracuse R. R., 485.
Schermerhorn v. Buell, 305.
v. Jenkins, 231.
v. Tripp, 28.
Schneider v. Jacobi, 870.
Schoonmaker v. Clearwater, 27.
v. Elmendorf, 274.
Schroeppel v. Taylor, 10, 146, 152.
Schuneman v. Palmer, 390.
Schuyler v. Warner, 802.
Schwab v. Furniss, 330.
Schwartz v. Bendel, 779.
Scofield v. Van Sycle, 331.
Scott v. Betts, 465.
v. Ely, 44, 719.
v. Leiber, 306.
v. Pentz, 404, 629.
v. Rushman, 803.
v. Shepherd, 652.
v. White, 100.
Scovill v. Griffith, 465.
Scranton v. Levy, 626, 702.
Scrugham v. Carter, 731.
Seaman v. Benson, 488.
v. Low, 322.
v. Luce, 654, 678, 751.
v. Ward, 579, 582, 693, 694.
Sears v. Lyons, 683.
Seaton v. Benedict, 384.
Seaver v. Robinson, 555.
Sebring v. Wheedon, 596.
Secor v. Keller, 275.
v. Sturgis, 288.
Seeley v. Engell, 471, 984.
Seers v. Grandy, 346.
Selden v. Pringle, 266.
Semayn's Case. 721.
Seymour v. Bradfield, 20, 219, 504, 639, 886.
v. Duscomb, 790.
v. Elmer. 842, 850, 851.
v. Judd, 16, 771.
v. Van Slyck, 388.
v. Wilson, 497.
Shaffer v. Lee, 655.
v. Wilcox, 564.
Shall v. Lathrop, 693.
Shannon v. Burr, 667, 880.
v. Comstock, 20, 51, 101, 152, 654.
Sharon v. Mosher, 664.
Sharp v. Whittenhall, 186.
Shaver v. Ehle, 384, 428.
Shaw v. Lawrence, 85, 164.
v. Raymond, 333.
v. Tobias, 303.
Shay v. People, 369.
Sheldon v. Adams, 761.
v. Clark, 305.
v. Hoy, 297, 303.
v. Hudson River R. R., 581.
v. Peck, 462.
v. Van Buskirk, 463.
v. Wood, 405, 637, 639.
v. Wright, 38, 139.
Shepard v. Potter, 639.
Sheridan v. Mann, 909.
Sherman v. Boyce, 737.
v. N. Y. Central R. R., 306.
v. Wells, 668.
Sherwood v. Mitchell, 415.
v. Saratoga, &c., R. R., 59, 73, 79, 225, 226, 346, 577.
Shoemaker, v. Benedict, 375.
v. McKee, 370.
Sholts v. Judges of Yates Co., 790.
Shorey v. Hussey, 524.
Shorke v. Charles, 36.
Shove v. Raynor, 4, 624.
Shufelt v. Cramer, 577.
Shumway v. Stillman, 74.
Sibley v. Howard, 695, 710.
Sibley v. Waffle, 513.
Sickles v. Mather, 438, 442, 444, 446, 448.
Silkman v. Boiger, 785, 849, 850.
Silsbury v. McCoon, 677.
Silverman v. Foreman, 609, 639.
Simons v. De Barre, 21.
v. Monier, 494.
Simmons v. Fay, 498.
v. Sherman, 921.
Simpson v. Carter, 824.
v. Watrus. 484.
Sisson v. Barrett, 462.
Sissons v. Dixon, 452.
Sizer v. Burt, 607, 639.
Skellinger v. Yendes, 754.
Skinner v. Dayton, 656.
v. Tinker, 663.
v. White, 656.
Skinnion v. Kelley, 14, 38, 144.
Slack v. Heath, 307.
Slaman v. Buckley, 704, 802.
Slane Peerage, 419.
Sleeper v. Van Middleworth, 516.
Slingerland v. Swart, 728.
Sloan v. Case, 290, 753.

Slocum v. Hooker, 279.
Slosson v. Beadle, 673.
Sluby v. Champlin, 432.
Smart v. Comstock, 274.
Small v. Ludlow, 9.
v. Sloan, 268, 388, 435.
Smith v. Allen, 178, 792, 914.
v. Beadnell, 372.
v. Benson, 184.
v. Brackett, 752.
v. Brown, 318.
v. Compton, 403, 693, 698.
v. Floyd, 602.
v. Frost, 401.
v. Goodrich, 225.
v. Greenin, 332.
v. Gugerty, 470.
v. Hall, 387.
v. Hill, 496, 636, 637, 752, 904.
v. Holmes, 304, 315.
v. Jones, 287, 382.
v. Joyce, 15, 46, 452.
v. Kerr, 411.
v. Lockwood, 324.
v. Lynes, 628.
v. Luce, 151.
v. McGowan, 435.
v. Mitten, 35, 246, 333, 615.
v. Oliphant, 279.
v. Randall, 572.
v. Ransom, 274.
v. Riggs, 32.
v. Schanck, 269, 377.
v. Smith, 672.
v. Stickney, 523.
v. Sutts, 768.
v. Tiffany, 580.
v. Van Brunt, 798, 801, 834.
v. Weed, 152.
v. White, 924.
v. Whittingham, 376, 394.
Snelgrove v. Stevens, 550.
Snell v. Loucks, 221.
Snider v. Cray, 403.
Snow v. Peacock, 392.
Snyder v. Beyer, 33.
v. Olmsted, 148.
Southwick v. Hayden, 400, 468.
Sowell v. Champion, 685.
Spade v. Hudson River R. R., 392.
Spalding v. Spalding, 192, 193.
Spargo v. Brown, 394.
Spear v. Downing, 302, 307, 316.
v. Myers, 607, 639.
v. Smith, 674.
Spence v. Beck, 806.
Sperceley v. Schulenburgh, 513.
Spencer v. Babcock, 463.
v. Cuyler, 755.
v. Halstead, 655.
v. Sar. & Wash. R. R., 633.
v. Wheelock, 582.
Sperry v. Major, 80, 626, 702.
Spies v. Boyd, 630.
Spoor v. Holland, 391, 678.
Sprague v. Cadwell, 521.
Spraker v. Cook, 769.
Sprague v. Irwin, 48.
v. Shed, 224, 359.
Spring v. Baker, 801, 802.
Squier v. Gould, 586, 635, 690, 905.
St. John v. Griffith, 307.
v. Mayor of New York, 630.
Staats v. Hudson R. R., 877.
Stacy v. Farnham, 193.
v. Graham, 521, 522, 639.
Stafford v. Williams, 21, 577, 586, 635, 824, 903, 907.
Stanbro v. Hopkins, 370.
Stanton v. Leland, 42, 759.
v. Schell, 358.
Staples v. Goodrich, 288.
v. Parker, 342.
Stark v. Boswell, 377.
Starks v. People, 521, 522.
State v. Ross, 385.
v. Thibeau, 385.
State of Indiana v. Woram, 282.
Stead v. Gascoigne, 741.
Stearns v. Tappin, 467.
Stebbins v. Cooper, 398.
Stedman v. Patchin, 464.
Stephens v. Reynolds, 637.
v. Vroman, 381.
v. Wider, 628, 687.
Stephenson v. Hall, 330.
Sterling v. Welcome, 6, 176, 733.
Stern v. Drinker, 303, 333.
Sternhaus v. Schmidt, 793.
Stevens, Ex parte, 788.
Stevens v. Eno, 740.
v. Low, 677, 678.
v. Rowe, 686.
Stevenson v. Hunter, 925
Stewart v. Ahrenfelt, 464.
v. Brown, 14, 99, 138, 140, 145, 146, 150, 152, 182.
v. Canty, 663.
v. Howard, 555.
v. McGuin, 86.
v. Meigs, 345, 577.
v. Smith, 45, 74, 803.
v. Travis, 306.
v. Wells, 374.
Stief v. Hart, 5, 730, 737.
Stiles v. Comstock, 306.
Stillwell v. Staples, 37.
Stockbridge Iron Co. v. Mellen, 300.
Stoddard v. Holmes, 217, 219, 375.
Stolp v. Van Cortland, 802.
Stone v. De Puga, 305.
v. Knowlton, 317.
v. Williams, 703, 705.
Storm v. Woods, 723.
Storms v. Snyder, 34.
Storp v. Harbutt, 690, 889.
Storr v. Scott, 379.
Story v. Bishop, 343, 359, 557.
v. Lovett, 428.
v. N. Y. & Harlem R. R., 656.
Stratton v. Pettit, 465.
Stroud v. Butler, 49, 612.
v. Frith, 462.
Striker v. Mott, 34, 35.
Struver v. Ocean Ins. Co., 771, 786.
Stuart v. Simpson, 581.
Sturges v. Allis, 958.
Sullivan v. McDonald, 776, 781.

Sunbolf v. Alford, 747.
Sunderland v. Loder, 745.
Supervisors, &c., v. White, 311, 317, 404.
Supervisor of Galway v. Stimson, 44, 272, 926.
Suydam v. Jackson, 680.
Swartwout v. Roddis, 810.
Sweet v. Barney, 387.
v. Bradley, 654.
v. Coon, 221.
v. Ingerson, 289.
v. Tuttle, 498, 972.
Sweezey v. Willis, 25.
Swift v. Falconer, 308, 583, 690, 889.
v. Kingsley, 308.
Syron v. Blakeman, 31.
Taft v. Sargeant, 279.
Tallman v. Bigelow, 137.
v. Turck, 326.
v. Woodworth, 594.
Tattersall v. Hass, 761.
Taylor v. Batsford, 621.
v. Everett, 620.
v. Harker, 141, 146, 152.
v. Heath, 80, 127, 159, 167, 169, 170.
v. Mayor, &c., of N. Y., 802.
v. Monnot, 493.
v. Seeley, 917.
v. Stringer, 489.
v. Wood, 509.
Teall v. Barton, 493.
v. Van Wyck, 405, 430, 793.
Tenny v. Filer, 703.
Terwilliger v. Knapp, 662.
Texier v. Gouin, 412.
Thallhimer v. Brinckerhoff, 374, 385.
Thatcher v. Morris, 301, 315.
The Mayor of N. Y. v. Green, 776.
The Queen's Case, 400, 481.
The Rector, &c., v. Buckhart, 285.
Thomas v. Dickinson, 621.
v. Harris, 684.
v. Hubbell, 376.
v. Mills, 876.
v. Murray, 629.
v. Newton, 509.
v. Roosa, 305.
Thompson v. Austen, 381.
v. Blanchard, 520, 524.
v. Dickerson, 580, 628.
v. Ketcham, 367.
v. Valarino, 766.
v. Sayre, 152, 171, 294.
Thomson v. Clerk, 737.
Therasson v. Peterson, 332.
Thormborow v. Whiteacre, 654.
Thurman v. Cameron, 422.
v. Wells, 629.
Thurston v. King, 718.
Tibbets v. Ayer, 942.
v. Blood, 273, 279.
Tibbits v. Percy, 281, 282, 460, 904.
Tibbles v. O'Connor, 198.
Tiffany v. Driggs, 112.
v. Gilbert, 7, 16, 27, 635, 854.
Tifft v. Barton, 740.
v. Culver, 20, 628, 685.
v. Tifft, 310, 330, 635, 888.
Tillou v. Clinton & Essex Ins. Co., 435.
Timmerman v. Morrison, 708.
Tinkom, v. Purdy, 739.
Tobey v. Barber, 468.
Todd v. Crookshanks, 185.
Tombs v. Rochester & Syracuse R. R., 17.
Tomlinson v. Borst, 437, 439, 445, 446.
Tompkins v. Haile, 326.
Tooker v. Gormer, 372, 518.
Tousley v. Barry, 377.
Tower v. Hewett, 618.
Townsend v. Billinge, 269.
v. Empire Stone Dressing Co., 470.
v. Fisher, 399, 461.
v. Keenan, 831, 883, 885.
v. Phillips, 724.
v. Susquehanna T. R., 285.
Tracy v. Albany Exchange Co., 667.
Tracy v. Suydam, 279.
Travers v. Nichols, 86.
Travis v. Bassett, 845, 848.
Treadwell v. Bruder, 227, 231.
v. Stebbins, 639.
Trelawney v. Coleman, 390.
Tremain v. Cohoes Co., 324.
Tripp v. Riley, 284, 582.
Troy, &c., R. R. v. Kerr, 308.
Trull v. Granger, 667.
Trust v. Delaplaine, 806.
Trustees, &c., v. Utica, &c., R. R., 305.
Trustees of M. E. Church v. Stewart, 286.
Trustees of Penn Yan v. Thorne, 612.
Trustees of St. Mary's Church v. Cagger, 580.
Tryon v. Jennings, 833, 884.
Tucker v. Ladd, 329.
Tullock v. Cunningham, 225.
Turck v. Richmond, 333, 615.
Turner v. Fendall, 730.
v. Railton, 378.
Tuthill v. Clark, 250, 253.
v. Wheeler, 323.
Tuttle v. Buck, 750.
v. Gladding, 379.
v. Hunt, 52, 111, 633, 905.
v. Smith, 314.
Tyler v. Olney, 578, 844.
Underhill v. Pomeroy, 580.
v. Reinor, 731, 889.
v. Taylor, 227.
Union Bank of Sandusky v. Torrey, 575.
Union India Rubber Co. v. Tomlinson, 267.
Updike v. Campbell, 630.
Vail v. Lewis, 728.
v. Rice, 464.
Vallance v. King, 635.
Van Amringe v. Barnett, 418, 906.
Van Antwerp v. Newman, 724.
Van Bergen v. Ackles, 711.
Van Bramer v. Cooper, 279.
Van Brunt v. Eoff, 435.
Van Buren v. Cockburn, 395.
v. Loper, 748.
v. Wells, 416.
Van Cleef v. Fleet, 724.
Vandenburgh v. Lenox, 653.
Vandenburg v. Truax, 324.
Vanderbilt v. Richmond Turnpike Co., 285.
Vanderpool v. Husson, 629.
v. Van Valkenburg, 420.
Vanderpool v. Wright, 46.

Vanderslice v. Newton, 309, 310.
Van Deusen v. Van Slyke, 696.
v. Young, 961.
Van Duzor v. Linderman, 36.
Van Dyne v. Thayre, 430.
Van Heusen v. Charles, 789, 799.
v. Kirkpatrick, 788, 811.
Van Keuren v. Parmelee, 375.
Van Kirk v. Wilds, 168, 169.
Van Leuven v. Lyke, 326.
Van Lien v. Byrnes, 265.
Van Loan v. Kline, 176.
Van Patten v. Onderkirk, 803.
Van Pelt v. McGraw, 387.
Van Rensselaer v. Bonesteel, 299.
v. Chadwick, 74.
v. Jones, 305.
v. Rucliff, 34.
Van Santwood v. Sandford, 160.
Van Schaick v. Winne, 296.
Van Sickler v. Jacobs, 750.
Van Slike v. Lettice, 790.
Van Steenburgh v. Tobias, 287.
Vantrot v. McCulloch, 890.
Van Vechten v. Paddock, 46.
Van Winkle v. U. S. Mail Steamship Co., 668.
Van Wyck v. Kelly, 850.
v. McIntosh, 434.
v. Pine, 733.
Varona v. Socarras, 515, 517.
Vasseur v. Livingston, 461, 470.
Vence v. Speir, 552.
Vermeule v. Beck, 290.
Vermilya v. Beatty, 301, 315.
Vibbard v. Johnson, 942.
Vibbard v. Staats, 450, 487.
Vicars v. Langham, 602.
Visger v. Ward, 756.
Visscher v. Gansevoort, 57.
Voorhis v. Baxter, 279.
v. Child, 279.
Voorhees v. Earl, 663.
v. Martin, 5.
Vosburgh v. Thayer, 438, 439.
v. Welch, 13, 14, 139, 151.
Waddell v. Cook, 731.
v. Elmendorf, 736.
Wadsworth v. Allcott, 468.
Waggoner v. Jermaine, 684.
Wailing v. Tolls, 382.
Wait v. Van Allen, 696, 786, 924.
Wakefield v. Gall, 550.
Wakeman v. Lyon, 745.
Walbridge v. Kennison, 378.
Walden v. Sherburne, 375.
Waldhein v. Sickel, 309, 761.
Waldron v. Willard, 327.
Wales v. Hart, 712.
Walker v. Ames, 957.
v. Bank of the State of N. Y., 669.
v. Burnham, 712.
v. Cruikshank, 59, 96.
v. Russell, 552.
v. Smith, 649.
v. Wilson, 399, 683.
Wallace v. Mayor of N. Y., 683, 684.
v. Patterson, 795, 797.
Wallis v. Warren, 938.
Walrath v. Redfield, 677.
Walrod v. Ball, 383.
v. Bennett, 245, 284, 307, 308, 371, 584.
Walrod v. Shuler, 695, 696, 786, 787.
Walsh v. Adams. 731.
Walter v. Lockwood, 297.
v. Post. 629.
Ward v. Ingraham, 37.
v. People, 509.
v. Smith, 667.
v. Washington Ins. Co., 607, 616, 633, 638.
Wardwell v. Patrick, 56, 402.
Warnick v. Crane, 635, 690, 905.
Warren v. Lynch, 160.
Warring v. Loomis, 624, 739, 824, 908.
Washington Ins. Co. v. Price, 23.
Waters v. Whitamore, 170.
v. Whittemore, 62, 78, 80, 81, 91, 92.
Watkins v. Weaver, 594.
Watkinson v. Laughton, 668.
Watson v. Bailey, 637.
v. Davis, 694.
v. Morton, 786.
Watts v. Cleaveland, 733, 895.
v. Willett, 160, 174.
Wavel v. Wiles, 840, 854, 921.
Weaver v. Devendorf, 424.
Webb v. Alexander, 374.
v. Page, 554.
Webber v. Gay, 49, 152, 171.
Weber v. Kingsland, 490, 504, 905.
Webster v. Hopkins, 277, 759, 780, 781.
Weeks v. Ellis, 38.
v. Goode, 379.
v. Lyon, 16, 219, 347, 359, 360, 405.
Weisser v. Martland, 399.
Welch v. Seaborn, 387.
Welland Canal Co. v. Hathaway, 398.
Welles v. Webster, 311.
Wells v. Gates, 273.
v. Jewett, 290, 325.
Wesson v. Chamberlain, 21, 745.
Westbrook v. Douglass, 586, 634, 636, 753, 899.
West v. Stanley, 583.
v. Wentworth, 660.
Westervelt v. Frost, 725.
Westlake v. St. Lawrence Co. Mut. Ins. Co., 496.
Wheeler v. Brant, 326.
v. Cropsey, 747.
v. Dakin, 718.
v. Lampman, 20, 72, 74.
v. Lozee, 553.
v. N. Y. & Harlem R. R., 73, 74.
v. Smith, 730.
v. Webster, 367.
Wheelock v. Brinckerhoof, 107, 160.
v. Hotchkiss, 711.
Wheelwright v. Beers, 668.
Whiley & Sherman, 178.
Whipple v. Foote, 736.
Whitaker v. Brown, 377.
Whitbeck v. N. Y. C. R. R., 495, 684.
White v. Ambler, 440.
v. Brown, 266.
v. Choteau, 271.
v. Joy, 311.

White v. Kibling, 396.
v. Seaver, 33.
v. Spencer, 295, 310, 311, 412.
v. Ward, 957.
Whiting v. Barney, 514.
v. Dudley, 34, 35.
v. Crin, 290.
v. Otis, 415, 628, 633.
Whitlock v. Bueno, 636.
Whitnash v. George, 376.
Whitney v. Bayard, 883.
v. Ferris, 375,
v. Shufelt, 13, 62, 79, 102.
v. Wynkoop, 574.
Whyman v. Garth, 428.
Wibert v. N. Y. & Erie R. R., 668.
Wickham v. Seely, 31.
Wiest v. Critsinger, 16, 217, 347, 359.
Wiggin v. Orser, 57, 58.
Wiggins v. Tallmadge, 249, 250, 251.
v. Wallace, 493.
Wightman v. Clapp, 823.
Wilbur v. Selden, 394, 396.
Wilcox v. Clement, 219, 227, 345, 359.
v. Green, 386.
v. Smith, 392.
Wilde v. N. Y. & Harlem R. R., 80, 279, 841.
Wilder v. Case, 403.
Wiles v. Peck, 834, 858.
Wiley v. Slater, 890.
Wilkie v. Bolster, 367.
v. Chadwick, 551.
Wilkiming v. Schmale, 232.
Wilkinson v. Gaston, 938.
v. Vorce, 224, 402.
Wilklow v. Bell, 697.
Willard v. Bridge, 290, 311, 634, 676.
v. Germer, 407.
Williams v. Allen, 282.
v. Barnaman, 180.
v. Bigelow, 769.
v. Cunningham, 776, 781.
v. East India Co., 414.
v. Eldridge, 504, 572, 573, 575, 576, 632.
v. Fitch, 512, 633, 905.
v. Glenny, 380.
v. Gwyn, 767.
v. Innes, 372.
v. Lowndes, 725.
v. McCauley, 841.
v. Shaw, 322.
v. Sherman, 708.
v. Spencer, 116.
v. Van Valkenburgh, 844.
Willins v. Wheeler, 7, 16, 635, 769, 855.
Willis v. Bernard, 390.
v. Forrest, 638.
v. Peckham, 554.
v. Welch, 575.
Williston v. Jones, 630.
Willoughby v. Carleton, 20.
v. Jenks, 34.
Willson v. Ellis, 749, 750.
Wilmot v. Richardson, 516, 633.
Wilson v. Boerem, 393.
v. Britton, 147.
v. Fenner, 21.
v. Gale, 408.
v. Kirkland, 433.
v. Little, 678.
v. Martin, 655.
v. Matthews, 676.
Winants v. Sherman, 450.
Winter v. Coit, 379.
v. Wroot, 390.
Wiseman v. Panama R. R. Co., 694.
Witbeck v. Waine, 461.
Wolcott v. McFarlan, 761.
Wolfe v. Howes, 318, 657.
v. Mersereau, 285.
v. Myers, 469.
Wollenweber v. Ketterlinus, 448.
Wood v. Combs, 678.
v. Jackson, 679.
v. Kelly, 783, 790, 793.
v. Rice, 24.
v. Weiant, 421.
Woodburn v. Chamberlain, 582.
Woodbury v. Sackrider, 311.
Woodin v. Bagley, 270.
Woodruff v. Com. Ins. Co., 399.
v. Cook, 302, 377.
Woodside v. Pender, 802.
Woodward v. Murray, 753.
v. Washburn, 91.
Woolley v. Wilber, 13, 39, 314, 319, 760.
Wooster v. Chamberlain, 276, 615.
Worrall v. Parmelee, 377, 484, 633, 905.
Wort v. Jenkins, 685.
Wright v. Jessup, 563.
v. Paige, 517.
v. Wilcox, 285.
Wrightup v. Chamberlain, 666.
Wright v. Williams, 333.
Wrigley, matter of, 62.
Wylie v. Hyde, 624.
Wynkoop v. Holbert, 795.
Yager v. Hannah, 15, 48.
Yates v. Joyce, 648.
Yordan v. Hess, 513.
Young v. Bushnell, 381.
v. Catlett, 505.
v. Hubbell, 579, 693.
Yorks v. Peck, 279.
Young v. Rummell, 310, 587, 693.
v. Scott, 241.
Zabriskie v. Smith, 325.
Zink v. Attenburg, 697.

PART V.

PRACTICE, PROCESS AND PLEADINGS.

CHAPTER I.

GENERAL PRELIMINARY CONSIDERATIONS.

In the first volume of this work the law relating to rights of action has been as fully discussed as the character of the work permits or requires.

In the present volume the rules of practice of pleadings and evidence will be the subject of discussion. And it is intended to make this part of the work as full and as complete as possible, since it is in relation to this part of the law that the principal difficulties arise in practice. Before any party can safely commence an action there are several particulars which require careful consideration by the party intending to institute the proceedings. Attention to this matter in the outset will frequently save the payment of large and useless bills of costs; and, in many cases, it may preserve a meritorious cause of action, which might be lost by a neglect of the plaintiff in not attending to his own interests, in due manner and season.

A party may have substantial and meritorious grounds for an action; although it may be that there is not a *present right* of action, on account of some preliminary act or thing necessary to be done. What constitutes a *right of action* will not be discussed in this place. But, it will be assumed for the present, that there may be good grounds for maintaining an action, if the necessary steps are taken in relation to it. It has been said, that, "in life, liberty and estate, every one (who has not forfeited them) has a property and right; and if they are violated, the law gives an action to redress the wrong, and punish the wrongdoer." 1 Com. Dig., Action, A. 1, Page 216. A *right of action* may be defined to be a right of prosecuting in a regular and legal manner in an appropriate court, for the recovery of whatever may be legally a right due to the plaintiff; it exists wherever a legal claim to damages, or to the recovery of some specific thing, has accrued, the action itself being the formal and prescribed mode of procedure whereby the right is vindicated or enforced in a court of law. Vide Broom's Com. on Com. Law, 74. It follows at once, from the very terms of definition just given, that, before

commencing an action in any given case, the plaintiff should carefully consider, in the first place, whether, upon all the facts which exist in the case, the law will give a right of action upon the merits, independent of all technicalities in the proceedings in relation to the action. If an action will not lie, then, of course no other considerations are necessary; but, in case that question is answered affirmatively, other considerations will arise. And some general rules will be noticed in relation to these considerations, including those in relation to the existence of a right of action.

The most general division of civil actions is into those relating to *contracts*, and those relating to *torts*.

1. If the action is founded upon a right arising upon contract, it will be necessary to determine that the nature of the contract is not *illegal*, either by statute or at common law; that the contract has the legal assent of the party sued; that there was a sufficient legal consideration; that the assent is not invalid on account of infancy, insanity, duress, and the like; and that there has been a breach of the contract by the party sued.

2. If the right of action arises from some tort or wrong, it must be a tort for which an action is maintainable; not one of that class for which an action will not lie; and the party complaining must not have contributed to the result, or have caused the occurrence of the act claimed as the right of action. Vol. I, 834, 835.

3. If the cause of action arises upon contract, has the plaintiff performed all the terms and conditions of it, which the contract and the law require of him before the opposite party can be put in default? Vol I, 176.

4. Has the plaintiff made a tender of performance, or of some act necessary for him to do before suing; or has the defendant made a tender, &c., which will defeat the action, or throw the costs of the action upon the plaintiff?

5. Has a notice been given, or a demand made, in those cases in which it is necessary?

6. Has the performance of the contract become illegal by act or operation of law; or has it become impossible by any acts or things which will legally excuse the performance thereof by either party?

7. Has the right of action, if once perfect, been in any manner destroyed, as by a release, by an accord and satisfaction, an arbitrament and award, or the like, or been discharged by operation of law?

8. Has there been a valid extension of the time for the performance of the contract; or a valid agreement not to sue before a given time which is yet unexpired; or, in other words, is the *cause of action complete*, at the *time* of *commencing* the action?

9. Is either party under a personal disability, such as infancy, coverture, lunacy, insanity, or the like, at the time of commencing the action; and if so, what steps are necessary to be taken to pursue the remedy regularly and legally?

10. Is the claim or demand barred by the statute of limitations, either as to those cases which are some of them limited to six years, and others to less time; or is the case within some of the exceptions of the statute; or have there been payments of principal or interest; or has a written, signed promise been given, &c.?

11. Is there sufficient legal evidence to maintain an action, independently of any proof offered by the defense; or to rebut any supposed defense that can be made; and is that evidence attainable so as to be available at the trial?

12. Who are the proper parties to the action, either as *plaintiffs*, or as *defendants;* do they sue in their own right; or as trustees of an express trust; or as officers of some corporation, such as town or county officers, and the like; or, as infants who must have a guardian, &c.; and how many plaintiffs ought to be joined, &c.? Or, 2dly, as defendants, are they sued as the original parties to the agreement, &c.; are they town or county officers, &c.; or are there several defendants who ought to be joined, &c.; or is the defendant an executor, administrator, &c., who cannot be sued as such executor, &c., before a justice; or is there any reason why the plaintiff may elect as to whom to make defendants; or have the parties been changed by an assignment of rights, by death, or in any other manner? And let care be taken to select the proper parties to the action, either as plaintiffs or as defendants, since the right of the justice to correct this mistake, without consent, has been questioned.

13. Have justices of the peace jurisdiction of the *subject matter* of the action; or is it one of that class of actions which is excluded from their jurisdiction, such as assault, battery, false imprisonment, libel, slander, malicious prosecution, criminal conversation or seduction; or do the accounts of both parties exceed $400; or is the action of that kind that title to real property will come in question, either by the plaintiff's own showing, or by the answer of the defendant?

14. Has the justice, before whom the action is to be commenced, jurisdiction of the person of the party named as defendant, viz., is the defendant a non-resident of the county, and is he sued in the town in which he may be at the time he is sued; or if the defendant is a resident of the county, does he reside in a town which is so remote from the justice, that he cannot compel the defendant to appear before him in favor of a resident plaintiff; or is there any other reason why the defendant may not be sued before the justice named?

15. Is the justice personally disqualified, viz., is he in any manner a party to the action; interested in the event of it; related to either party by consanguinity or by affinity; a tavern keeper, or a resident in a town which sues in its corporate capacity for a penalty?

16. Is it necessary to furnish affidavits, undertakings, &c., to the justice, before he can issue the process required; is the pro-

cess sought such as is required, such as a long summons when proper, a short summons, or a warrant, or an attachment either long or short; or is it necessary to indorse the process, as in actions for penalties, &c.; and is the process correct in form and substance; and is it perfect and complete when issued so as not to be void or irregular? Is it properly stamped? *Post,* 153.

CHAPTER II.

JURISDICTION IN CIVIL ACTIONS.

The first, and the most important question which arises, when a justice is called upon to act in the discharge of his official duties, is, whether he has jurisdiction in the case. And, whenever he takes cognizance of an action, and proceeds in it, he in effect decides that he has jurisdiction, although that decision is not announced in terms. *Clary* v. *Hoagland*, 6 Cal., 685. The term jurisdiction has been variously defined, although it has not always been done with that accuracy and comprehensiveness which is so important in a definition. The word is used in so many different applications, that it may be difficult to give any single definition which shall be entirely accurate in every instance. The definition hereafter given, is to be understood as limited to the proceedings before justices of the peace in *civil actions;* although the definition may be more extensive than may be required by this particular application of it.

Definition.] Jurisdiction is that power or authority which the *law* has conferred upon courts, judges, or justices of the peace, over the persons or the property of parties, and over the subject matter of actions or proceedings; to take cognizance of, to hear, try and determine the rights of the parties in relation thereto; to render a proper decision or judgment therein; and to carry that decision or judgment into execution; and see *People* v. *Sturtevant* 5 Seld., 266, 267. Jurisdiction has reference to the *right* to act, not to the particular manner in which that right may have been exercised. This word has in many instances, been so incorrectly employed, as to lead to some confusion. *D'Ivernois* v. *Leavitt,* 8 Abb., 62. A common instance of this error is seen in a case in which the justice originally had jurisdiction of both the subject matter of the action, and over the person of the defendant; but the cause had been improperly adjourned a second time, on motion of the plaintiff, against the objections of the defendant. Of such a case it is frequently said that the action is discontinued, out of court, or that the justice has lost his *jurisdiction* over the action. If the adjournment was improper, the judgment subsequently rendered will be *erroneous or irregular*, and, therefore, reversible on an appeal. But the judgment is not *void*, however erroneous it may be. *Horton* v. *Auchmoody*, 7 Wend., 200. And so of a verdict which is received in the absence of the plaintiff; the judgment is erroneous, and will be reversed on an appeal Vol. I. 54, § 101; *Douglass* v. *Blackman*, 14 Barb., 381; *Shove* v

Raynor, 3 Denio, 77. But if it is not void, and it cannot be questioned collaterally, *Relyea* v. *Ramsay*, 2 Wend., 602; *D'Ivernois* v. *Leavitt*, 8 Abb., 60. It is very true that the justice has no legal right to grant such an adjournment, nor to receive a verdict in the absence of the plaintiff; but the absence of that right is a totally different thing from a want of jurisdiction over the parties to the action, or over its subject matter; for, in the latter case, the judgment would be utterly void in all places, and for all purposes. The law has pointed out the course in which a justice is to exercise the jurisdictiou conferred upon him.

And the correct test is, has he the *authority* of *law*, to take cognizance of the action, to hear, try and determine it, and to render and enforce a judgment therein. If he has this authority, he has jurisdiction, otherwise, he has not. The manner in which a justice is to exercise his jurisdiction, is the subject of this work. But, in the first place, there will be a general view taken of the character and principles which relate to that subject.

Its incidents.] A justice cannot have any jurisdiction by mere implication, but it must be expressly conferred; yet in relation to those incidents which are usually annexed to jurisdiction, and necessary to its exercise, the rule is, that the grant of jurisdiction in express terms, carries with it all the legal incidents necessary to a legal and proper exercise of the authority. *Stief* v. *Hart*, 1 Comst., 20; *Robbins* v. *Gorham*, 11 E. P. Smith, 588; *S. C.*, 26 Barb., 586, 593; *Voorhees* v. *Martin*, 12 Barb., 508. "Whoever grants a thing, is supposed also tacitly to grant that, without which the grant itself would be of no effect." Broom's Leg. Max., 362; Vol. I, 775. And in those cases in which jurisdiction has been conferred, the statute provides in relation to the manner of its exercise, that, "for that purpose, where no special provision is otherwise made by law, such court shall be vested with all the necessary powers which are possessed by courts of record." Vol. I, 37, § 1. The rule stated, is therefore sustained by the common law and by the statute. And there will be frequent occasions to notice its application in practice in the following pages.

Where exercised.] Every judicial authority ought to be exercised within the territorial limits of the officer's jurisdiction. And this is true not only as to justices of the peace, but to higher judicial officers. So strictly is this rule enforced, that the first judge of the court of common pleas, under the former practice, could not allow an appeal from a justice's court, where the allowance was made at Albany, and the judge was the first judge of the Montgomery common pleas. The supreme court said: "The judge had no jurisdiction to allow the appeal, it was a judicial act which could properly be performed only in the county for which he was appointed." *People ex rel. Newell* v. *Mont. Com. Pleas*, 18 Wend., 649. This rule is to be most carefully observed by justices of the peace, especially since it has been held in one case, that a justice could not legally try a cause out of his own precinct, even by

the consent of the parties. *Foster* v. *McAdams*, 9 Texas, 542; see also *Reed* v. *Warth*, 2 Hilt., 281.

The city court of Brooklyn is a court of special and limited jurisdiction, and therefore a referee appointed by that court has no power to try the cause in the city of New York, as that is situated beyond the territorial limits of the court. *Bonner* v. *McPhail*, 31 Barb., 107.

The statute also declares the same rule as to justices. "Justices of the peace must reside in the town for which they were chosen, *and shall not try a civil cause in any other town*, except in cases otherwise provided by law." (1 R. S., 383, § 10, 5th ed.)

But the rule has a more extensive application than to justices of the peace; for, it is equally applicable to a constable, who has no legal right to serve or execute any civil process, for the commencement of an action, out of the county in which it was issued, and is returnable. *Litchfield* v. *Burwell*, 5 How., 342; *Hulbert* v. *Hope Mutual Ins. Co.*, 4 How., 275, 415. For instance, he cannot serve a civil warrant by arresting a party out of the county in which the warrant was issued, and is returnable. Nor can he serve an execution or an attachment against the property of any person, when the property is out of the county in which such execution or attachment was issued, and is returnable. *Sterling* v. *Welcome*, 20 Wend, 240, bottom page. The same rule is applicable to the service of a summons. For, if a summons is served on a party out of the county in which it is issued and returnable, the service is utterly void, and the party is under no obligation to appear and answer; but he may reverse any judgment rendered on such service, or he may treat it as a nullity whenever it is attempted to be enforced against him. *Harrington* v. *People*, 6 Barb., 607; *Noyes* v. *Butler*, 6 Barb., 613; *Milton* v. *Green*, 5 East, 233. The service of any civil process, by a constable, except a subpœna, out of the county, would also be in violation of the command in his process; for that does not authorize its service out of the county, and therefore such service is entirely unauthorized even by the process. It is a legal presumption that the officer will act in obedience, as well as in accordance with the commands of his process.

And the legal intendment in favor of an observance of this discharge of official duty is so strong, that on a return to an appeal, from a justice's court, if it appears that the justice issued a summons, directed to any constable of the proper county, and it is returned by a constable with a proper return of personal service; such return will be construed and intended to have been served by a proper constable, and *within* the proper county. *Potter* v. *Whittaker*, 27 How., 10; *Com. of Excise of Saratoga Co.* v. *Doherty*, 16 How., 46. Before the service will be held invalid, it must appear affirmatively that the process was served out of the proper county. *Ib.*

Its territorial extent, or the kind of process.] It may be declared as a general rule, that the territorial limits of a justice's jurisdic-

tion are co-extensive with the limits of the county in which he resides. But the statute has imposed restrictions in relation to the persons of certain parties, and has deprived the justice of jurisdiction in relation to them. See Vol. I, page 38, §§ 6, 7. It is evident that the process of the justice may run into any part of the county in which he resides, and that it may be served in any part of the same county. But the statute has expressly excluded the persons mentioned from the general rule. If a justice should issue process against any of the persons thus exempted from his jurisdiction, the judgment would clearly be erroneous and reversible on an appeal. *Tiffany* v. *Gilbert*, 4 Barb., 320; *Willins* v. *Wheeler*, 8 Abb., 116; 17 How., 93; 28 Barb., 669. It has been held that such a judgment is entirely void, and that an action could be maintained in the supreme court to have it declared void. *Cooper* v. *Ball*, 14 How., 295; and see *Beattie* v. *Larkin*, 2 E. D. Smith, 244. But in the case of *Tiffany* v. *Gilbert*, 4 Barb., 324, it is said by the supreme court: "The jurisdiction was made local by statute; not in such a sense as to render the judgment *coram non judice*, as though the justice had entertained jurisdiction in an action of slander, but in a sense that rendered the judgment *erroneous*." The question came up in that case on an appeal, so that the question as to the validity of the judgment in a collateral proceeding, was not in question. In *Foster* v. *Hazen*, 12 Barb., 547, the action was for an assault, &c., and a false imprisonment. The defendant set out in his answer the various proceedings by virtue of which a justice issued a warrant on which the plaintiff was arrested, which was the alleged assault, &c. The answer did not state that the action was brought before a justice of the town wherein either of the parties resided, &c. The plaintiff demurred to the answer for this and various other causes. But the supreme court held the answer sufficient in that respect, and cited with approbation the language of the supreme court in *Tiffany* v. *Gilbert*, as already cited. The question was one of pleading, and the precise point decided, was, that the answer sufficiently set forth the judgment of the justice for the purposes of pleading; although the court evidently regarded the judgment as valid in this collateral action. In *Barnes* v. *Harris*, 4 Comst., 374, the action was brought upon a justice's judgment, in which a long summons had been issued, but the complaint in the action in the supreme court upon the judgment did not show the residence of the defendant, at the time of commencing the action. The defendant demurred to the complaint, assigning, among other causes, that the complaint did not even show that the defendant was a resident of the county, &c. The court of appeals held the complaint sufficient. But this case was one in which the sufficiency of the pleading was in question, and nothing else could be properly decided. The judgment was properly pleaded, because it was not necessary in the pleadings to state affirmatively or negatively all the facts which might relate to jurisdiction. But the question whether the judgment would be

void, if it should appear on the trial that the defendant was a non-resident of the county, did not arise in the case. This class of cases, in relation to residents of the county who must be sued in certain towns, as provided by the statute, is somewhat analogous to those cases in which non-residents of the county are sued. As to the non-resident of the county, there must be a specified process; and, as to the resident defendant, the action must, in addition, be brought within the towns mentioned. In *Harriott* v. *Van Cott*, 5 Hill, 285, the defendant in the action in the marine court, was a non-resident of the county, and he was sued by a long summons, when the proper process was a short summons. The plaintiff in that action had judgment, and sold the property of the defendant in that action, on an execution. The latter then brought an action of trespass for taking the property. The defense was, that the judgment and execution of the marine court, were a legal defense in favor of the plaintiff in the action in that court.

But the supreme court held the judgment void, and decided that the plaintiff who procured the judgment in the marine court was a trespasser in his acts of enforcing the judgment. In *Bowne & Millard* v. *Mellor*, 6 Hill, 496, a long attachment was issued against the property of Mellor. The action before the justice was commenced by Bowne, and Millard was the surety in the attachment bond. The property of Mellor was attached, and Bowne, the plaintiff in the attachment suit, did not appear in the action on the return day, and the action was discontinued. Mellor then brought an action on the attachment bond, and it was held that he was entitled to recover. BRONSON, J., said: "As Mellor was not a resident of the county of Delaware, there should have been a short instead of a long attachment. He might have treated the process as void, and recovered his damages in an action of trespass. But he elected, as I think he had a right to do, to waive the irregularity and take his remedy on the bond. Having adopted that course, Bowne, who procured the attachment to be issued, was not at liberty to show the irregularity for the purpose of defeating the action." The cases cited are sufficient to show the importance of strictly observing the rule in relation to territorial jurisdiction as applicable to the persons or the property of the parties sued. Whether the judgment in such cases is entirely void, is in many cases a matter of importance. But the certainty that the judgment is at any rate erroneous, ought to be sufficient to excite due care in not obtaining such a judgment. There is an other class of cases in which the validity of a judgment may arise. We have seen, *ante*, 6, that a justice cannot try a civil action out of the town in which he resides. In *Pollock* v. *Aldrich*, 17 How., 109, it was held that a justice might take a confession of a judgment in any town in the county in which he resided. In that case the confession was taken in a town in which the justice did not reside, but was not entered in his docket until his

return home. In such a case, it may perhaps be said that there was no trial.

The statute expressly authorizes a justice to "take and enter judgment on the confession of a defendant." Code, § 53, sub. 8; Vol. I, 6. And there is no restriction in relation to that which prohibits it from being done in any town in the county.

Before 1830, a justice might have made his process returnable in any town in the county, but since the statute (1 R. S., 383, § 10, 5th ed.), declaring that a justice shall not try a civil action out of the town in which he resides, no justice can now make his civil process returnable in any town but that in which he resides, without a violation of the letter, spirit and intent of the statute.

The statute ought to be so construed as to secure the object of its enactment. To make the process returnable in any other town than that in which the justice resides, might, if the defendant were bound to appear there, be as great an inconvenience to him to attend the joining of the issue as it would be to attend the trial there.

It may be said that the expression "try a civil cause," does not literally include the framing of the pleadings at the joining of issue. Yet the spirit of the statute is, that in all actions which are tried, or are triable before a justice of the peace, upon an issue joined, and the introduction of evidence on the trial, such causes, and every act done in them after the service of process, shall be performed in the town in which the justice resides.

The acts of the justice, at the joining of an issue, are in their nature judicial. Suppose that either party demurs to a pleading of the opposite party, an issue of law is at once made; and the decision of the questions made is a *trial* of an issue of law. *Small* v. *Ludlow*, 1 Hilt., 307. The defendant may demur to the complaint on the ground that all the facts stated do not constitute a cause of action, and the decision of that question may dispose of the cause, and so of a demurrer to an answer.

The object of the statute was to provide for the convenience of parties in attending the trial; and there ought to be a strict and careful observance of it by every justice. The rule stated, need not be applied to the mere *issuing* of process, for it is of no importance to either of the parties to the action where the process is issued, if it is made *returnable* in the proper town. Though it must not be forgotten, that no judicial act can be done by a justice out of his county. *Ante*, 5. It not unfrequently happens that a question is made whether a justice is a town or a county officer.

Prior to the year 1826, justices of the peace held their offices by appointment, Const. of 1822, art. 4, § 7; and amendment thereto, No. 1, in the year 1826. By the amendment which was made in 1826, the office was made an elective one; and every town elected its proper number of justices.

The Constitution of 1846, makes the office an elective one; and the officer is required to be elected by the electors of each town.

Const. 1846, art. 6, § 17. The Revised Statutes of 1830, required justices to reside in the towns for which they were chosen; and also prohibited them from trying civil causes in any other town. 1 R. S., 383, § 10, 5th ed.

Prior to this amendment of the Constitution in 1826, and the enactment of the statute in 1830, it was entirely clear that the office of justice of the peace was a county office. *Gurnsey* v. *Lovell*, 9 Wend., 319; *Schroeppel* v. *Taylor*, 10 Wend., 196. And since that time, and the Constitution of 1846, art. 6, § 17, it is equally clear that the office is a town office, with a county juris diction, except in the prohibited cases already mentioned. *People* v. *Garey*, 6 Cow., 642, 647, 648. Same case affirmed by court for correction of errors, 9 Cow., 640 (Laws of 1859, chap. 476), which provides for filling a vacancy in the office, by the supervisor, town clerk, and the remaining justices. So that, if it is a county office, we have the anomaly of an officer elected by the voters of a single town or appointed by its officers, and yet holding a county office. But see what is said in *People* v. *Keeler*, 3 E. P. Smith, 370, 381; *People* v. *Carter*, 29 Barb., 208. The *territorial extent* of the officer's *jurisdiction*, is not the test whether he holds a town or a county office, for any constable may serve a summons anywhere in the county. *Mills* v. *Kennedy*, 1 Johns., 502. In this respect, his territorial jurisdiction is co-extensive with that of the sheriff; yet a constable is but a town officer. *People* v. *Garey*, 6 Cow., 647, 648. The manner of their election to office is not the test as to the extent of the officer's *jurisdiction*. For, though a justice of the peace may be elected by the electors of a single town, or appointed by town officers to fill a vacancy; yet, the legislature may confer jurisdiction upon them to send their process into any part of the state. In *ex parte McCollum*, 1 Cow., 567, Ch. J. SAVAGE said: "The right of the legislature to extend or limit the jurisdiction of justices, as to the amount cognizable before them, has never been disputed. Their power to limit or extend their territorial jurisdiction is, in my mind, equally clear. Should the legislature enact that justices should have power to send their process into any county in the state, or hear and try causes to any amount, no part of the constitution would be violated. Though such an act might be thought indiscreet, yet it would be the duty of the court to carry it into effect. In some of our sister states, justices have general jurisdiction; and even with us they have jurisdiciion throughout the state for some purposes. For instance, the removal of paupers, and of the apprehension of criminals, and of the putative father of a bastard child, under certain qualifications. The result is, that the jurisdiction of justices of the peace rests in legislative discretion, and is subject to legislative control." And in cases under the law relating to mechanics' liens, a notice may be served anywhere in the state, even when the proceedings are before a justice of the peace. 3 R. S., 822, § 132. There are other cases in which a justice has jurisdiction beyond the territorial limits of the county

in which he resides. He may issue a subpœna, and it is valid to compel the attendance of a witness who is in the county in which the cause is to be tried, or in an adjoining county. Vol. I, 49, § 70.

He may also issue a commission, which is valid in any part of the state; Vol. I, 67, 68, §§ 169, 170, 171; *Hall* v. *Barton*, 25 Barb., 274; or even in any part of the United States, *Eaton* v. *North*, 7 Barb., 631; in which case the witness was in the state of Virginia. And the statute which authorizes the issuing of the commission does not limit its execution in respect to place; so that it would be valid if executed in Canada, or in one of the territories of the United States, &c. The only difficulty which would be experienced in case of a long delay, would be, that the commission might not be returned within the ninety days limited by statute for adjournment. Vol. I, 67, 68, §§ 169, 170, 171, 172, 173.

Jurisdiction of the person.] It is not only important that a justice should exercise his jurisdiction within its legal territorial limits, but that he should also have jurisdiction of the persons of the parties to the action.

The law, which has conferred jurisdiction over the persons of parties, has declared with precision in what manner that jurisdiction is to be exercised. And, since justices do not possess any authority but that which is conferred by the statute, if there is not a compliance with the statute, there will be no jurisdiction of the action.

No man is to be condemned unheard, and therefore process is given to courts to bring parties before them for the purpose of determining rights.

And, in every instance, the law has given that kind of process which was deemed best for the interests of all parties. When a particular kind of process is directed to be employed, to the exclusion of any other; or when but one kind of process is given in a specified case, no process but that given can be properly used. If a justice issues a process which is not authorized by law in such a case, and the defendant does not, in any manner, waive the objection by appearing in the action, the judgment will be entirely void as between the parties to the action. And if an execution is issued on the judgment, and the person of the defendant is taken, or his property is sold, the plaintiff will be liable to be sued as a trespasser. *Rogers* v. *Mulliner*, 6 Wend., 597; *Gold* v. *Bissell*, 1 Wend., 210; *Harriott* v. *Van Cott*, 5 Hill, 285; *Reynolds* v. *Orvis*, 7 Cow., 269. There are cases in which the justice is not held liable, though the parties may be so. If a justice has jurisdiction of the subject matter of the action, and would have jurisdiction of the person of the defendant if proper process were issued, a mere mistake of the justice as to the kind of process issued will not, it has been said, render him a trespasser. *Hoose* v. *Sherrill*, 16 Wend., 33; *Rogers* v. *Mulliner*, 6 Wend., 597. But the utmost that can be said is, that the justice will be protected in such a case, if he acted in good faith. In

Blythe v. *Tompkins*, 2 Abb., 468, the justice was held to be a trespasser for issuing a defective criminal warrant, on which the plaintiff was arrested. And in the case which holds him excused for a mistake, the court said: "Should he knowingly issue a warrant against the provisions of the statute, he would be amenable in an action." *Rogers* v. *Mulliner*, 6 Wend., 603.

There is also a class of cases which render it questionable whether *Rogers* v. *Mulliner* was correctly decided, and whether the justice would be protected. In *Bigelow* v. *Stearns*, 19 Johns., 39, a justice issued a summons for the purpose of securing the appearance of the defendant before him on a complaint for disturbing a religious meeting. The defendant appeared before the justice on the return day of the summons, and insisted that a warrant ought to have been issued instead of the summons. The justice overruled the objection, and the defendant left the court. The justice convicted the defendant, and issued a warrant on the conviction, on which the defendant was arrested. The justice was sued for an assault, &c., and a false imprisonment, and he was held liable as a trespasser. The supreme court said: "If a court of limited jurisdiction issues a process which is illegal, and not merely erroneous, or if a court, whether of limited jurisdiction or not, undertakes to hold cognizance of a cause, without having gained jurisdiction of the person, by having him before them, in the manner required by law, the proceedings are void; and in the case of a limited or special jurisdiction, the magistrate attempting to enforce a proceeding founded on any judgment, sentence, or conviction, in such a case, becomes a trespasser." In *Colvin* v. *Luther*, 9 Cow., 61, a warrant was issued and served, but the defendant did not personally appear before the justice on the return day, though an agent did. It was held that the judgment was void, even collaterally. See Vol 1, 43, § 39. In *Percival* v. *Jones*, 2 Johns. Cas., 49, a justice was held to be a trespasser for voluntarily issuing an execution against the body of a defendant who was exempt from arrest on such an execution. And the principle was recognized that a justice is excused from liability for issuing any process of which he has jurisdiction, at the request of a plaintiff; and that in such case the justice is excused if he acts in good faith, though the plaintiff is liable, if the process is improper. The justice seems to be regarded as the agent of the party in such cases, and the principal alone is held liable. The last two cases show that a justice may be liable for issuing improper process, or for authorizing the imprisonment of one who is exempt therefrom, if he assumes to act on his own responsibility.

There is a still different class of cases in which a justice will be a trespasser for issuing process, even if the process issued is the proper one. If an affidavit is necessary to be made and delivered to the justice as a preliminary step to issue a warrant, he will be a trespasser if he issues the warrant without such an affidavit. For, without such affidavit, there is no authority to issue the

process. *Whitney* v. *Shufelt*, 1 Denio, 592; *Evertson* v. *Sutton*, 5 Wend., 281; *Vosburgh* v. *Welch*, 11 Johns., 175; *Gold* v. *Bissell*, 1 Wend., 210. The action was not against the justice in the last case cited, and the language of the court is explained in *Rogers* v. *Mulliner*, 6 Wend., 602.

The rule in all cases is, that the justice must have jurisdiction over the person of the defendant; and that such jurisdiction must be acquired in the manner pointed out by law. For, in every case in which the provisions of the law are omitted or disregarded, the judgment will be erroneous, and therefore reversible, in all such cases; and, in many cases, as has been seen, the judgment will be void collaterally, either as to the parties or the justice, or as to both of them. *Reynolds* v. *Orvis*, 7 Cow., 269.

But jurisdiction is not obtained by the mere issuing of proper process in due form, and in a proper manner. There must also be a legal service of the process upon the defendant, and a due return made of that service. And, when the action is one of which a justice has cognizance, and process is duly issued in proper form, and it is legally served on the defendant, and a proper return made, then a justice has jurisdiction of the action. But where a justice makes a summons returnable at one o'clock in the afternoon, and the process is duly served and returned, he cannot legally call the cause at ten o'clock in the forenoon of the same day, and try it and render judgment against the defendant in his absence. If he does so, the judgment will be void, and it will not constitute any bar to a subsequent action for the same cause. *Sagendorph* v. *Shult*, 41 Barb., 102. If a justice issues the proper process in a cause, a mere clerical error or defect in the process will not affect its validity; for the process is amendable. *Woolley* v. *Wilber*, 4 Denio, 570; *Brace* v. *Benson*, 10 Wend., 213; *Near* v. *Van Alstyne*, 14 Wend., 230; and if not amended in such a particular the judgment will be valid.

Of the property.] The law not only requires that there should be jurisdiction of the subject matter of the action, and of the person of the defendant, but it is also required that there should be jurisdiction of the property of the defendant. For, there are several cases in which the property of the defendant may be taken and sold, even though no process is served on the defendant himself. A defendent may keep himself concealed to avoid the service of civil process; or, he may leave the county for that purpose; or with intent to defraud his creditors; or he may conceal, dispose of, or remove his property with such intent. In such cases the law has provided a mode of seizing the defendant's property, and holding it to be sold and applied to the payment of the judgment rendered in the action.

The regular course of practice is to serve process on the defendant, obtain a judgment, and sell his property on an execution. But when the fraudulent conduct of the defendant does not permit this course, then the law gives the remedy already mentioned. But it is to be remembered, that the defendant still has

rights which the law has carefully guarded. Before the property of any defendant can thus be taken, there must be legal proof of the facts and circumstances which authorize the issuing of such process. But this is not all, there must also be ample security given for the indemnity of the defendant if the process is taken where there was no just cause for it.

And in relation to this class of cases, the law is enforced most strictly.

In order to obtain a valid judgment, and to sell the property of the defendant, there must be a strict compliance with every requirement of the statute in relation to obtaining jurisdiction. If a justice should issue an attachment without an affidavit, he would be liable as a trespasser for any injury which the defendant in the action might suffer from a sale of his property. *Adkins* v. *Brewer*, 3 Cow., 206; *Vosburgh* v. *Welch*, 11 Johns., 175. And the justice will also be a trespasser if he issues an attachment without requiring the bond required by law. *Davis* v. *Marshall*, 14 Barb., 96. The plaintiff also will always be liable as a trespasser for obtaining an attachment and proceeding with it, if there is not furnished both an affidavit and a bond. *Adkins* v. *Brewer*, 3 Cow., 206; *Davis* v. *Marshall*, 14 Barb., 96.

Such judgments are reversible on an appeal, both in those cases in which there was no affidavit and bond, and in those cases in which the affidavit was insufficient. *Dewey* v. *Greene*, 4 Denio, 93; *Stewart* v. *Brown*, 16 Barb., 367; *Bennett* v. *Brown*, 4 Comst., 254. The cases on this point are very numerous. The judgments are also void collaterally in every case, and in every manner in which their validity may come in question. *Davis* v. *Marshall*, 14 Barb., 96; *Adkins* v. *Brewer*, 3 Cow., 206; *Vosburgh* v. *Welch*, 11 Johns., 175. There is, however, this qualification of the general rule, viz., when the affidavit states facts and circumstances which are sufficient to call for an exercise of the judicial authority of the justice in deciding as to the sufficiency of the affidavits, then, although the proof is slight and inconclusive, and would not sustain the judgment on an appeal, yet it will be a valid judgment whenever the question arises collaterally. *Miller* v. *Brinkerhoof*, 4 Denio, 118; *Skinnion* v. *Kelley*, 4 E. P. Smith, 355, 356. In the last case, the court said: "In this class of cases, where facts are preliminarily to be proved as the basis of the right to employ the process, if the proof has a legal tendency to make out the case required by the statute, although it be so slight and inconclusive that, upon a direct proceeding to review it the magistrate's action would be reversed, yet in a collateral action the process will be deemed valid. It will be deemed so, because the justice, having proof presented to him, and being required by law to determine upon the weight of the proof, has acted judicially in making his determination. His decision may be erroneous, but it is not void." *Kissock* v. *Grant*, 34 Barb., 144, is to the same effect.

As to amount.] The justice must also keep within his jurisdiction as to the amount involved in the action. A judgment

rendered by him for an amount exceeding that allowed by law, will not only be erroneous, but entirely void. *Mattison* v. *Baucus*, Lalor's Sup. to Hill & Denio, 321; S. C., 1 Comst., 295.

It was formerly held, that a summons which stated an amount exceeding the jurisdiction of the justice was entirely void, and that the defendant was not under any obligation to appear and answer to it. *Yager* v. *Hannah*, 6 Hill, 631. But, this rule has been changed by the Code, § 53, subd. 6, 7; Vol. I, 5; and there are cases in which a judgment for more than two hundred dollars may be rendered. The cause of action need not be stated in the summons. *Cornell* v. *Bennett*, 11 Barb., 657; *Smith* v. *Joyce*, 12 Barb., 21; *Delancey* v. *Nagle*, 16 Barb., 96; *Humprey* v. *Persons*, 23 Barb., 313.

And, therefore, the defendant is bound to appear on the return day of the summons, to see if the cause of action is one for which a judgment for more than one hundred dollars may be legally rendered. *Humphrey* v. *Persons*, 23 Barb., 313. Though, of course, the judgment would be void whether the defendant appeared and objected, or if he did not appear, if the judgment was for more than two hundred dollars, when it was not rendered on one of the claims for which a judgment may be legally taken for an amount exceeding that sum.

Of the subject matter of the action.] A justice may exercise his judicial authority within the proper territorial limits, and he may issue process which is proper in form, but all that will not be of any avail if jurisdiction of the subject matter of the action is wanting. And, in cases relating to the subject matter of the action, the rule is, that there must be a clear and affirmative grant of jurisdiction or it does not exist. For, since there is no authority by which a justice can try a civil action unless the statute has conferred it, the want of authority will be as fatal if express jurisdiction is not given, as though there had been a prohibition of its exercise in the given case. *Dudley* v. *Mayhew*, 3 Comst., 9; *Beach* v. *Nixon*, 5 Seld., 36; *Blin* v. *Campbell*, 14 Johns., 432; *Coffin* v. *Tracy*, 3 Caines, 129. In the one case there would be no jurisdiction because none was conferred by law, and, of course, none would exist; and, in the other case, there would be no jurisdiction because it was expressly prohibited; the result would be precisely alike in both cases, viz., a want of jurisdiction. There will not be any attempt to state here any of the numerous cases in which a justice has jurisdiction in civil actions.

When void for want of jurisdiction.] When the statute has not conferred jurisdiction over the subject matter of the action, any judgment which may be rendered will be absolutely void. *Coffin* v. *Tracy*, 3 Caines, 120; *Blin* v. *Campbell*, 14 Johns., 432; *Dudley* v. *Mayhew*, 3 Comst., 9; *Beach* v. *Nixon*, 5 Seld., 36. It is the *law* which confers jurisdiction, in every case where it exists. And in all cases a party is at liberty to show the want of jurisdiction in relation to subject matter, or the legality of the organization of the court, even when the judgment was rendered by his consent,

or at his request. *Oakley* v. *Aspinwall*, 3 Comst., 547; *Noyes* v. *Butler*, 6 Barb., 613.

When erroneous for want of jurisdiction.] There is no class of cases in the books of reports which relate to jurisdiction that are more numerous than those in which the question arose upon an appeal, because of some alleged error in jurisdictional matters. The general rule is, that there must be a strict compliance with the requirements of the statute as to the manner of acquiring jurisdiction; or in default or neglect thereof, the judgment will be erroneous, and consequently reversible on an appeal. *Tiffany* v. *Gilbert*, 4 Barb., 320; *Fitch* v. *Devlin*, 15 Barb., 47; *Willins* v. *Wheeler*, 8 Abb., 116; *S. C.*, 28 Barb., 669; *S. C.*, 17 How., 93. These are but a few of the numerous cases on the question. There is one distinction which it is important to observe in all of these cases relating to jurisdictional defects. It has been already seen that if the justice originally had jurisdiction of the subject matter of the action, and over the person of the defendant, his his subsequent errors will not render the judgment void. *Ante*, 4. But a different rule prevails when the question is raised by an appeal from the judgments, for if it should then appear that the justice had erred in the exercise of his jurisdiction, the judgment will be reversed. A familiar illustration of this rule is found in the case of an adjournment, which is granted by the justice in a case which is not authorized by law; the judgment is not void, but it is erroneous, and will be reversed on appeal. *Gamage* v. *Law*, 2 Johns., 192; *Wiest* v. *Critsinger*, 4 Johns., 117; *Proudfit* v. *Henman*, 8 Johns., 391; *Weeks* v. *Lyon*, 18 Barb., 530; *Deland* v. *Richardson*, 4 Denio, 95; *Hard* v. *Shipman*, 6 Barb., 621. An other instance is when a justice receives a verdict in the absence of the plaintiff, the judgment is not void, *Relyea* v. *Ramsay*, 2 Wend., 602; though such a judgment is clearly erroneous. *Douglass* v. *Blackman*, 14 Barb., 381.

What proceedings are necessary.] From what has preceded there has perhaps enough been said to show what steps ought to be observed in a civil action. But, it will not be amiss to state, that, in all matters which relate to acquiring jurisdiction over the person or the property of the defendant, and also in relation to the subject matter of the action, or to the territorial extent of its limits, there must be a strict compliance with the requirements of the statute or jurisdiction will never be attained. *Seymour* v. *Judd*, 2 Comst., 464. And unless jurisdiction is once acquired the judgment will be utterly void. *Ib.*

How far consent will confer it.] It is frequently said that consent will *confer* jurisdiction over the *person*, though not so in relation to the subject matter of the action. This statement is not entirely accurate. For there cannot be any jurisdiction *as a court* unless it is conferred by the *law*. Consent would not authorize a private person to take cognizance of an action and render a valid *judgment*. And yet that might be done if it were

true that consent could *confer jurisdiction*. Parties may arbitrate their claims, but the award is not a judgment.

The utmost that can properly be said is, that where there is jurisdiction over the subject matter of the action, and there is also a right to jurisdiction over the person, if appropriate process is issued and served, there the justice may acquire jurisdiction over the person of the defendant by his consent, notwithstanding a defect in the process. In such a case, the law gave a right to jurisdiction, and the defendant waived an irregularity in the exercise of that jurisdiction. In such a case, a waiver would render the judgment as valid as though no defect ever existed.

The right to object was given for the benefit of the defendant. And there is no maxim of the law more familiar than that which declares that every man is at liberty to renounce any benefit which the law has reserved for him. *Tombs* v. *Rochester and Syracuse R. R.*, 18 Barb., 583; *Conkling* v. *King*, 6 Seld., 446, opinion; *Buel* v. *Trustees of Lockport*, 3 Comst., 197; *Baker* v. *Braman*, 6 Hill, 47.

Errors when waived by pleading, &c.] The remarks just made have explained the question so far as express consent is concerned. But there is an other and more extensive application of the same principle. For, in relation to defects in the process, it is a most extensive rule that every step which is taken in a cause without objection, is a waiver of every previous defect or irregularity. To enumerate all the instances in which this rule has been applied and enforced is entirely unnecessary, since the object of the present section is to show what the general rule is, and to leave the application for a more appropriate place in the work.

The following cases show its application when the party plead without objection, and previous irregularities were held to be waived: *Onderdonk* v. *Ranlett*, 3 Hill, 323; *Aldritch* v. *Ketcham*, 3 E. D. Smith, 577; *Bray* v. *Andreas*, 1 E. D. Smith, 388; *Malone* v. *Clark*, 2 Hill, 658. This rule is so well established that it would be deemed out of place to cite authorities, were it not for two cases which will be here noticed.

In *Cornell* v. *Smith*, 2 Sandf., 290, it was held that pleading in the action was not a waiver, so as to confer jurisdiction over the person of the defendant, who was a non-resident. But, in that case, the statute declared that the justice should dismiss the action with costs of suit, in the same manner as if the plaintiff were nonsuited on the trial on the merits; and it also declared that the judgment should be *utterly void*. Laws of 1813, 379, § 103. The statute was here imperative and express, that the action should be dismissed, and also that the judgment itself should be void.

In *Robinson* v. *West*, 11 Barb., 309, the defendant was a nonresident of the city of New York, where he was sued in the marine court by a long summons.

The superior court held that, by pleading without objection,

the defendant waived the error, and thus conferred jurisdiction over his person. 1 Sandf., 19. This decision was pronounced by a very able judge, and concurred in by a learned court. But it was reversed in the supreme court; and as the superior court and the supreme court are both courts of ability and learning, it cannot be said that the question is settled by the decision in *Robinson* v. *West.*

There is a statute which declares that the parties may appear and join issue without any process whatever. Vol. I, 38, §§ 9 and 10, sub. 3; Vol. I, 44, § 46. Whenever, therefore, the parties voluntarily appear and join issue, the justice has jurisdiction over the person of the defendant. In the case of *Robinson* v. *West,* the court attach a great deal of importance to the expression of the statute, which is: "and if such defendant be proceeded against otherwise, the justice shall have no jurisdiction of the cause." Vol. I, 75, § 215. Full effect may be given to the statute, and still hold that the parties may waive the irregularity, by appearing and pleading without objection.

It has been already seen, from numerous cases, that the justice would not acquire jurisdiction if he issued improper process, and that the judgment would be void, as between the parties; and that it was also reversible at the option of the defendant. And, surely, this is protection enough, for the defendant may reverse it at the expense of the other party if he chooses; or he may treat it as utterly void when an attempt is made to enforce it against him.

With all deference to the learned court which decided *Robinson* v. *West,* it seems to me that the true construction of the statute is, that if the justice issues any other process than a short summons in such a case, he will not acquire any jurisdiction of the action *by virtue of the process* which he issues. If the defendant does not appear to answer the process, the judgment will be void.

If the defendant does appear, and expressly agrees to join issue there is no reason why the action is not one in which issue is joined by consent as the law permits. The true question ought to be whether the parties in such a case *voluntarily* joined issue. And the court, in the case cited, seems to entertain the same view, for it is said: "The court below say that the defendant, by pleading over, must have agreed to enter an action in the court without process."

"This would be to infer an agreement, contrary to all the facts in the case, brought home to the knowledge of the court by the record before it. The return shows that the defendant was brought before the court by this illegal process; and that it was under that process that he asked for an adjournment and obtained it, and asked that he might send for counsel, and got ten minutes to do it in, and under the force of that process he pleaded, and by virtue of that process, and not of any agreement to enter an action without process, the plaintiff took judgment against the defendant in his absence, after waiting more than hour for his

return. The process is returned as the foundation to the action, and no agreement to enter the action without process is pretended in the return. To infer such an agreement under these circumstances, is to do violence to one's common sense. The suit being commenced by process, an agreement to *enter* the action without process, could hardly be established, without an express abandonment of the process, or an express agreement to enter or commence the action anew, without process." 11 Barb., 311. The opinion of the court has been thus partially cited for the purpose of showing that the court did not think, in that case, that the defendant *voluntarily* joined issue. There is nothing in the case which really militates against the rule as stated in the commencement of this section. If the process is made use of fraudulently or oppressively, as the court evidently thought was done in that case, then the decision, on the facts of that case, was right.

But if a defendant voluntarily joins issue, knowing of the defect at the time, and making no objection thereto, he ought then to be regarded as voluntarily joining issue, and as tacitly agreeing to waive all defects as to the process. Good faith and fair dealing require this; for, in the first place, the defendant was under *no legal obligation* to appear and answer the process, and his appearance is, therefore, voluntary; and, in the second place, a voluntary joining of issue, without any objection, is an implied agreement to waive the irregularity, and no one ought to be allowed to retract a consent once fairly and knowingly given. It may be said, that the party may consent because he is ignorant of the law. Be it so. The rule of law is clear, that every man is presumed to know the law, and is bound to act accordingly—a rule most extensively applied, and most invariably enforced, both in civil and criminal matters.

The rule, that a defendant, by voluntarily appearing and joining issue, without objection, waives the objection so far that jurisdiction is obtained over his person, is sustained by a numerous, and nearly unbroken series of cases in this state. *Day* v. *Wilber*, 2 Caines, 134; *Malone* v. *Clark*, 2 Hill, 658; *Onderdonk* v. *Ranlett*, 3 Hill, 323; *Bloodgood* v. *Overseers of Jamaica*, 12 Johns., 285; *Andrews* v. *Thorp*, 1 E. D. Smith, 615; *Monteith* v. *Cash*, 1 E. D. Smith, 412; *Aldritch* v. *Ketcham*, 3 E. D. Smith, 577; *Bray* v. *Andreas*, 1 E. D. Smith, 388; *Cunningham* v. *Phillips*, 1 E. D. Smith, 417; *Hogan* v. *Baker*, 2 E. D. Smith, 22; *Paulding* v. *Hudson Manuf. Co.*, 2 E. D. Smith, 38; *Gossling* v. *Broach*, 1 Hilt., 49; *Mahoney* v. *Penman*, 4 Duer, 603; *Dempsey* v. *Paige*, 4 E. D. Smith, 218; *Robinson* v. *West*, 1 Sandf., 19.

Since the foregoing remarks were written, the court of appeals have finally settled the question. And it is expressly held that, if a long summons is issued against a non-resident defendant, the process is not a nullity if the defendant voluntarily appears and joins issue without objection. *Clapp* v. *Graves*, 12 E. P. Smith, 418. Nor is the judgment even erroneous in such a case,

and it will not be reversed on an appeal from the judgment. *Ib.* But it is clear that a party may appear and object to the defects in the process; and, if his objections are overruled, he may then join issue on the merits without waiving his previous objections. *Wheeler* v. *Lampman*, 14 Johns., 481; *Shannon* v. *Comstock*, 21 Wend., 457; *Camp* v. *Tibbetts*, 2 E. D. Smith, 20; *Dewey* v. *Greene*, 4 Denio, 93; *Allen* v. *Stone*, 9 Barb., 61; *Resseqnie* v. *Brownson*, 4 Barb., 541; *Cunningham* v. *Goelet*, 4 Denio, 71; *Belden* v. *N. Y. and Harlem R. R. Co.*, 15 How., 17; *Avery* v. *Slack*, 17 Wend., 85. In the last case, the court said, COWEN, J.: "But it is said that the defendant waived the objection by pleading over. Not so. He made a specific objection in due season, and that being overruled, he was compelled to plead or give up all he had to say on the merits. Resistance, to the extent of a man's power, is certainly a new kind of waiver." Process for the commencement of an action against a convict in the state prison, may be served on him in the prison. Although his right to sue is suspended, he may still be sued, and the suit prosecuted to judgment. *Davis* v. *Duffie*, 8 Bosw., 617.

The provisions of the statute (3 R. S., 90, § 1, 5th ed.), for the appointment of trustees of the estate of an imprisoned debtor, do not in any manner interfere with the right of prosecuting an action if the creditor prefers that course. *Ib.*; and see *Harvey* v. *Jacob*, 1 Barn. & Ald., 159.

There is nothing better settled in the practice of justices' courts and in those of record, than that which holds that a party who takes any steps in a cause voluntarily, and without objection, waives all previous defects or irregularities, not merely in the process, but in all subsequent proceedings. If a cause is irregularly adjourned, yet an appearance at the trial without objection, waives the objection, and the judgment is entirely regular and valid. *Dunham* v. *Heyden*, 7 Johns., 381; *Willoughby* v. *Carleton*, 9 Johns., 136; *Kilmore* v. *Sudam*, 7 Johns., 529; *Hill* v. *Downer*, 11 Johns., 461; *Tifft* v. *Culver*, 3 Hill, 180; *Allen* v. *Edwards*, 3 Hill, 499; *Nellis* v. *McCairn*, 35 Barb., 115; *Seymour* v. *Bradfield*, Id., 49. So the right to a trial by jury may be waived by the acts of a party. Id., 52.

How far it may be lost.] Upon this subject it is merely necessary to say that when the justice has once possessed jurisdiction of the subject matter of the action, and over the person of the defendant, no subsequent irregularity will render the judgment void, where the question comes up collaterally. *Ante*, 16. And on the other hand, a justice may try a cause so improperly as to lose jurisdiction in the sense that the judgment is erroneous, and therefore reversible on appeal. See the cases, *ante*, 16.

Ought to appear on the face affirmatively.] The proceedings of every court ought to show on their face that there was a legal jurisdiction to render the judgment.

In the superior courts of record it is not strictly necessary that such facts should be stated in the record, because jurisdiction is

presumed to exist in such cases. But in inferior courts there is no such presumption, and their proceedings must all show affirmatively that they had jurisdiction, or they will be of no validity whatever, unless, in those cases in which it may be legally done, it is shown by extrinsic evidence that there was, in fact, jurisdiction. *Simons* v. *De Barre*, 8 Abb., 269; *Noyes* v. *Butler*, 6 Barb., 613; *Harrington* v. *People*, 6 Barb., 607; *Hard* v. *Shipman*, 6 Barb., 621; *Benn* v. *Borst*, 5 Wend., 292.

There are numerous cases in which it may be shown that there was in fact jurisdiction, notwithstanding the omission of the record to show it. But it will not be of any avail to insert facts in the record which would, if true, show jurisdiction; because the question whether the justice originally acquired jurisdiction is always open for examination by the defendant. *Ante*, 5, 13, 15.

This principle does not in the least conflict with the rule that a judgment is conclusive between the parties and their privies; because, if the justice never had jurisdiction then it is not a judgment but a mere nullity.

But when jurisdiction is shown to have once existed, then the judgment will be conclusive; and the judgment of a justice will be as conclusive as that of a court of record. *Wesson* v. *Chamberlain*, 3 Comst., 331. And so, when jurisdiction is shown, the regularity of the proceedings of a justice is presumed as much as those of a court of record. *Wilson* v. *Fenner*, 3 Johns., 439; *Clements* v. *Benjamin*, 12 Johns., 299; *Fuller* v. *Wilcox*, 19 Wend., 351; *Oakley* v. *Van Horne*, 21 Wend., 305; *Baum* v. *Tarpenny*, 3 Hill, 75; *Stafford* v. *Williams*, 4 Denio, 182.

But when an appeal is taken from the judgment of a justice on the ground that he had no jurisdiction, the return must then show affirmatively that there was originally jurisdiction to render a valid judgment. And if the jurisdictional facts were not proved before the justice, it will not be of any avail that such facts really existed.

If an attachment or a warrant is issued without an affidavit, it is of no consequence that the defendant is a fraudulent debtor. It is only in those cases in which such facts are proved before the justice, that he is authorized to act, and these facts must appear in the return or the judgment will be reversed.

Personal disqualifications.] The administration of justice ought to be impartial. And there ought not to be the slightest cause for questioning the purity of the motives of the justice. The confidence of the people in any tribunal must be founded upon the intelligence and the integrity which it exhibits in the course of its proceedings. The circumstances which influence the mind are frequently very powerful, even when the person affected is unconscious of it. A juror who has heard the circumstances of a case, and has formed an opinion, is not permitted to sit as juror at the trial.

And a justice ought to be as far above suspicion as a juror; and, for that reason, a justice ought never to advise with either

of the parties in relation to the law of the case on the merits, nor as to the manner of prosecuting the cause. It is impossible for a justice to counsel either party in relation to the cause, and then to feel entirely indifferent whether the advice given, or the opinion expressed, shall prove correct. And this is of the highest importance, since the justice must sit in judgment upon that opinion; for it would be most strange, indeed, if the opinion expressed did not produce any influence upon either the judgment or the feelings of the justice. But, however that may be; and however just the action of the justice might be under such circumstances, yet the opposite party could not fail to feel that there were just and reasonable grounds to question his impartiality. And, therefore, no justice ought to place himself in a position so questionable. Every one who has observed the action of the human mind, must have seen how naturally it sides with one party or the other, even when no part is taken in the controversy; and for that reason the justice should make impartiality his constant study in all his official acts. A justice cannot, like a juror, be challenged because he has expressed an opinion in the cause. *McDowell* v. *Van Deusen*, 12 Johns., 356. The only remedy of a party in such a case is to call for a jury, which is liable to challenges until an impartial one is obtained.

In one case in the Delaware county court, it was held by GLEASON, county judge, that judgment must be reversed where it appeared that the justice who rendered it had himself acted as counsel for the plaintiff before an other justice for the same claim; and that he refused to dismiss the action when pending before him, although the defendant applied to him to do so. *Carrington* v. *Andrews*, 12 Abb., 348; see also *People* v. *Clark*, 21 Barb., 214.

Interest of the justice, or a party to the record.] There are cases, however, in which a justice on account of reasons personal to himself, cannot sit as a judge or a justice in the cause, even if he would. The statute declares: "No judge of any court can sit, as such, in any cause to which he is a party, or in which he is interested, or in which he would be excluded from being a juror by reason of consanguinity or affinity to either of the parties." Vol. I, 78, § 2. This statute applies to justices of the peace as much as to judges of courts of record. Every judgment which is rendered in violation of it will be utterly void. It is scarcely possible to conceive a case in which the justice would be named as a party to the record in an action brought before himself. But the statute applies to a case in which the justice is beneficially interested in the judgment, although the action may be nominally in the name of other parties. *Foot* v. *Morgan*, 1 Hill, 654. And where several persons are necessary to form a court, or to constitute a quorum of it, for the transaction of business, if any one of those members necessary to form a court, or a quorum thereof, are parties to the action, the judgment will be void. *Converse* v. *McArthur*, 17 Barb., 410; *Baldwin* v. *McArthur*, 17 Barb., 414.

In these cases it is not important that the justice is not the only

one interested; that his interest is remote and trifling; or, that it is in common with many others; for, when he is a party to the record, the statute declares that he cannot sit as a judge. And, where one of the justices who sat as a member of a court of sessions, was also, at the same time, a superintendent of the poor of the county who applied for and obtained an order for the maintenance of a poor person, it was held that the order was void. Last two cases cited. In these cases, the county judge and the other justice of sessions, were as much interested in the event of the action of the court as the one who was named as a party to the proceeding; but the causes were not decided upon the question of *interest*, for the reason that the members of the court were remotely interested as tax payers; but upon the express ground that one of the members of the court was named as a party to the record.

An interest in the event of the action is equally a disqualification of a judge or a justice. But it must be an interest in the event of the action, in which he sits as judge or justice, or he will not be disqualified. That he is interested in similar causes, is of no consequence, so long as he has no interest in the cause which he tries as a justice. It does not matter in what manner he may hold his interest; whether as a single individual, or as a member of a corporation; for, when a corporation is a party, either as a defendant or as a plaintiff, if the justice is a member of the corporation, he cannot sit as justice. The statute is to be so construed as to disqualify the justice in every case in which he has a pecuniary interest, which is directly involved in the determination of the action which is tried before him. *Washington Ins. Co.* v. *Price*, 1 Hopkins, 1; Vol. I, 78, §§ 2, 8. The test is, to determine whether he has a direct personal pecuniary interest in the event of the particular action, and whether the judgment directly affects that interest; if it does he cannot sit as a justice in the cause.

There is a partial qualification of the statute when a town is a party to the action. The statute provides: "Any action in favor of a town, which, if brought by an individual, could be prosecuted before a justice of the peace, may be prosecuted by such town, in like manner, before any such justice; but no action to recover a penalty given to a town, shall be brought before any of the justices of the peace residing in the town for the benefit of which the same is prosecuted; but all such actions may be brought before any one of the justices of the peace residing in any other town in the same county." 1 R. S., 837, § 5, 5th ed. This section applies to those cases only in which the town sues in its *corporate* capacity for the recovery of a penalty. And, therefore, where an action was brought before a justice of the peace, in the names of the overseers of the poor, to recover a penalty for a violation of the excise law, in selling spirituous liquors without a license, it was held, that, although the penalty, when recovered, was to be applied to the use of the poor of the

town in which the justice resided, he nevertheless had jurisdiction. *Wood* v. *Rice*, 6 Hill, 58; *Corwein* v. *Hames*, 11 Johns., 76. Therefore, in all actions brought by town officers, as such, in their own names, for the recovery of penalties, the justices of the same town will have jurisdiction, notwithstanding the penalties, when collected, are directed by statute to be applied to the use of the poor of the same town.

Relationship to parties.] But there are other personal disqualifications than those of being pecuniarily interested in the action, or of being a party to it.

Relationship, either by consanguinity or by affinity, to either of the parties to the action, is a disqualification of the justice.

Impartiality in the administration of justice is one of its essential elements; and, where there is partiality in that administration, there is also certain injustice to one of the parties.

Nothing is more likely to bias the judgment and the feelings of a justice than his relationship to one of the parties; for that attachment which exists for relatives is founded in the best feelings and principles of our nature. And it is a wise provision of the law which forbids a justice from sitting in such a case, since it is important to the public interests that there should be implicit confidence in all courts, and in the belief that they will administer impartial justice alike to all, in whatever circumstances or condition. The first question is, what is such a relationship by consanguinity or affinity as will disqualify a justice? *Affinity* properly means the tie which arises between the husband and the blood relatives of the wife, and between the wife and the blood relatives of the husband, in consequence of the marriage; and, therefore, while the marriage tie remains unbroken, the blood relatives of the wife stand in the same degree of *affinity* to the husband that they do in consanguinity to her. But there is no *affinity* between the blood relatives of the husband and the blood relatives of the wife. *Paddock* v. *Wells*, 2 Barb. Ch., 331; *Higbe* v. *Leonard*, 1 Denio, 186.

Consanguinity is that relation which subsists among all the different persons who descended from the same stock or common ancestor. Some portion of the blood of the common ancestor flows through the veins of all his descendants, and though mixed with the blood flowing from many other families, yet it constitutes the kindred or alliance by blood between any two of the individuals.

This relation by blood is of two kinds, lineal and collateral. *Lineal* consanguinity is that relation which exists among persons where one is descended from the other, as between the son and the father, or the grandfather, and so upwards in a direct ascending line; or the grandson, and so downwards in a direct descending line.

Collateral consanguinity is the relation subsisting among persons who descend from the same common ancestor, but not from each other. It is essential, to constitute this relation, that they

spring from the same common root or stock, but in different branches. The mode of computing the degrees is to discover the common ancestor, to begin with him, to reckon downwards, and the degree of the two persons, or the more remote of them, is distant from the ancestor, is the degree of kindred subsisting between them. For instance, two brothers are related to each other in the first degree, because from the father to each of them is one degree. An uncle and a nephew are related to each other in the second degree, because the nephew is two degrees distant from the common ancestor; and this rule of computation is extended to the remotest degrees of collateral relationship. This is the mode of computation by the common and the canon law. Bouv. Law Dict., title, Consanguinity. Chancellor KENT says, 4 Com., 412, original paging: "In the mode of computing the degrees of consanguinity, the civil law, which is generally followed upon that point, begins with the intestate, and ascends from him to a common ancestor, and descends from that common ancestor to the next heir, reckoning a degree for each person, as well in the ascending as descending lines. According to this rule of computation, the father of the intestate stands in the first degree, his brother in the second, and his brother's children in the third; or, the grandfather stands in the second degree, the uncle in the third, the cousins in the fourth, and so on in a series in genealogical order." See also Dayton's Surrogate, 212, &c., 2d ed.; *Sweezey* v. *Willis*, 1 Bradf., 495; *Bogert* v. *Furman*, 10 Paige, 496; Willard on Executors, 195, 196.

There are several cases which show what persons are so related to the justice as to disqualify him from acting. In *Edwards* v. *Russell*, 21 Wend., 63, the justice and the plaintiff were cousins, and the justice dismissed the action on account of relationship, but rendered judgment against the plaintiff for costs. It was held that the judgment must be reversed, because the justice had no authority to render any judgment whatever. In *Randall* v. *Hall*, Lalor's Sup. to Hill & Denio, 239, the justice and the defendant were second cousins. The justice dismissed the action, and rendered judgment against the defendant for the costs of the justice and those of the constable, and nothing more. This judgment was reversed. In *Post* v. *Black*, 5 Denio, 66, the justice and the plaintiff were second cousins, and the judgment rendered was reversed. In *Foot* v. *Morgan*, 1 Hill, 654, it was held that a judgment was void where the plaintiff was a nominal party, and the real party in interest was a person who had married a sister of the justice's wife, and both wives were living at the time the judgment was rendered. And see *Cain* v. *Ingham*, 7 Cow. 478, and note *a*. In *Place* v. *Butternuts Woolen Co.*, 28 Barb., 503, the justice was a brother to one of the stockholders in the defendant corporation. The corporation asked to have the action dismissed for that reason. The justice refused, and the plaintiff had judgment. This was reversed by the supreme court, on the

ground of the relationship which existed between the justice and the brother who was such stockholder.

There are also some cases in which the justice was held not to be disqualified. In *Carman* v. *Newell*, 1 Denio, 25, it was objected that the justice could not sit, and it was proved that John Carman, a brother of the plaintiff, had married the widow of a deceased brother of the justice, and that the widow was then dead. It did not appear that there were any children of the widow living. It was held that the justice was not disqualified from acting by reason of affinity.

In *Higbe* v. *Leonard*, 1 Denio, 186, a brother of the justice had intermarried with a sister of the plaintiff, and the parties were married before the commencement of the action, and at the time of the trial and the rendition of the judgment were still living. It was held that the justice was not disqualified. See the terms Affinity, &c., *ante*, 24.

The foregoing cases were all decided since the enactment of the statute which forbids a judge from sitting if related to either party. And the same cases hold that the statute applies to justices of the peace as well as to courts of record. The statute is as follows: "No judge of any court can sit, as such, in any cause to which he is a party, or in which he would be excluded from being a juror by reason of consanguinity or affinity to either of the parties." Vol. I, 78. § 2.

This statute is imperative; and it renders the decisions which were made before the enactment of the statute entirely useless upon this question; and, so far as they may lay down a different rule from that declared by the statute, they are void. See *Eggleston* v. *Smiley*, 17 Johns., 133, which is not law since the statute; see also *Pierce* v. *Sheldon*, 13 Johns., 191, in which the plaintiff was a son-in-law of the justice, the judgment was reversed, but it was not then settled that the justice was disqualified as the statute now does. In *Bellows* v. *Pearson*, 19 Johns., 172, the plaintiff was a son-in-law of the justice, the judgment was also reversed. The last two decisions were both right; but neither of them was founded on the disqualification of the justice, in the sense that the statute now disqualifies them.

The death of the husband, without issue, will sever the tie of affinity between the wife and a third person to whom she was related, in consequence of the husband's relationship to him by consanguinity only.

But if there be living issue of the marriage, who survive the husband, such issue will continue the relationship by affinity between the wife and the blood relatives of her deceased husband. *Paddock* v. *Wells*, 2 Barb. Ch., 331; *Cain* v. *Ingham*, 7 Cow., 478, and note *a*. And, of course, the death of the wife, without issue, will sever the tie of affinity between the husband and the blood relatives of the wife; though if there be issue of the marriage living, the relationship will be continued. *Ib.*

It has been made a question whether this statutory disqualifi-

cation may not be waived by the consent of the parties. And in *Oakley* v. *Aspinwall*, 3 Comst., 547, the court of appeals held that, where a judge is disqualified to sit in a cause by reason of consanguinity to one of the parties, he cannot sit even by the consent of both the parties. And, in this case, the judge participated in the decision at the request of the party who subsequently moved to have the judgment vacated, which motion was granted.

It is a matter of some importance to determine the character of the judgment, if such a one is rendered. In *Foot* v. *Morgan*, 1 Hill, 654, it was held that such a judgment was absolutely void, and that it could not be set off against an other judgment. In other cases, where the question arose on appeal, the judgments were reversed because they were erroneous. *Edwards* v. *Russell*, 21 Wend., 63; *Randall* v. *Hall*, Hill & Denio, Sup., 239; *Post* v. *Black*, 5 Denio, 66; *Place* v. *Butternuts Woolen Co.*, 28 Barb., 503. In the cases just cited, the question whether the judgments were absolutely void did not arise, although the judges said in some of these cases that the judgments were void. And, in view of the plain declaration of the statute that in such cases the judge shall not sit as such, it seems too plain for argument that the judgment is absolutely void; for it is by virtue of the statute that he has jurisdiction, and when he is prohibited by statute from acting in a given case, he has no more authority to act in that case than a private citizen would have. It therefore follows, that such a judgment may be treated as a nullity in all places and for all purposes, either collaterally or on appeal. And it is now settled by authority, that a judgment which is rendered by a justice who is related to one of the parties, is absolutely void, whether the question arises directly or collaterally. *Schoonmaker* v. *Clearwater*, 41 Barb., 200.

The fact of the relationship of the justice to the party, may be shown by the return of the justice on an appeal; and if it appears in the return, the judgment will be reversed. *Edwards* v. *Russell*, 21 Wend., 63; *Post* v. *Black*, 5 Denio, 66; *Randall* v. *Hall*, Hill & Denio, Sup., 239; *Place* v. *Butternuts Woollen Co.*, 28 Barb., 503.

The question may also be raised by assigning the relationship as *error in fact*, on an appeal. And the truth of the allegations may be determined in the county court on affidavits, or by the oral evidence of witnesses sworn by the court. Code, § 366. This section of the Code is intended to permit the parties to determine every thing assigned as error in fact, upon affidavits, or upon oral evidence, if the facts are not within the knowledge of the justice; or, if they cannot be properly made to appear in the return. *Cook* v. *Swift*, 18 How., 454; *S. C.*, 10, Abb., 212; *Hurd* v. *Beeman*, 8 How., 254; *Adsit* v. *Wilson*, 7 How., 64; *Harvey* v. *Rickett*, 15 Johns., 87; *Roberts* v. *Failis*, 1 Cow., 238; *Rose* v. *Smith*, 4 Cow., 17; *Tiffany* v. *Gilbert*, 4 Barb., 320.

It is evident, from the cases cited, that no objection need be

made before the justice, and that an appearance is not a waiver of it, since express consent cannot confer jurisdiction. And if any such judgment should be enforced by an execution, the justice and the plaintiff would both be trespassers. The proper course for the justice, when the question arises, is to dismiss the action and not to render any judgment whatever.

Innkeeper, &c.] The statute disqualifies innkeepers from acting as a court in certain cases. Vol. I, 37, §§ 3, 4. Under these sections it has been held that a tavern keeper might be elected justice, provided he was such *at the time of his election. Parmelee* v. *Thompson*, 7 Hill, 77.

It has been held, under this amended section (4), that the only effect of the statute was to deprive the justice of his jurisdiction in the *civil actions*, which are provided for in the sections mentioned. And it was held, that the justice, although a tavern keeper in fact, had jurisdiction to hear complaints for neglecting to work on highways as is required by the statute, and on proper evidence, to impose and collect fines. *Rice* v. *Milks*, 7 Barb., 337.

If a justice should keep a tavern in fact, by keeping up a sign, receiving travelers and selling liquor, though he has no license, that is keeping tavern in fact within the statute. *Clayton* v. *Per Dun*, 13 Johns., 218; *Schermerhorn* v. *Tripp*, 2 Caines, 108.

Actions expressly excepted.] The language of the statute which confers jurisdiction on justices, is necessarily general in its character, and it relates to classes of actions, rather than to particular cases. Code, § 53, Vol. I, 5. There are many actions which would be within the jurisdiction of a justice, under the general language mentioned, were it not that the statute has expressly excepted certain classes of actions from such jurisdiction. The statute declares, Code, § 54: "But no justice of the peace shall have cognizance of a *civil action:*

"1. In which the people of this state are a party, excepting for penalties not exceeding one hundred dollars;

"2. Nor where the title to real property shall come in question, as provided by sections 55 to 62 inclusive;

"3. Nor of a *civil action* for an assault, battery, false imprisonment, libel, slander, malicious prosecution, criminal conversation or seduction;

"4. Nor of a matter of account, where the sum total of the accounts of both parties, proved to the satisfaction of the justice, shall exceed four hundred dollars;

"5. Nor of an action *against* an executor or administrator as such."

This section of the Code is substantially a re-enactment of a section of the Revised Statutes in relation to justices' courts, although it excepts some cases not excepted by those statutes.

There have been many cases decided which have settled what construction the statute is to receive. And the cases decided under the Revised Statutes are entirely applicable to cases arising under the Code, unless where, in some particular instance,

the Code has expressly changed the former rule. And these changes will be hereafter pointed out in an appropriate place.

People a party.] The first subdivision of § 54, prohibits a justice from trying any *civil action* in which the people of this state are a party, except in actions for penalties not exceeding one hundred dollars. This, by implication, permits an action for such penalties when the amount does not exceed that sum. But subdivision 3 of § 53 of the Code, expressly gives jurisdiction to the extent of two hundred dollars in ordinary cases.

Title to lands in question.] The most intricate, the most frequent and the most important cases have arisen under the second subdivision.

The prominent object of the statute, is to prevent an inferior court like that held by a justice of the peace, from determining in any manner the rights of parties in relation to the *title* to real estate. While, on the other hand, such courts are permitted to hear and determine questions in relation to the *possession* of lands.

The language of the statute is to be carefully noticed. It does not deprive a justice of jurisdiction absolutely, in all cases in which the title to lands may come in question. Code, § 54, sub. 2. But it is in those cases in which the *title* to real property shall come in question, as provided by §§ 55 to 62 of the Code, both inclusive.

It is important, therefore, to determine what is prescribed by those sections relative to the title of real property.

The 55th section of the Code reads as follows: "In every action brought in a court of a justice of the peace, where the title to real property shall come in question, the defendant may, either with or without other matter of defense, set forth in his answer any matter showing that such title will come in question. Such answer shall be in writing, signed by the defendant or his attorney, and delivered to the justice. The justice shall thereupon countersign the same and deliver it to the plaintiff."

But a mere answer of title in the defendant is not alone sufficient. And the 56th section of the Code provides that an undertaking shall also be given. The conditions of the undertaking are specified in this section. The 57th section provides for a discontinuance of the action when the defendant has complied with sections 55 and 56.

Section 58 reads as follows: "If the undertaking be not delivered to the justice, *he shall have jurisdiction of the cause*, and shall proceed therein; and the *defendant* shall be precluded, *in his defense*, from drawing the title in question."

By section 59, it is further provided: "If, however, it appear on the trial, *from the plaintiff's own showing*, that the title to real property is in question, and such title *shall be disputed by the defendant*, the justice *shall dismiss the action*, and render judgment against the plaintiff for the costs."

It is evident from the reading of these sections, that the inten-

tion of the law is, that the defendant shall always set up *title* in his answer if he relies upon that, or if he desires to avail himself of that defense. If he neglects to set up such defense, the statute declares that he shall be precluded from drawing title in question by way of defense.

And in such cases, however valid his title may be, it will be of no avail to him because of his omission to set it up in his defense. It has been already seen that an undertaking is also necessary in order to deprive the justice of jurisdiction. But there are also many cases in which the title to real estate may come in question, in other ways than on the showing of the defendant.

If the plaintiff cannot make out his case without showing title, the defendant may dispute that title and the justice is bound to dismiss the action. For although the defendant is not permitted to show title on his part, the statute declares that he may dispute the title of the plaintiff if he proves any on the trial, and if the defendant does dispute that title, it is fatal to the plaintiff's action. The only effect, therefore, which is produced by an omission of the defendant to set up title, is to deprive him of the right to show his title in his defense, for it does not in any manner deprive him of the right of disputing any title which the plaintiff may show on the trial, in order to make out his case. And it is of the highest importance, therefore, to determine correctly whether the title to lands is really in question in a given case.

And, in the first place, it is very clear that the title to lands is not in question where the sole point to be determined is as to who is in the *actual possession* of the land. *Fredonia, &c., Plank Road Co.* v. *Wait*, 27 Barb., 214; *Ehle* v. *Quackenboss*, 6 Hill, 537.

It is sometimes said that a justice has no jurisdiction to try the *right* to the *possession* of land, because it is assumed that the right to the possession is of itself a question of title. That statement is not accurate, if it is to be taken as broadly as it is stated.

If the plaintiff, or the defendant, claims a right to the *possession* of the land, solely because he is the legal owner of it in fee, which carries with it the right to the possession, then the title to land undoubtedly comes in question. But there may be a *right* to the *possession* of land independently of a claim of *title* to it. And a litigation of the right of possession would not, in such a case, be in any sense a trying of the title to lands.

Take the case of a landlord and tenant, where a farm is leased to the tenant for the term of one year. If the landlord is guilty of a trespass during that year the tenant may maintain an action against him as well as against a stranger. And a litigation of the right to the *possession* would not be a question of title.

If the tenant proved his right to the possession of the land by producing the lease, that lease of itself would be conclusive evidence that the *title* was in the landlord. So that, so far from being a question of title, the lease would be an express admission that the title was in the landlord. Where a party claims posses-

sion of lands by virtue of a contract, which gives him a right to the possession, and no claim is made to the ownership, then the question may be tried by a justice.

But where the right to the possession is founded solely on the ownership of the lands, then the justice cannot try the right to possession under such a claim. There are several cases which will illustrate these principles. Where the defense interposed is that the plaintiff gave a license to the defendant to do the acts complained of, the title does not come in question. *Rathbone* v. *McConnell*, 7 E. P. Smith, 466; *People* v. *N. Y. Com. Pleas*, 18 Wend., 579; *Wickham* v. *Seely*, 18 Wend., 649; *Launits* v. *Barnum*, 4 Sandf., 637. And a mere license is not an interest in lands, so as to draw the title in question. *Dolittle* v. *Eddy*, 7 Barb., 75; 3 Kent's Com., 452, 453, orig. pag.; and see the note to *Prince* v. *Case*, and *Rerick* v. *Kern*, 2 Am. Lead. Cases, 728 to 777; Vol. I, 772, &c.

Where the defendant cut down growing trees, under a parol license and before its revocation, it was held that, though growing trees constitute an interest in land, yet a parol license was a good defense for acts done before its revocation. *Pierrepont* v. *Barnard*, 2 Seld., 279. So, where the defendant, by a parol license of the plaintiff, took gravel from the plaintiff's land to repair highways, before a revocation of the permission, it was held that the license was a good defense. *Syron* v. *Blakeman*, 22 Barb., 336. Title is not in question in such cases, for the license admits the title to be in the plaintiff, and that the action would lie were there no license.

O'Reilly v. *Davies*, 4 Sandf., 722, is an instructive case on this branch of the law. The complaint was in trespass for entering on the plaintiff's lot and blasting and carrying away rock and stone therefrom.

The answer stated that plaintiff contracted with defendant to blast off the rock and stone, to enable cellars to be made and buildings erected on the premises, and, among other things, defendant was to have the rock obtained in blasting. The court, by SANDFORD, J., said: "We think, on consideration, that there was no 'claim of title to real property' made by the pleadings in this case. The answer admits the plaintiff's title unequivocally. It attempts to justify what has been done, by a contract made with the plaintiff to blast the rock on his land, and remove it out of his way, so that he might build houses there, and, as a part of his reward for his labor, the rock removed was to be the defendant's. This sets up no title to the rock in the land, nor to any part of the freehold. It is a contract to do certain acts on the plaintiff's land, as his laborer or servant, and for his benefit. If there were such a contract the defendant had a right to enter on the land to do the work. If there were none, his entry was a trespass. His claim is no more than a license. It does not savor of title. His claim to the stone is not that he had right or title to them as stone or rock in the plaintiff's soil, or as being a part of

the soil. Before they were blasted out, he could not mark out or designate any portion of the rock or stone which was his, or ever would become his under the contract. His claim of right to them was a mere corollary to the execution of his contract to do labor for the plaintiff, and arose from its execution. It was a claim to the rock after it was removed and blasted, not to the rock attached to the freehold."

The question of title to lands is in all cases a question of ownership. *Smith* v. *Riggs*, 2 Duer, 622. In the case last cited, the action was brought to recover damages for the breach of a covenant, by which the defendant bound himself to convey to the plaintiff, on or before a certain day, a house and lot in the city of New York, "by a good and sufficient deed, free from incumbrances." The deed was executed by the defendant, but not by his wife, so that her inchoate right of dower would not be barred.

The plaintiff had a verdict with six cents damages, and he claimed to recover costs because title was in question. The court said: "The controversy turned wholly upon the question, whether an inchoate right of dower in the defendant's wife was a subsisting incumbrance, which was necessary to be removed by a release to enable the defendant to perform his covenant; and this was not a question of title, but of the legal construction of the agreement. It is admitted by the pleadings, that the defendant was the owner in fee of the house and lot, which he agreed to convey. The title of an owner is certainly not divested by an outstanding incumbrance, and, according to the decisions, the question of title is, in all cases, a question of ownership. We entirely agree with the counsel for the plaintiff, that an action like the present is no more fit to be tried by a justice of the peace than a suit in equity to enforce a specific performance of a contract; but, looking at the issues made by the pleadings, we cannot say that under the terms of the Code, as formerly under those of the Revised Statutes, this action might not have been tried by a justice, had the damages claimed not exceeded the limits of his jurisdiction."

This case was decided solely on the grounds that the answer admitted the title in the lands to have been in the defendant; and that a mere incumbrance, though a breach of the covenant did not raise a question of title to lands. The action was for a breach of a contract, and it claimed to recover money, so that it may be said to be within the 1st subdivision of the 53d section of the Code. The Code does not provide whether the contract shall be one relating to personal or to real property. And there are numerous cases in which actions will lie on contracts relating to real property, for instance, between landlord and tenant. The only restriction in actions relating to real estate is, that the *title* to land shall not come in question, and that the action arises on *contract*. If the action is for a *fraud* in the sale of real estate, no action of that kind can be tried

before a justice of the peace. *White* v. *Seaver*, 25 Barb. 235. The Code, § 53, sub. 9, confers jurisdiction for a fraud in relation to the sale of personal property, but not for frauds in the sale of real property.

The defendant ought to raise the question below, if he insists that title is in question on the plaintiff's own showing, or he will waive the objection. But such an action is open to the still more serious objection that the Code has not conferred jurisdiction to try such an action in any event; and, in that case, the objection may be made at any time and in all places, because the judgment would be absolutely void, for we have seen that consent never confers jurisdiction as to the subject matter of actions. *Ante*, 16.

Where a plaintiff, in his complaint, averred the ownership and possession of a certain piece of land, and alleged an entry thereon by the defendant, with teams and plows, and the plowing up and destroying the shrubbery, vines and trees growing thereon; and the defendant alleged, in his answer, that he entered and took the vines, &c., under and by virtue of an agreement made between the plaintiff and defendant on the sale of the premises by the defendant to the plaintiff, containing certain reservations, &c.; it was held that, under this issue, the title to land came in question. *Powell* v. *Rust*, 8 Barb., 567. In the case last cited, the defendant claimed to own the growing trees, &c., which were a part of the real estate while growing, and he based his defense on the ground of his ownership of the trees, &c.

It therefore differs materially from the cases already cited, in which the defense was a license, &c., for that admitted title in the plaintiff. Where an action is brought before a justice of the peace, by the assignee of the lessor in a lease in fee against the assignee of the lessee, to recover rent, and the defendant in his answer denies all the allegations in the complaint, the title to land necessarily comes in question, and the justice has no jurisdiction to render a judgment if the plaintiff shows his title as the ground upon which he claims to recover, and the defendant disputes that title. *Main* v. *Cooper*, 26 Barb., 468; *S. C.*, 11 E. P. Smith, 180.

If the action is one in the nature of waste, alleging a forfeiture and praying for the recovery of the possession of the land, title is in question, and a justice has no jurisdiction. *Snyder* v. *Beyer*, 3 E. D. Smith, 235. Where the defendant claims a right by prescription to plow the plaintiffs lands, title is in question. *Eustace* v. *Tuthill*, 2 Johns., 185.

An occupant of a house which is damaged by blasting rocks, may maintain an action for the injury to his possession, whether he is owner or merely a tenant, and the title to land is not in question. *Hardrop* v. *Gallagher*, 2 E. D. Smith, 523. And so, in an action for obstructing a right of way, where the defendant answers by a general denial, the title to real estate cannot be said to be in question so as to oust a justice's court of jurisdic-

tion, if the defendant, being called as a witness, in the course of his testimony proves on his own behalf the plaintiff's title. The defendant himself having shown the title, it cannot be regarded as disputed, within the meaning of the statute, so as to oust the justice of jurisdiction. *Hastings* v. *Glenn*, 1 E. D. Smith, 402. So, where a defendant had agreed to remove his fence, so as to open a road to its original width, title is not in question. *Storms* v. *Snyder*, 10 Johns., 109. In actions by *overseers of highways* to recover *penalties* for encroachments upon the highway, *title* to the land in the highway is no defense, and no such question of title can be properly raised; because, though the ultimate title to the lands may be in the defendant beyond any dispute, that will be no defense to an action for the penalty, for the statute imposes the penalty on the owner of the ultimate fee, as much as on an entire stranger to the title. *Fleet* v. *Youngs*, 7 Wend., 291, 299, opinion; *Parker* v. *Van Houten*, 7 Wend., 145.

But, in an action of trespass between individuals, if the defense interposed is, that the place where the trespass was committed is a public highway, that raises a question of title. *Whiting* v. *Dudley*, 19 Wend., 373; *Willoughby* v. *Jenks*, 20 Wend., 96; *Randall* v. *Crandall*, 6 Hill, 342; *Dinehart* v. *Wells*, 2 Barb., 432. And the justice will not have jurisdiction to try the question whether it is a highway, even by the consent of both parties. *Ib.*

So, where the defendant claims a right of way over the plaintiff's lands by prescription, the title to lands is in question. *Striker* v. *Mott*, 6 Wend., 465. Many of the foregoing cases were where the defendant set up the defense of title in his answer.

But the question frequently arises in a class of cases in which no defense of title is interposed.

If the action is brought for a trespass on wild, uncultivated and unoccupied lands, the plaintiff is then compelled to prove his title to the lands for the purpose of showing a constructive possession. *Hubbell* v. *Rochester*, 8 Cow., 115; *Aikin* v. *Buck*, 1 Wend., 466; *Van Rensselaer* v. *Radcliff*, 10 Wend., 639. The defendant may object to such evidence, and he may dispute the plaintiff's title, and insist on having the action dismissed on the plaintiff's own showing, and the justice is bound to dismiss the action. *Main* v. *Cooper*, 26 Barb., 468. If the defendant does not object to the evidence, nor expressly dispute the plaintiff's title, the justice may receive the plaintiff's deed in evidence, and render a judgment in his favor, which will be entirely valid. Vol. I, 770; *Koon* v. *Mazuzan*, 6 Hill, 44; *Adams* v. *Beach*, 6 Hill, 271; *Bellows* v. *Sackett*, 15 Barb., 97. For the Code, § 59, only requires the justice to dismiss the action when title is in question, even on the plaintiff's own showing, in case the title shall be *disputed* by the defendant. And it has been repeatedly held that the defendant is bound to dispute the title of the plaintiff before the justice, by explicitly calling his attention to it, and disputing the title, or the objection will not be of any avail on an appeal. *Koon* v. *Mazuzan*, 6 Hill, 44; *Adams* v. *Beach*, 6 Hill, 271;

Browne v. *Scofield*, 8 Barb., 239; *Adams* v. *Rivers*, 11 Barb., 390; *Bellows* v. *Sackett*, 15 Barb., 97.

Where a deed of land is offered in evidence by the plaintiff in a justice's court, to prove the mere fact of the purchase of the land as evidence of the performance of a condition precedent to defendant's liability upon a written instrument which is the foundation of the action, it is admissible, although the title is disputed by the defendant as insufficient to convey the premises. Its admission in such a case, and for such a purpose, does not draw the title to the premises in question in such a manner as to oust the justice of jurisdiction. *Nichols* v. *Bain*, 27 How.. 286. *S. C.*, 42 Barb., 353.

These cases show that it is not a ground of dismissing the action in every case in which *title comes in question;* but only in those cases in which title comes in question as prescribed by the sections of the Code mentioned, viz., 55 to 62, both inclusive. Code, § 54, sub. 2.

It may sometimes be a question what is disputing the title within the meaning of the 59th section of the Code.

And it is sufficient to say, that whenever the defendant on the trial below distinctly asserts that the title is in question on the plaintiff's own showing, and he asks the justice to dismiss the action for that reason, this will be entirely sufficient as an objection to raise the question of title.

And where the parties actually litigate the title by the introduction of evidence of title on both sides, that is sufficient to raise the question of title. *Whiting* v. *Dudley*, 19 Wend., 373; *Striker* v. *Mott*, 6 Wend., 465. In an action of trespass for taking firewood, the defendant set up in his answer, these facts, viz., that such wood grew and was cut upon the Tonawanda Reservation in the county Genesee; that such reservation is Indian lands, and is owned and occupied by the Seneca Nation of Indians, that such Indians reside thereon; that the defendants are Seneca Indians, and occupy and reside on the said reservation, and are members of said nation, and that in their own right as such Indians they took, carried away, &c. It was held that this raised a question of title to lands. *Smith* v. *Mitten*, 13 How., 325.

It is an important question, sometimes to know whether the judgment will be void or merely erroneous, in case a justice should improperly refuse to dismiss a cause when requested to do so in a proper case.

It was casually said in *Koon* v. *Mazuzan*, 6 Hill, 46, that the judgment would not be void but merely voidable for error. That point was not involved in that case, and it was a case on error, so that the question could not properly arise as to its validity collaterally. Such a case is not at all like a case where a justice has jurisdiction and errs in exercising it, like that of an improper adjournment of a cause.

The statute declares, that in case title comes in question as

provided by the Code, the justice shall *have no jurisdiction.* Code, § 54, Sub. 2.

In such a case, the jurisdiction as to the *subject matter* of the action is *conditional;* and it is declared that in a certain contingency, no jurisdiction shall exist; and when that contingency occurs, the right to try the action is gone. And this is the rule, whether the question arises on a case where the plaintiff shows title, or one where the defendant pleads title and gives the proper undertaking. Whenever the question is properly raised as provided by the Code, the judgment will be utterly void, if the justice assumes to proceed and try the cause and render a judgment.

Assault and battery, &c.] The third subdivision of section 54 of the Code declares that no justice of the peace shall have cognizance of a *civil action* for an assault, battery, false imprisonment, libel, slander, malicious prosecution, criminal conversation, or seduction. The damages claimed in such actions are generally much greater than the amount of a justice's jurisdiction. The nature of the actions are so generally understood, that it is not difficult to determine whether a given action is one of those excluded from the jurisdiction of a justice. It was held, before the enactment of this section of the Code, or of any similar statute, that a justice had no jurisdiction of an action for a malicious prosecution. *Main* v. *Prosser*, 1 Johns. Cas., 130; *Vanduzor* v. *Linderman*, 10 Johns., 106. Since the enactment of the statute, very few cases have been decided and reported on this subject.

In *Shorke* v. *Charles*, 18 Wend., 616, it was held that an action on the case for an assault and battery could not be tried before a justice.

In *Rich* v. *Hogeboom*, 4 Denio, 453, it was held that trespass cannot be maintained in a justice's court for tearing and injuring the plaintiff's clothes, if it appears that the damage was done in connection with an assault on his person.

In *Bull* v. *Colton*, 22 Barb., 94, in an action brought before a justice of the peace, the complaint alleged that the defendant made an assault upon the horse of the plaintiff, while said horse was attached to a buggy wagon, "*and while plaintiff was in said wagon*, by willfully and maliciously striking, whipping, beating and pounding said horse with a whip and hoe, and greatly injured, hurt and damaged said horse, and caused said horse to rear up, jump and run, *while said plaintiff was in said buggy wagon*, causing said horse to be greatly frightened, to plaintiff's damage $100. Held, that the action was not one for an assault and battery upon the complaint as put in; but that it was proper for the justice to permit the plaintiff to amend the complaint by striking out the allegations relative to the plaintiff's being in the wagon, at the time of the occurrence and that after such amendment, the action was clearly an action for injuring property, which the justice had jurisdiction to try.

Demands exceeding four hundred dollars.] An other class of cases of which a justice has no jurisdiction, is specified in sub-

division 4, of section 54 of the Code: "Nor of a matter of account where the sum total of the accounts of both parties, proved to the satisfaction of the justice, shall exceed four hundred dollars." The first thing to be noticed is, that the statute does not apply unless the accounts or claims *litigated* exceed four hundred dollars. For, if the accounts have exceeded four hundred dollars, but the parties have settled and struck a balance, so that the amount in controversy is less than that sum, the justice will have jurisdiction. *Abernathy* v. *Abernathy*, 2 Cow., 413, 416. So where the accounts have exceeded four hundred dollars, and the amount has been reduced by *payments* to less than that sum, the justice has jurisdiction. *Matteson* v. *Bloomfield*, 10 Wend., 555, and note at the end of case; *Ward* v. *Ingraham*, 1 E. D. Smith, 538; *Crim* v. *Cronkhite*, 15 How., 250.

In *Hoodless* v. *Brundage*, 8 How., 263, the plaintiff sued the defendant on a promissory note which, with interest, amounted to $258.60, but claimed and demanded judgment for a balance only of $95.85. The defendant, on the trial, proved his account to be $253.48, and the referee reported a balance due the plaintiff of $5.20. The question was, whether the plaintiff was entitled to costs on the ground that the demands of the parties allowed by the referee, in the aggregate exceeded $400, and therefore deprived a justice of the peace of jurisdiction. Held, that he was not. The only claim proved was the defendant's claim, which, with the plaintiff's demand, was short of $400. If the plaintiff's claim exceeded $400, and the amount is reduced by a *set-off* to a sum less than $100, the justice will not have jurisdiction even if the amount of the recovery does not exceed six cents. *Stillwell* v. *Staples*, 3 Abb., 365; *S. C.*, 5 Duer, 691. If the pleadings show that the amount of the accounts on both sides exceed $400, and the parties on the trial admit the correctness of the items, and the balance recovered is less than $100, the justice has no jurisdiction, for the admissions of the parties would be *proving* the accounts within the statute. *Stilwell* v. *Staples*, 3 Abb., 365; *S. C.*, 5 Duer, 691.

In *Gilliland* v. *Campbell*, 18 How., 177, an action was brought upon a promissory note for $186, given on a settlement of accounts between the parties, and a defense interposed on the ground of a mistake in fact as to any amount being due to the plaintiff, and the referee, on the trial, examined all the accounts between the parties, which exceeded $2,000, and corrected the errors committed in their settlement, which reduced the amount of the note down to $26.12, and thereupon reported his conclusions of fact, and added thereto his conclusion of law, "that the plaintiff recover of the defendant $26.12, with costs." Held, that by the facts found, a justice of the peace had no jurisdiction of the action.

Where the amount of the accounts, still subsisting open and unliquidated between the parties, is a question of fact, and the evidence is conflicting, the determination of the justice upon that

point is necessarily as conclusive as upon any other question of fact where his jurisdiction is not affected by his finding. And if, under such circumstances, the justice decides that the accounts of the parties, as proved to his satisfaction, exceed $400, and that he is, therefore, ousted of his jurisdiction, the county court has no right to reverse his judgment, on appeal. *Parker* v. *Eaton*. 25 Barb., 122; and see *Sheldon* v. *Wright*, 1 Seld., 497; and *Skinnion* v. *Kelly*, 4 E. P. Smith, 355.

The statute declares, that if the amount of the accounts exceed $400, the justice shall not have jurisdiction. And though in *Lamoure* v. *Caryl*, 4 Denio, 372, it is said that a judgment would be merely erroneous and not void, if the justice improperly refused to dismiss the action, such a remark was not called for in the case, nor was the point decided, because the question arose on a writ of error. Whenever it is conceded by the parties, or found as a fact from the evidence, that the amount of the accounts litigated exceeds $400, the statute declares positively that the justice shall have *no jurisdiction.*

Actions against executors, &c.] The last subdivision of section 54, declares that a justice shall not have jurisdiction of an action *against* an executor or administrator *as such.* They would be liable, however, on their own personal contracts in relation to the property or estate which they represent. And an action against one of the obligors of a bond, conditioned for the faithful execution of his duties as an administrator, is an action against the defendant personally, and may be sued in a justice's court. *O'Neil* v. *Martin*, 1 E. D. Smith, 404. Executors and administrators may sue as plaintiffs in a justice's court for any claim of the estate, just as though the claim were a personal one in their own behalf.

Oath of office.] A justice is required to take an oath of office before entering upon the official discharge of its duties. 1 R. S., 402, § 98; Id. 410, § 24. And if any person shall execute any of the duties of the office without having taken and subscribed the oath of office required by law, he will forfeit the office and be deemed guilty of a misdemeanor. 1 R. S., 412, § 36.

But though no oath of office has been taken, yet he is an officer *de facto;* and his acts will be as binding as between the parties to the action, and as to third persons, as though he were an officer *de jure*. *Greenleaf* v. *Low*, 4 Denio, 168; *Weeks* v. *Ellis*, 2 Barb., 320. And this is the rule even as to ministerial officers, for it will be no defense to an indictment for an assault on a constable in the discharge of his duties, that he had not taken the oath of office, because it is sufficient that he is an officer *de facto*. *People* v. *Hopson*, 1 Denio, 574; and see *Bentley* v. *Phelps*, 27 Barb. 524.

But a different rule would prevail if such an officer should sue for his fees, for he must then be an officer *de jure* to entitle him to recover. And if he should render a judgment, which, as we have seen, would be binding as between the parties; yet, if the

judgment should be enforced against the property of the defendant, the justice would be a trespasser.

The sound distinction in such cases is, that the office is *void* as to the officer himself; but *valid* as to strangers. *Riddle* v. *Bedford*, 7 Serg. & Rawle, 386; cited in *Green* v. *Burke*, 23 Wend., 503; *People* v. *Peabody*, 6 Abb., 234; and cases there cited.

Nature of justice's jurisdiction.] A justice of the peace does not exercise a common law jurisdiction of a general character; but it is a limited statutory authority.

And in all matters relating to the acquirement of jurisdiction, the authority conferred must be strictly pursued. As to jurisdictional matters, nothing can be taken by implication. *Jones* v. *Reed*, 1 Johns. Cas., 20. And in every preliminary step which is required by law in order to acquire jurisdiction of the person or the property of the defendant, there must be the strictest compliance with the statute, or jurisdiction will not be obtained.

If an affidavit or a bond is required as a pre-requisite to the issuing of process, it must be furnished or the proceedings will be void. But to furnish *an* affidavit or a bond is not all that is required, for it must be substantially such as the law requires or it will be entirely useless, The distinction to be observed is, that in acquiring jurisdiction the strictest observance of the statute is necessary, or the proceedings will be void. But when jurisdiction is once obtained, though the subsequent proceedings may be irregular or erroneous, yet the judgment will not be *void*, though it may be erroneous.

Amendments, &c.] In relation to amendments, a justice possesses the same authority, in relation to jurisdictional matters, as in reference to any other amendment. *Woolley* v. *Wilber*, 4 Denio, 570; *Bull* v. *Colton*, 22 Barb, 94.

This brief review of the general principles relating to jurisdiction may be of service to those for whom this work is intended.

For, though it is far from being a complete exposition of the entire law upon the subject, yet, it will be found to be practically useful in elucidating those questions which so frequently occur in the practice before justices of the peace.

CHAPTER III.

COMMENCEMENT OF ACTIONS.

SECTION I.

OF ACTIONS AND OF PROCESS.

Whenever one person is satisfied that he has a perfect and legal cause of action against an other, which he wishes to prosecute, the next consideration will be, how to legally pursue the remedy.

No notice will be here taken of that class of cases in which a party is permitted by law, if he chooses, to redress the injury without a resort to an action. But the only matters which will

now be considered, are those in relation to cases in which a party resorts to an action at law as the means of obtaining redress.

It will be assumed that a right of action exists, and that the remedy sought may be obtained in a justice's court, by an action therein. The Code defines an action thus: "An action is an ordinary proceeding in a court of justice, by which a party prosecutes an other party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense." Code, § 2. Judge HARRIS comments on this definition thus: "It must be conceded, I think, that this definition is not remarkable for its perspicuity or distinctness. I suppose, myself, that any judicial proceeding which, if conducted to a termination will result in *a judgment*, is an action." *People* v. *County Judge of Rensselaer*, 13 How., 400. In the older books an action was defined thus: "A lawful demand of one's right." Co. Litt., 285; 1 Bac. Ab. 63; Com. Dig. Action, A, 1. It is true that an action is a lawful demand of one's right. But the converse is not equally true, that every lawful demand of one's right is an action; because there may be a lawful demand of a right without any action.

The following is submitted as my definition of an action: A civil action is a legal prosecution, in an appropriate court, by a party complainant, against a party defendant, to obtain the judgment of that court in relation to some right claimed to be secured, or some remedy claimed to be given, by law, to the party complaining. In every civil action which is legally prosecuted, it must be in a court which has jurisdiction, or it will not be in an appropriate court; there must be a party complaining, who brings the action before that court; there must be a party who is charged with doing or omitting to do something, for which he is brought into court; there must be a subject matter of litigation; and, upon the whole case, the rights of the parties are to be determined by a judgment of the court.

"The distinction between actions at law and suits in equity, and *the forms* of all such actions and suits, heretofore existing, are abolished, and there shall be, in this state, hereafter *but one form of action* for the enforcement or protection of private rights and the redress of private wrongs, which shall be denominated *a civil action*." Code, § 69; Vol. I, 12.

"In such action, the party complaining shall be known as the plaintiff, and the adverse party as the defendant." Code, § 70; Vol. I, 12. A judgment may be obtained in an action without process if the parties choose to appear voluntarily and join issue. But the general rule is, that every action must be commenced by the issuing the service, and the return of legal process, before a legal judgment can be rendered therein. There are several kinds of process which are used during the course of an action, and many of the general rules hereafter stated relate to each of these kinds of process.

The term process, however, when it refers to the commencement of a civil action in a justice's court, may be defined thus:

It is that official mandate or precept which, by authority of law, may be made and issued by a court or officer for the commencement of a civil action.

The law has provided several different kinds of process for the commencement of actions, each of which was intended to be adapted to some purpose of its own, &c., and to have, in some respects, an object different from that of the others; and each of these differences and peculiarities must be carefully observed in practice. Judgments may be rendered on confession, or in an action without process. When process is issued, for commencing actions, the following are the kinds which are in use in justices' courts: 1. A long summons; 2. A short summons; 3. A long attachment; 4. A short attachment; 5. A warrant; 6. Replevin proceedings; 7. Mechanics' lien proceedings. The particular instances in which each of these will be proper, and the necessary preliminaries to be observed to render them regular, will be noticed when discussing them separately in a subsequent place.

To be in name of people.] "All writs and process shall be in the name of the people of this state, except where otherwise provided by law." Vol. I, 80, § 17.

To be in English.] "All writs, process, proceedings and records in any court within this state shall be in the English language (except that the proper and known names of process and technical words may be expressed in the language heretofore and now commonly used), and shall be made out on paper or parchment, in a fair, legible character, in words at length and not abbreviated; but such abbreviations as are now commonly used in the English language may be used, and numbers may be expressed by Arabic figures or Roman numerals, in the customary manner." Vol. I, 80, § 18.

The year and the day of the month, and the amounts or sums of money mentioned in the process or proceedings or record, may, therefore, be expressed in figures.

A transcript was objected to in one case, for the reason that it was not in the English language. But the supreme court said: "The transcript is written in bad English, and probably worse Dutch, and so far is liable to the criticisms made upon it, but the essential parts of it are sufficiently intelligible to answer all legal purposes." *Jackson* v. *Browner*, 7 Wend., 389.

Must be signed.] "All process issued by any justice of the peace shall be signed by him, and may be under seal or without seal." Vol. I. 66, § 158.

Must not be issued in blank.] "Every summons, warrant, attachment and execution issued by a justice of the peace shall be entirely filled up, and shall have no blank in the *date* or *otherwise*, at the time of its delivery to an officer to be executed. Every such process which shall be issued and delivered to an officer, to be executed contrary to the foregoing provision, shall be *void*." Vol. I, 66, § 159.

The object this statute and its construction is thus expressed

by the supreme court in a case where a justice omitted to insert in an attachment the amount of the debt sworn to, and where, on an objection made to the process, the justice amended it by inserting the amount of the debt sworn to. The court said: "The provision requiring process to be filled up before issuing, was intended to guard against the abuse which at one time was but too common. Justices put blank process into the hands of constables and others, to be filled up by them as they saw fit, in the same manner as attorneys in courts of record issue process. To such cases the statute is applicable; but does not interfere with the power of amendment in clerical mistakes in process issued properly by the justice himself." *Near* v. *Van Alstyne*, 14 Wend., 230.

So a justice may amend a summons in the date, after its service, or he may disregard the error, if the defendant does not appear. *Arnold* v. *Maltby*, 4 Denio, 498. So, where the summons contained only the given name of the plaintiff, it was held amendable as a clerical defect, and the surname was inserted. *Stanton* v. *Leland*, 4 E. D. Smith, 88. So after the service and return of a summons, the name of one of the plaintiffs was amended from Joseph to Jasper. *Brace* v. *Bensen*, 10 Wend., 213.

It is not necessary that the justice should fill up and sign the process with his own hand. This may be done by an other person, if it is done at the request of the justice, in his immediate presence, and by his express and explicit directions. A constable is required to sign his return to a summons. But that may be done by the justice before whom the summons is returnable, if done at the request of the constable, and in his presence, and by his direction. *Reno* v. *Pinder*, 6 E. P. Smith, 298, 301, 302, 303, reversing the same case in 24 Barb., 423; see, also, *Borrodaile* v. *Leek*, 9 Barb., 611. Any person may fill up a summons or other process, whether in the presence of the justice or not; and if the justice sees fit to sign it, this will be well enough, for, by adopting what has been done, the justice makes the whole his own act.

It is important to a justice that he should not disregard this statute. "Every justice or constable offending against either of the provisions of the last three sections shall be deemed guilty of a misdemeanor, and, on conviction, shall be subject to fine or imprisonment, or both, in the discretion of the court. Every such conviction shall operate as a forfeiture of the office of the justice or constable so convicted." Vol. I, 66. § 162.

This statute is to be construed as all other similar statutes are. If a justice should by mistake leave a blank in the date of process, or should give it a wrong date, or should commit any other clerical error, he would not be liable to the penalties mentioned. It was not mistakes of that kind that the statute was directed against. And, besides, if there was no intention to omit filling up the process, there would not be any offense. The intent is essential to the crime. But it must not be understood, that a justice may sign blank process and deliver it in violation of the

statute, and then escape the consequences by a plea of ignorance of the existence of the statute. Every man is presumed to know the law, and ignorance of it is no excuse. The intendment of law will be in favor of innocence, and if the case is open to two constructions, one of innocence the other of guilt, then innocence will be presumed. *People* v. *Smith*, 20 Johns., 63.

Must be properly directed.] When process is regular on its face, the officer to whom it is directed is bound to execute it according to its command. 2 R. S., 696, § 38, 1st ed.; 3 R. S., 979, § 53, 5th ed.; *People* v. *Brooks*, 1 Denio, 457.

If it is not directed to an officer he is under no obligation to serve it. The statute requires every summons, attachment, warrant or execution to be directed to any constable of the county in which the justice resides. Vol. I, 38, § 12; Id., 40, § 18; Id., 41, §§ 28, 29; Id., 57, § 120.

And where a warrant of commitment, issued by a justice of the peace upon a conviction for petit larceny, was not directed to any officer, class of officers, or other person by whom it was to be executed, it was held to be void, and a constable who executed it was held liable to an action for an assault and battery and false imprisonment. *Russell* v. *Hubbard*, 6 Barb., 654. A magistrate who issues void process, is liable for the injury inflicted upon the party against whom it issued. But this is so in those cases only in which the process is executed according to its mandate. And, therefore, where a justice of the peace issued an attachment without jurisdiction, *directed*, according to the statue, *to any constable of the county*, but the party who sued it out placed it in the hands of a *deputy sheriff*, with directions to execute it, which he accordingly did; it was held, in an action of trespass by the party against whom the attachment was issued, that the justice was not liable. *Merritt* v. *Read*, 5 Denio, 352. The court said: " It is a *direction* to the particular officer or class of officers named, and not to a different one; and if a person *not mentioned* or *referred* to in it, undertake to execute it, he is considered not only as having volunteered but as having *intended* to act *officiously*, without the consent of the magistrate and against his express direction, as contained in the process." Id., 353, 354; and see *Fregard* v. *Barnes*, 7 Exch., 827.

Process to state name of plaintiff.] The general rules in relation to the names of the plaintiff are, that the names should be truly and accurately given; that the names should be stated in full, both christian and surname, unless a plaintiff has several christian names, when one of those must be stated and the others may be expressed by the initials. The law, however, does not recognize but one christian name, and the addition or the omission of the other names will be of no consequence. *Franklin* v. *Talmadge*, 5 Johns., 84; *Roosevelt* v. *Gardinier*, 2 Cow., 463; *Milk* v. *Christie*, 1 Hill, 102. If there are several parties plaintiffs, the names of each of them must be stated in the same manner as those of single plaintiffs; the names of partners, or others jointly interested, must

be stated separately and in full, and not in the firm name. *Bentley* v. *Smith*, 3 Caines, 170. In actions by town or county officers, the name of the plaintiff must be stated, with the addition of his title of office, and it is improper to state the name of the office alone. *Supervisor of Galway* v. *Stimson*, 4 Hill, 136. In actions by a plaintiff in a representative character, the name of the plaintiff and the character in which he sues, should be fully and accurately stated. In actions by infants and others who appear by guardian, the name of the infant and that of the guardian should be so stated as to show that one was infant and the other guardian. Executors and administrators should state their names and that of the person whom they represent. Corporations should sue in their corporate name, if they have one. Lunatics should sue in their own name, with the addition of their committee, if there is one, or by guardian if there is none. *McKillip* v. *McKillip*, 8 Barb., 552. An action could not be maintained in the name of the committee alone. *Lane* v. *Schermerhorn*, 1 Hill, 97. The question who are proper parties to an action, will be fully discussed in another place. The object of the foregoing remarks was to show in what manner the names of the plaintiffs should be stated, not who ought to be plaintiff.

Process to state name of defendant.] The general rules in relation to plaintiffs, are equally applicable to defendants.

Fictitious names.] "When the name of any *defendant* shall not be known to the plaintiff, he may be described in the *summons* or *warrant* by a fictitious name; and if a plea in abatement be interposed by such defendant, the justice before whom the suit is pending shall amend the proceedings according to the truth of the matter, and shall thereafter proceed therein in like manner as if the defendant had been sued by his right name." Vol. I, 74, § 207.

It will be observed that this section of the statute applies only to defendants, and to process by summons and warrant. Previous to this enactment, where a warrant was issued by a justice of the peace, against "John Doe, the person carrying off the cannon," instead of Levi Mead, who was, when it issued, in the act of carrying off a cannon, and for whom it was intended, and where Mead was arrested under that warrant, it was held that he might maintain trespass against the persons concerned in the arrest. *Mead* v. *Haws*, 7 Cow., 332; see also *Scott* v. *Ely*, 4 Wend., 555; *Miller* v. *Foley*, 28 Barb., 630. In the case last cited, a warrant was issued by a justice of the peace, which recited a complaint against *John R.* Miller, for a felony, and commanded the officer to arrest "the *said William* Miller," and it was held that the warrant afforded no justification to the officer for the arrest of John R. Miller, although it was proved that he was the person intended.

This was a criminal warrant, and the statute which has been cited applies to civil warrants only. In all cases, except warrants and summonses in civil actions, the same strict rule still prevails.

And, therefore, an *attachment* cannot be issued against a defendant by a fictitious name. For, if so issued and executed, the justice and all concerned would be trespassers. See the cases last cited. In *McCabe* v. *Doe*, 2 E. D. Smith, 64, a judgment in an attachment suit was reversed, because the defendant was proceeded against by a fictitious name. In *Davenport* v. *Doady*, 3 Abb., 409, an attachment was issued against Davenport, by the name of John Doe, &c., and a vessel attached under it; judgment and execution followed, and Davenport brought replevin against the officer for the vessel, and he was held to be entitled to recover its possession.

Return day.] Every summons and attachment should have a time and place mentioned in it as the return day of such process. It should specify some particular day, and hour of the day, and some particular place for the return of the process, and for the appearance of the person who is required to appear in obedience to its mandate. The judgment of a justice will be reversed, when from the return on an appeal, it does not appear that the summons served on the defendant set forth the *time* and *place* for his appearance, if he did not appear in the action below. *Stewart* v. *Smith*, 17 Wend., 517. The place for the return may be mentioned thus: at the office of John Frothingham, in the village of Johnstown, or at the inn of John H. Gross, in the village of Johnstown. A justice must not only state a day and hour of appearance in the process, but he must also observe it in his practice. If he specifies one o'clock in the afternoon, as the time for the defendant to appear and answer, and he then calls the cause at 10 o'clock in the forenoon of that day, and renders judgment against the defendant in his absence, such judgment will be utterly void. *Sagendorph* v. *Shult*, 41 Barb., 102.

Time, how computed.] The general rule for the computation of the time which may intervene between the date and the return day of process is, to *exclude* the day of the date, and to *include* the day of the return. *Bissell* v. *Bissell*, 11 Barb., 96; *Judd* v. *Fulton*, 10 Barb., 117; *Ex parte Dodge*, 7 Cow., 147.

"The time within which an act is to be done, as herein provided, shall be computed by excluding the first day, and including the last. If the last day be Sunday, it shall be excluded." Code, § 407.

This section applies to the *practice* under the Code, and does not affect the general rule, in relation to the construction of time under general statutes. And in fixing the time for the return of a long summons, if the day selected would fall on Sunday, then the return day must be on the day following, or some other day not exceeding twelve, nor less than six days from the date. The same rule applies to a short summons, except that the time must not be less than two, nor more than four days from the date of the process.

If Sunday is one of the days intervening between the date and the return day, it is counted in the same manner as a week day.

King v. *Dowdall*, 2 Sandf., 131. A short summons, therefore, may be issued on Saturday, and returnable on the Monday following. A long summons, issued on the first day of the month, cannot be made returnable later than the thirteenth day of the same month; and if the last day is Sunday, it must be made returnable on the day preceding. A long summons which is returnable on Friday, must be served as early as the Saturday preceding. So, a summons returnable on Saturday, must be issued and served as early as the Saturday preceding, though there would then be seven days between the date and the return day. The reason is, because the process could not be served on Sunday, and its service on Monday would not leave six days between the service and the return day. Fractions of a day are not counted in the computation of time, so that a short summons issued at any time on Saturday, may be returnable at any time on the Monday following. *Columbia Turnpike* v. *Haywood*, 10 Wend., 422. And a short summons served on the 14th, which is returnable on the 16th, is regular. *Ball* v. *Mander*, 19 How., 468. The same rules of computation, as to time, are applicable to the service and return of process. The day of service is excluded; fractions of a day are disregarded; intermediate Sundays counted like other days, and the return day is always included.

Plea in the process.] The statute provides that a summons or a warrant shall contain the plea to which the defendant is to answer. Vol. I, 38, § 12; Id., 40, § 18. The object of stating this plea in the process was, probably, for the purpose of informing the defendant of the general nature of the action against him, and whether it arose upon contract, or for a tort. Whatever may have been the reason for requiring it, is of little consequence, because it is practically disregarded. It was decided many years ago, that it was no ground of error that the cause of action stated in the summons was different from that stated in the complaint. *Bowen* v. *Ferne*, 16 Johns., 161. The same rule has been repeatedly enforced by the supreme court, in cases arising since the Code. *Delancy* v. *Nagle*, 16 Barb., 96.

It has also been held, that it was no cause of reversal of the judgment, though the summons did not in any manner state the cause of action, or its nature. *Smith* v. *Joyce*, 12 Barb., 21; *Cornell* v. *Bennett*, 11 Barb., 657; *Humphrey* v. *Persons*, 23 Barb., 313. The practical effect of these cases is, to render the summons or warrant a mere means of bringing a party into court, where he will learn from the complaint what the cause of action is.

Sunday, issuing or service of process on.] No civil process can be legally issued on Sunday. *Van Vechten* v. *Paddock*, 12 Johns., 178. Nor can civil process be legally served on that day. *Rob* v. *Moffat*, 3 Johns., 257; *Vanderpoel* v. *Wright*, 1 Cow., 209. No civil process can be legally served on Saturday on a person who keeps that day as the Sabbath. *Maxson* v. *Annas*, 1 Denio, 204; Laws 1839, page 305. Nor can such process be made returnable

on Saturday as against such persons. 2 R. S., 936, §§ 69, 70, 71, 5th ed. If any civil process is served on Sunday, the service will be absolutely void. 2 R. S., 935, § 65, 5th ed.

By the method of computing time in this state, established by the Revised Statutes, a day consists of twenty-four hours, and commences and ends at midnight. Whenever, therefore, a statute forbids an act to be done on a particular day, it has reference to this mode of computation by the calendar, unless there is some express declaration to the contrary. *Pulling* v. *People*, 8 Barb., 384.

Election day.] No civil process can be legally served on an elector on any day on which a general election is held, and at which he is entitled to vote. 1 R. S., 418, § 3, 5th ed.; *Meeks* v. *Noxon*, 1 Abb., 280; *Bierce* v. *Smith*, 2 Abb., 411.

Town meetings.] "Whenever a town meeting shall be held in any town, no civil process shall be served in any such town, on any elector entitled to vote therein, on any day during which such town meeting shall be held." 1 R. S., 819, § 22, 5th ed. This statute does not, in terms, forbid the service of process on any elector in any other town, if he should happen to be there.

Penalties, process to be indorsed.] "Upon every process issued for the purpose of compelling the appearance of the defendant to any action for the recovery of any penalty or forfeiture, shall be indorsed a general reference to the statute by which such action is given, in the following form: 'According to the provisions of the statute regulating the rate of interest on money;' or, 'according to the provisions of the statute concerning sheriffs,' as the case may require, or in some other general terms referring to such statute." Vol. I, 755, § 7. The following indorsements have been held sufficient. In an action for a violation of the excise law, the process was indorsed thus: "Issued according to the *proceedings* of title nine, chapter 20th, part first, of the Revised Statutes." *Andrews* v. *Harrington*, 19 Barb., 343. In another action of a similar kind, the indorsement was, "according to the provisions of title 9, part 1, chapter 20, of the statute of excise and the regulations of taverns and groceries." *Perry* v. *Tynen*, 22 Barb., 137.

In an action for a penalty for receiving illegal toll at a plank-road gate: "Issued according to the provisions of the statute concerning the incorporation of turnpike and plankroad companies, and the collection of penalties for demanding and recovering more than lawful toll, in passing through toll gates on such roads." *Marselis* v. *Seaman*, 21 Barb., 319. But the following was held defective, in an action for a violation of the excise law: "According to the act 'Of the internal police of the state.'"

The object of such an indorsement is to inform the defendant what particular statute it is claimed that he has violated. There ought, therefore, to be such a reference as will accomplish that purpose. If a reference is made to the Revised Statutes, it may be thus: "Issued according to the provisions of article of

title of chapter of part of the Revised Statutes, entitled" &c.; or, the reference may be in the manner prescribed in the section of the statute which has been quoted. Or the reference may be to the laws of some particular year, as: "Issued according to the provisions of laws of chapter , entitled," &c.

When the process is served by delivering a copy of the summons to the defendant, there ought also to be a copy of the indorsement served, and duly certified as a part of the process. A general appearance in the action, without objection, will waive the objection that the process ought to have been indorsed in the manner required by the statute. *Sprague* v. *Irwin*, 27 How., 51. And the effect of the appearance is the same, whether the defendant knew of the irregularity or not, at the time of appearing. *Ib.*

In actions for a willful trespass on land, it is not necessary to indorse the process, because the statute does not give the action; it merely creates a forfeiture for treble damages, where the evidence warrants such damages. *Ib.*

Amount, jurisdiction as to.] It was formerly held that a summons must not claim an amount exceeding the ordinary jurisdiction of the justice, or it would be void, and that the defendant would be under no obligation to appear and answer it. *Yager* v. *Hannah*, 6 Hill, 631. This is no longer the rule. There are some cases in which a justice may render judgment for more than two hundred dollars; and a defendant is therefore bound to attend on the return day, and learn whether the case is one of that character. If he does not appear, and the plaintiff recovers judgment on a claim where more than two hundred dollars is recoverable, the defendant will be remediless on an appeal. *Humphrey* v. *Persons*, 23 Barb., 313.

Deputing person to serve process.] "Every justice who shall issue any process authorized by this title, excepting a *venire*, whenever he shall judge it expedient, on the request of a party, may, by written authority indorsed on such process, empower any proper person, being of lawful age, and not a party in interest in the suit, to execute the same." Vol. I, 72, § 196; *Monteith* v. *Cash*, 1 E. D. Smith, 412. "The person so empowered, shall thereupon possess all the authority of a constable, in relation to the execution of such process, and shall be subject to the same obligations, but shall not receive any fee or reward for his services therein." Id., § 197.

"Every constable to whom process shall be directed and delivered, agreeably to the provisions of this title, shall execute the same in person, and shall not act by deputy in any case." Id., § 198.

By the terms of the statute, a person under the age of twenty-one years, cannot be deputed to serve such process. *Miln* v. *Russell*, 3 E. D. Smith, 303. When an execution is duly issued to a constable, it becomes his duty to execute it in person. He has no power to *substitute* another constable in his place. *Downs* v. *McGlynn*, 2 Hilt., 14; *S. C.*, 6 Abb., 241.

Form of deputation to be indorsed on the process.

FULTON COUNTY, *ss:* On the request of the within named plaintiff, I do adjudge it expedient to empower some proper person to execute the within process; and I, therefore, empower John P. Albro, being of lawful age, and not a party in interest in the suit, to execute the same. November 2d, 1864. DAVID KENNEDY, *Justice.*

The deputation ought to show that the appointment was made at the request of the plaintiff, that the person appointed was of lawful age, and that he was not a party in interest. In all proceedings in inferior courts, it ought to appear *affirmatively*, that the justice had jurisdiction to render the judgment which he has given.

Officer, when protected and when not.] A mere ministerial officer will always be protected in executing process, if it is regular and legal on its face; and if the process be such as the court or officer issuing it, has general jurisdiction to issue in proper cases. The officer need not look behind his process, to know that there was authority to issue it. *Savacool* v. *Boughton*, 5 Wend., 170; *Cornell* v. *Barnes*, 7 Hill, 35; *Parker* v. *Walrod*, 16 Wend., 514; *Fulton* v. *Heaton*, 1 Barb., 552.

But if process shows on its face, either that it was issued without authority, or that the person who issued it had no jurisdiction to issue such process, then the process will not afford any protection to the officer executing it. *Stroud* v. *Butler*, 18 Barb., 327; *Parker* v. *Walrod*, 16 Wend., 514; Vol. I, 739.

Again, if process is regular and legal on its face, and is issued by a court or a person who is authorized to issue such process, it will not invalidate the protection to the officer, to allege and prove that he knew of a want of jurisdiction in issuing it. In such cases the general rule is still enforced, that the officer need look only to his process. *Webber* v. *Gay*, 24 Wend., 485; *People* v. *Warren*, 5 Hill, 440. But though an officer *may*, he is not *bound* to execute process, which he knows to be void. *Cornell* v. *Barnes*, 7 Hill, 35. If, however, there is merely some irregularity in the issuing of the process which does not affect its jurisdiction, and which the defendant might waive, the officer will not be excused from serving it. *Bacon* v. *Cropsey*, 3 Seld., 195 and 199, and cases there cited.

Officer bound to execute process.] Whenever the law imposes a duty upon an officer, he is bound to discharge it to the best of his ability. If a justice should refuse to swear a party to an affidavit in a proper case, he would be liable to an indictment for the refusal. *People* v. *Brooks*, 1 Denio, 457.

It is, therefore, the duty of a ministerial officer to execute all legal process which is directed to him by name, or as one of a class of officers. A refusal would not only be indictable, but the officer refusing would also be liable to the party injured, for such damages as he might sustain in consequence.

It is not permitted to a constable to serve process, or to refuse to serve it at his pleasure. If process is regular on its face, and it

is issued by one who has competent authority for that purpose, the constable is bound to serve or execute the process according to its mandate. He may, however, demand his legal fees for the service before the summons or process is served. And if the payment of such fees is refused, he may lawfully refuse to serve it until he is paid. But when his legal fees are tendered to him, he is guilty of a misdemeanor, and liable to fine and imprisonment, if he willfully refuses to serve the process. 2 R. S., 696, § 38, 1st ed.; 3 R. S., 979, § 53, 5th ed.

The term *willfully* includes every *intentional* refusal, even although the constable may honestly think that he is not bound to serve the process. It will not be any defense to an indictment, that the officer was not guilty of bad faith in refusing, and that his refusal was upon the ground that he thought the law did not require him to do the act. *People* v. *Brooks*, 1 Denio, 457.

There are, however, instances in which a refusal would not be willful. If the constable is sick and unable to serve the process, or if his health is such that a service of such process would be attended with great danger to him, the law would not be violated, since such a refusal would not be regarded as willful. So, if a member of the constable's family is so sick as to require his constant attention, the law would *excuse* him from serving process which would cause him to be long absent, and besides that such a refusal would not be willful. Again, if a constable is engaged in other official duties, he is not bound to leave those before they are discharged.

Officer cannot take reward, extra fees, &c.] "No constable shall ask or receive any money or valuable thing from a defendant, or any other person, as a consideration, reward or inducement for omitting to arrest any defendant, or to carry him before any justice, or for delaying to take any party to prison, or for postponing the sale of any property under any execution, or for omitting or delaying the execution of any duty pertaining to his office." Vol. I, 66, § 160. A violation of this statute is a misdemeanor, punishable by fine and imprisonment, and, on conviction, a forfeiture of the office. Id., § 162.

No constable can maintain an action to recover more than the legal fees for his services, though they may have been worth much more than the fees given by law; and though the party may have expressly agreed to pay such additional sum before the services were rendered. *Hatch* v. *Mann*, 15 Wend., 44; *Downs* v. *McGlynn*, 2 Hilt., 14; *S. C.*, 6 Abb. 241; Vol. I, 105.

Process amendable.] It is a rule of very extensive application, that process is amendable either in form or substance. The principles will be fully stated under title Amendments.

Waiver of defects in process.] If process is defective in form or in substance, or if it is irregularly issued, or is improperly served, a party is at liberty to disregard the defects. And all such defects or omissions, and all irregularities, will be waived by voluntarily taking any subsequent steps in the action without making ob-

jection. For a full review of the cases, see title, "Waiver by pleading," and "Jurisdiction."

Process, when set aside for fraud.] The law condemns every species of fraud and unfair practice. And whenever there is an attempt to pervert and prostitute the process of the law, to the purposes of base men, in their unjust designs, it is the duty of every court to enforce a proper remedy, by promptly setting aside such process as may have been fraudulently obtained. No justice, who is fit to hold his office, will tolerate an abuse of his process by any man who would employ it for an unlawful purpose. And where an unlawful use is made of his process, or where there is a gross abuse of it, in the commencement of actions, the justice has the same power to correct that wrong that is possessed by a court of record. Vol. I, 37, § 1; *Babcock* v. *Lipe*, 1 Denio, 139; *Mosher* v. *Lawrence*, 4 Denio, 419; *Robbins* v. *Gorham*, 26 Barb., 586, 592, opinion of court; *S. C.*, 11 E. P. Smith, 588; *Fulton* v. *Heaton*, 1 Barb., 552; *Brace* v. *Benson*, 10 Wend., 213. In one case the defendants moved to set aside a warrant because they were not liable to arrest; and they offered to prove the facts, which were conceded by the plaintiffs. The justice refused to set the warrant aside; and after judgment in favor of the plaintiffs, which was affirmed by the county court of Washington county, the judgment of the justice and that of the county court were both reversed by the supreme court. It was conceded that the defendants were not liable to arrest by warrant; but the plaintiffs' affidavits made a *prima facie* case, and it was insisted that the defendants could not controvert their truth. Judge COWEN delivered the opinion of the court, and said: "Upon the motion to quash the warrant, the plaintiffs, before the justice, admitted that the defendants were residents of Granville, in Washington county, and had been so for more than thirty days before the warrant was taken out. The justice had jurisdiction of the process, and the affidavit on which the warrant was issued made it regular in the first instance. But certainly the affidavit was not conclusive. It was still open to be met by the defendants, on proof that it was made under a plain mistake. That was admitted, and the justice should, therefore, have dismissed the suit; or, to speak more technically, he should have set aside the proceedings for irregularity." *Shannon* v. *Comstock*, 21 Wend., 457, 459. It will readily be seen that if this is the rule when process is obtained by mistake, a far more cogent reason exists for its exercise in cases of fraud. No court will sanction any attempt by fraud or misrepresentation to bring a party within its jurisdiction.

And if a party has been induced by a false statement to come within the jurisdiction of the court, and is there served with process, the service and the process will be set aside. *Carpenter* v. *Spooner*, 2 Sandf., 717. And if he has been arrested under such circumstances the court will set aside the service and discharge the defendant from arrest. *Goupil* v. *Simonson*, 3 Abb., 474; *Metcalf* v. *Clark*, 41 Barb., 45.

Process, service by constable in his own favor.] It has been held that a constable may serve a summons when he is plaintiff in the action. *Putnam* v. *Man*, 3 Wend., 202; *Tuttle* v. *Hunt*, 2 Cow., 436. But a plaintiff in an action, who is not a constable, cannot be deputed by the justice to serve a summons in his own favor, as it has been seen that the statute requires that the person deputed shall not be a party in interest in the suit.

SECTION II.

ACTION, WHERE TO BE COMMENCED.

One person may have a legal and perfect cause of action against an other, and yet, if he desires a legal remedy, he must pursue that remedy in the manner which the law has prescribed. One of the restrictions imposed by law is that in relation to the town in which a defendant may be sued. It is not always left to a plaintiff to select any town in a county in which to commence an action. Though there are cases in which the plaintiff may sue in any town in the county. These several cases will be now noticed. The statute is as follows: "Every such action shall be brought before some justice of the town wherein, either, 1, the plaintiffs, or any one of them reside; or 2, where the defendants, or any one of them reside; or 3, before some justice of an other town in the same county, next adjoining the residence of the plaintiff or defendant." Vol. I, 38, § 6. The preceding section relates exclusively to those cases in which both parties, plaintiff and defendant, are residents of the county in which the action is commenced. And the first clause of the next section cited also relates to a case in which both parties are residents of the county, but in which the defendant has absconded from his residence in that county. It will be observed that in every instance the statute says, the town in which the party *resides*, &c., or adjoining the residence, &c., which could not be applicable to a non-resident, whether plaintiff or defendant.

"But if a defendant has absconded from his residence, such action may be brought before a justice of the town in which such defendant or his property may be; and if the plaintiffs be all non-residents of the county, or if the defendant be a non-resident of the county, then such action may be brought before any justice of the town in which such plaintiffs or defendant may be." Id., § 7.

The latter portion of the preceding section relates exclusively to the case of non-resident parties, whether plaintiff or defendant.

This is evident from the plain reading of the statute; and besides that, the case of resident parties had already been fully provided for. These provisions of the statute in relation to the town in which the action must be commenced are equally applicable to every kind of process. So that, when a summons, long or short, or process for the recovery of personal property, or an attachment, long or short, or a warrant, is issued against a non-

resident defendant, the process must be returnable before some justice of the town in which the defendant may be at the time when the action is commenced.

These provisions of the statute seem to be very plain; and yet a little further explanation may be of service to a justice who is not experienced in the duties of his office; or to the student at law who is not yet familiar with all the principles of the law.

The plaintiff may exercise a very considerable choice in the selection of a town in which to sue, notwithstanding the provisions of the statute referred to.

If the parties are all residents of the county, the action may be brought in any town in which any one of the plaintiffs resides; or in any town in which any one of the defendants resides; or in any town, in the same county, adjoining the residence of either of the plaintiffs, or either of the defendants.

If there is but one plaintiff and one defendant, and they both reside in the same town, there will generally be several adjoining towns, and the plaintiff may sue in the town in which he resides, or in any adjoining town in the same county, and before any justice in any one of such towns.

If there are several plaintiffs and several defendants, all of whom reside in the same county, but in different towns, then the number of towns in which the action may be brought, will be increased, since the action may be brought in any town in which any one of the plaintiffs or any one of the defendants resides, or in any adjoining town in the same county. The plaintiff, however, will not be permitted to bring his action in any other town than those specified. And if he does so, the defendant will not be under any obligation to appear and answer the process, but he may bring an appeal to reverse it. As to the validity of such a judgment, see *ante*, 7.

But if a defendant has absconded from his residence, then an action may be brought against him in any town in which such absconding defendant or his property may be. The object of the law in restricting a plaintiff as to the town in which he might bring an action, was for the benefit of defendants, and to protect them from the vexation, trouble and expense of attending an action in a town remote from their residence. But if a person absconds from his residence, he forfeits all claim to any special consideration as to his convenience; and the creditor is permitted to pursue his remedy by action in any town in which such defendant or his property may be at the time when the action is commenced. It may happen that the absconding defendant is in one town, while his property may be in an other; and in that case, the plaintiff may sue in either town. It may be, too, that the defendant is removing his property with the intention of secreting it within the county, or of removing it therefrom; and in such cases, the plaintiff may, in a proper case, have an attachment in any town in which the defendant or his property may be.

Again, the plaintiffs may *all* be non-residents of the county; and in that case, the action may be commenced in any town of the county in which the defendant resides; and the plaintiff need not be present in person, but may act by attorney. *Hunter* v. *Burtis*, 10 Wend., 358, 360; *Onderdonk* v. *Ranlett*, 3 Hill, 323. But if the defendant is a non-resident of the county, he must be sued in the town in which he may be at the time when the action is commenced, especially if the plaintiff is a resident of that county. See language of Opinion in *Hunter* v. *Burtis*, 10 Wend., 361. The statute does not in express terms provide for a case in which both parties, plaintiff and defendant, are non-residents.

Were it not for the restrictions of the two sections which have been cited, *ante*, 52, a plaintiff would be authorized to commence an action in any town in the county, whether the defendants were residents of the county or not. And if the plaintiff is a non-resident, and the defendant is a resident, the plaintiff may still sue in any town in the county. But a non-resident defendant, if sued by a resident plaintiff, must be sued in the town in which he may be at the time the action is commenced. If both parties are non-residents, the plaintiff's right to sue in any town in the county is not restricted, unless by the terms of the statute, which declare, that in case the defendant is a non-resident, the action *may* be brought in any town in which he may be.

The evident object of the statute was to provide, as far as possible, for the convenience of non-resident parties, whether plaintiffs or defendants. And when both are non-residents, there is no reason why the convenience of one party should be consulted more than that of the other. And the reasonable rule would be that the action might be commenced in the town in which the plaintiff or the defendant might be at the time of commencing the action; since the general provisions of the law would allow an action in any town in the county, were there no restrictions, and that general rule ought to prevail in the absence of a statute expressly forbidding it. As to the consequences of suing in the wrong town, see *ante*, 7.

SECTION III.

ISSUE WITHOUT PROCESS.

Jurisdiction of the person of the defendant can be obtained in the manner prescribed by law, and in no other way, unless a party waives some irregularity by voluntarily appearing or taking some step in the action. And, though process is generally issued for commencing actions, yet an action may be commenced without process. The statute provides: "Suits may be instituted before a justice, either by the voluntary appearance and agreement of the parties, or by process; when by process, it shall be either a summons, a warrant, or an attachment." Vol. I, 38, § 9. Parties do not generally volunteer to join issue without process. Though it frequently occurs that process is issued and served,

and that there is some irregularity in issuing it; or that it is defective in form or in substance; or that it has not been properly served. In all such cases, if the party sued appears in the action and voluntarily puts in an answer without making any objection to the defects, that will be deemed a voluntary joining of issue, and jurisdiction of the person will be complete, because an issue might be joined without any process; and irregular, and even void process, which may have been issued and served, will not, in any manner, invalidate an issue voluntarily joined. The statute cited is of value, therefore, since, if jurisdiction could not be obtained over the person of the defendant except by process, there could not be a waiver, perhaps, in case of *void* process, though as to process merely *irregular*, a different rule would be applied. When no process has been issued; or when the service of process is not sufficient to require the defendant to appear and answer it, there will not be any action pending until issue is actually joined. In one case the summons was served by copy, not personally, and the plaintiff and defendant appeared before the justice and an adjournment was had on motion of the defendant, but no issue was joined, nor any pleadings put in. The plaintiff appeared on the adjourned day and took judgment. The defendant did not appear at the trial. The judgment was held erroneous and reversed, because there was not any action pending. *Lester* v. *Crary*, 1 Denio, 81. In such a case the service of the process was not personal, and the justice, therefore, did not acquire jurisdiction by the process. And since no issue was joined, it could not be an action pending by virtue of a voluntary joining of issue.

SECTION IV.

ACTION, WHEN DEEMED COMMENCED.

When process is issued, the statute determines at what time the action is commenced. "Suits shall be considered as commenced at the times following: 1. Upon process by warrant, at the time of the arrest of the defendant; 2. Upon process by attachment or summons, on the day when the process shall be *delivered* to the constable. But if two or more suits be commenced by summons or attachment, on the same day, the suits in which the process was first served shall be deemed to have been first commenced; 3. Where the suit is instituted without process, at the time of the parties joining issue." Vol. I, 38, § 10.

The law does not make it any part of the official duty of a justice to deliver a summons, a warrant or an attachment to a constable for service; though it is entirely proper for him to do so if he pleases. And when the constable applies for the summons, at the request of the plaintiff, as is frequently the case, it is the general practice for the justice to deliver the process to him. In such a case, the justice will, of course, know precisely when the action is commenced, by the *delivery* of the process to the constable. But that knowledge on his part, and even the return

of the justice on an appeal, that the process was *delivered* by him to a constable on a specified day, is not sufficient evidence as to the time when the action was commenced. And where the statute of limitations is interposed as a defense, and it becomes important to show on what day the process was *delivered* to the constable for service, that fact must be proved on the trial before the justice, in the same manner as any other fact in the cause. Neither the knowledge of the justice that the process was issued in due time, nor his return of that fact to the county court, will prevent a reversal of the judgment, if it appears that the service of such process was not made until after the statute had attached. *Cornell* v. *Moulton*, 3 Denio, 12; *McGraw* v. *Walker*, 2 Hilt., 404. The reason why the justice cannot act upon his own knowledge of the time when the process was issued, is, because in the trial of all causes before him, he must act solely on such legal evidence as may be given before him. And he cannot in any case decide a cause upon facts within his own knowledge, if they are not legally proved before him. It may be said that the justice may have entered in his minutes, or his docket, the time of the delivery of the process to the constable. But, if this were so, the two cases last cited expressly hold, that this will not be sufficient evidence of the fact.

The statute does not require any entry in the docket in relation to the delivery of the process to a constable, though it does require an entry as to the time when the first process was issued. Vol. I, 69, § 174, sub. 2. It may be true that the docket is evidence as to the time when the process was issued. But the process may have been issued and delivered to the plaintiff. And if it was not *delivered* to a *constable* in due time, that would be of no avail as an answer of the statute of limitations. It is not the *issuing* of the process, but the *delivery* of it to a constable that constitutes the commencement of an action.

The docket of the justice will be legal evidence before him of every fact which he is required by law to enter therein. But it will not be evidence of any other facts. The return of a constable is legal evidence of the time and manner of the service of process, because the law makes it so. And in the absence of any other evidence, the action will be deemed to have been commenced at the time of the service of the process, as it appears by the constable's return. *Cornell* v. *Moulton*, 3 Denio, 12; *McGraw* v. *Walker*, 2 Hilt., 404.

But the indorsement by a sheriff or a constable, of the time of the receipt of a summons by him, is not sufficient legal evidence, as to the time when he received such process. Such an entry is not required by law, and therefore it is not evidence. *Wardwell* v. *Patrick*, 1 Bosw., 406. But it is evidence of any entry which is required by law; as for instance, a sheriff is required to indorse on an execution the precise time when he received it, and therefore his return of that fact is legal evidence.

As a general rule, fractions of a day are not noticed in legal

proceedings. *Blydenburgh* v. *Cotheal*, 4 Comst., 418; *Columbia Turnpike Road* v. *Haywood*, 10 Wend., 422. And if an action is commenced at any time on the last day before the statute of limitations has attached, it will be in time. But there are cases in which an action may have been commenced, on a specified day, beyond any question; and yet, it may be important to determine, at what specified time on that day the action was commenced. Whenever it is important to determine such time precisely, the law permits the inquiry to be made. And, when ascertained, such precise time is conclusive.

The following are some of the instances in which it may be important to determine precisely when the action was commenced. A defendant who is sued may purchase a claim on the day on which the action was commenced, for the purpose of setting it off against the plaintiff's demand. And if he purchased it before the suit was commenced, it is a legal set-off, though it would be otherwise if not owned before the action was commenced. Again, a sheriff may be sued for the escape of a prisoner from the jail limits. But if the action is not commenced until after the return of the prisoner, it will be too late, for the return will be a legal defense in behalf of the sheriff. *Wiggin* v. *Orser*, 5 Duer, 118.

The important inquiry now occurs, when is an action commenced in these cases in which the precise time is material? In the supreme court the action is commenced at the time of the *service* of the summons. Code, §§ 99, 127; *Wiggin* v. *Orser*, 5 Duer, 118. But the statute has prescribed a different rule in justice's courts. The statute which has been cited declares that a suit shall be deemed to be commenced by summons or attachment on the day when the process shall be *delivered* to the *constable*. Vol. I, 38, § 10, sub. 2. See *Koon* v. *Greenman*, 7 Wend., 121.

Before the enactment of the Code, and before the Revised Statutes of 1830, it was held that both in justices' courts, *Boyce* v. *Morgan*, 3 Caines, 133, and in courts of record, the *issuing* of the process was the commencement of the action. *Bronson* v. *Earl*, 17 Johns., 63; *Burdick* v. *Green*, 18 Johns., 14; *Visscher* v. *Gansevoort*, 18 Johns., 496; *Ross* v. *Luther*, 4 Cow., 158; *Hogan* v. *Cuyler*, 8 Cow., 203. In a justice's court, the single question to be settled now is, at what time was the process *delivered* to the *constable* for service. Though there are cases in which the actual *service* of the process is made the test, as where two actions are commenced on the same day, then that action is first commenced in which the process was first served. When the process is actually delivered to the constable, there need be no question as to the precise time when it was done.

The statute has not declared, in terms, whether the delivery of the process to the constable must be actual and personal, or whether it may be constructive, as by a delivery of it to his wife, if he is absent from home. In the absence of any adjudication of this question by the supreme court, the safe rule will be to deliver

the process to the constable personally. In the following class of cases it is necessary that a party should be certain what the rule is as to the time when an action is commenced.

A suit is commenced on a promissory note by delivering the summons to a constable before the note is due. The service of the process may not be made until after the note is fully due; and yet the action will be prematurely brought, and the plaintiff will fail at the trial. *Hogan* v. *Cuyler*, 8 Cow., 203; Vol. I, 458. The same rule applies to a case of set-off; for, if the demand is purchased by the defendant after the delivery of the summons to a constable, though before it is actually served, it cannot be set off. *Ib.* So, in all cases, if the process is delivered to the constable to serve before the cause of action is perfect, it will not be of any avail that the service was not made until after a perfect right of action existed. In thus stating the rule as to the time when an action is deemed to be commenced, the provisions of the Code have not been overlooked. As we have seen, *ante*, 57, an action is commenced in the supreme court at the time of the *service* of the summons. Code, §§ 99, 127; *Wiggin* v. *Orser*, 5 Duer, 118. And, again, by § 64, sub. 15 of the Code, in relation to justices' courts, it is provided. "The provisions of this act, respecting forms of action, parties to actions, the rules of evidence, *the times of commencing actions*, and the service of process upon corporations, shall apply to these courts." A careful examination of the question will render it plain, that the reference to the times of commencing actions relates to the statute of limitations prescribed by the Code. And it is evident that the rule is precisely the same, either in a justice's court or in a court of record, as to the time within which an action must be commenced. And this is what was intended by the Code, § 64, sub. 15, just cited. But to declare within what times actions shall be commenced, is a totally different thing from that of declaring *what acts* shall constitute the commencement of an action. Full effect is thus given to the provisions of the Code, without, in any manner, interfering with the statute which provides what shall constitute the commencement of an action in a justice's court, which is by the *delivery* of the summons or attachment to the constable. There is one more fact which ought to be mentioned in this connection. The Code, § 8, declares that certain provisions, including §§ 99 and 126, shall apply to all the courts in this state.

But this general language cannot affect the question, for there are many things in some of the sections thus referred to, which cannot have any application to a justice's court. The true construction of section eight is, that the provisions of those sections referred to shall apply so far as is consistent with the objects of the Code. And to construe it, so far as justices' courts are concerned, as relating to general rules of law, rather than as to the rules of practice of that court. And finally, there is an other view which shows that this is the correct construction of the Code. By § 64, subd. 15, it is expressly declared what provisions of the

Code are to apply to justices' courts. And no rule is more familiar than that which declares that the express mention of certain things or acts shall exclude the idea that any others were intended. It would have been sufficient to state the true rule on this question and leave the matter there. But the practical importance of the rule may render such explanation more satisfactory to those who would wish to know the reasoning by which it is established.

CHAPTER IV.

LONG SUMMONS.

SECTION I.

LONG SUMMONS, WHEN PROPER.

This is the general or common process used for commencing actions in justices' courts. There are many cases in which a plaintiff has his choice whether to take this process, or to take a warrant, or a short attachment, or a long one, or a replevin process. But there are some very important distinctions to be observed in relation to these kinds of process. A long summons is always issued on the mere request of a plaintiff, without any proof or any security in any case whatever. But neither a short summons, nor a warrant, nor an attachment, whether a long or a short one, nor a replevin process, can be issued without due proof, and, in most instances, by also giving security. In treating of warrants, short summonses, attachments and replevin, the practice will be fully stated in relation to proof, security, &c.

It must not be understood, however, that a plaintiff may always take a long summons for commencing his action, even though he may prefer to do so. For, though there are many cases in which he may take that process, or may elect to take some other one, as has just been stated, yet there are cases in which a long summons cannot be legally issued. There are some general rules, which, if observed, will leave but little chance to err in selecting the proper process to be issued. If all the parties, plaintiffs and defendants, are residents of the county, a long summons *may*, in all cases, be issued. To this rule there is no exception, unless in those instances in which some statute requires a warrant, or some other process, to be used instead. *Walker* v. *Cruikshank*, 2 Hill, 296.

If all the defendants are residents of the county, a long summons *may* always be taken. And this is the rule, even when the plaintiffs are non-residents, if the defendants are residents. For, though a non-resident plaintiff in such a case might have a short summons, on proper proof and security, he is not bound to take it, but may take the ordinary long summons. This process is always proper to be issued against a railroad corporation, if the track of the road runs through the county. *Johnson* v. *Cayuga, &c., R. R. Co.*, 11 Barb., 621; *Sherwood* v. *Saratoga, &c., R. R. Co.*, 15 Barb., 650; *Belden* v. *N. Y. and Harlem R. R. Co.*, 15 How., 17. It is said that in such cases, a railroad corporation is to be treated

as a freeholder and an inhabitant of the county. 15 Barb., 650, and 15 How., 17. The same rule is applicable to plank road and turnpike corporations. And in all cases in which corporations of any kind are located in any county, they may be treated in the same manner as natural persons of that county are, either as to suing or being sued, except that the service of process on corporations must be on such of their officers as the law prescribes.

Formerly corporations might sue, but could not be sued in justices' courts. This rule has been changed by statute, and corporations may now either sue or be sued in these courts. Laws 1847, ch. 470, § 45; and see the three cases last cited; see also Const. 1846, art. 8, § 3; Code, § 64, sub. 15.

A non-resident plaintiff may waive his right to a short summons, and take a long summons without making any affidavit or giving any security. *Nichols* v. *Tracy*, 1 Sandf., 278; *Kelly* v. *Kelly*, 2 E. D. Smith, 250.

Defendants who are *joint debtors* (not joint and several debtors), may be sued by this process where some of the defendants are residents, and others of the defendants are non-residents of the county. *Burghart* v. *Rice*, 2 Denio, 95; *Murphy* v. *Mooney*, 2 Sandf., 288. But a different rule prevails, it would seem, when the debt is *several*, or *joint* and *several;* as where the defendants are makers and indorsers of a promissory note. The following case will illustrate this: Van Cott sued Harriott in an action of trespass, for unlawfully taking his goods, and the facts of the case were as follows: Harriott had brought an action in the marine court of the city of New York against one Bailey as the maker, and Van Cott as the indorser of a promissory note. The suit was commenced by a long summons, which was served on Van Cott more than six days before the return day, and on Bailey less than six days before the return day. Van Cott resided in the county of Kings, and Bailey in the city of New York. As the summons had not been served on Bailey in due time, Harriott discontinued the action as to him, and took judgment against Van Cott, who did not appear. An execution was issued on this judgment and was levied on Van Cott's goods, and he brought his action against Harriott for authorizing the taking of his goods on that execution. The supreme court held that the action was maintainable. It was attempted, by counsel, to make the case one like that of joint debtors. But the court said: "That doctrine may perhaps be maintained where the suit is against joint debtors. But here the suit was against the maker and the indorser of a promissory note, who might have been sued separately." *Harriott* v. *Van Cott*, 5 Hill, 285, 286. It is worthy of notice, that in the case just cited, the action would not have been properly brought, even if the defendants had been sued separately. Bailey was a resident, and the summons was not served on him six days before the return day. So that he was not legally sued. Again, Van Cott was a non-resident, and he was sued by a long summons, which was served more than six

days before the return day. And if he had been sued alone it would clearly have been erroneous, even if the judgment was not entirely void, as it really was, since there was no appearance by him. The resident defendant was discharged too, which operated to sever the action, and make it a separate one against the defendant, Van Cott, alone, and as such it was clearly void, because he was a non-resident of the county.

This case does not, therefore, expressly decide that a joint and several note, or a note made by a resident maker and a non-resident indorser, may not be sued by a long summons when the process is properly served on the resident, and a judgment taken against him jointly with the non-resident indorser.

It is difficult to see any good reason why joint and several debtors may not be sued in the same manner as joint debtors. One of several joint and several debtors is liable to pay the whole debt, just as much as though they were joint debtors. And, if the plaintiff so elects, it is difficult to understand why he may not sue on the joint liability, since his right of action is joint as well as several. There would not be any greater inconvenience to the defendant than there would be if his debt were a joint debt, and not a joint and several one. In the case of *Burghart* v. *Rice*, 2 Denio, 95, which has been cited to show that joint debtors may be sued by long summons, the court in referring to Cowen's Treatise, said, "and he likens it to the case of one of several defendants who, if he were a sole defendant, would be privileged against being sued in a particular manner, but when prosecuted with others, may be proceeded against in the ordinary way. This I think is the true rule." In the absence of an express adjudication, the safe course would be, not to sue any but joint debtors, by a long summons, when one of the defendants sued is a non-resident of the county. If the parties are severally liable, a judgment may be obtained against any of them by such process as is appropriate when they are separately sued.

Under the statute against *joint debtors*, authorizing a plaintiff to proceed to judgment where all the defendants have not been brought in, judgment may be entered as well where the defendant not brought in is an *infant*, as where he is an adult. *Mason* v. *Denison*, 11 Wend., 612; *S. C.*, 15 Wend., 64.

Where the action does not arise on contract, but is for some wrongful or unlawful act, the defendants are not *joint debtors*, notwithstanding the fact that they may be sued jointly.

Where some of the plaintiffs are residents, and some of them non-residents, a long summons is proper if the defendants are all residents; or if the action is against *joint debtors*, and some of them are residents, though others may be non-residents.

But a long summons is never a proper process if the defendants are all non-residents of the county. Vol. I, 75, § 215; Laws 1831, ch. 300, § 33. Nor in those cases in which the action is one not arising on contract, but is for a tort or wrongful act if the defendant is a non-resident. Vol. I, 74, 75, §§ 213, 215; Id.,

38, § 11. Nor in an action to recover against a party if the claim is for the recovery of money collected by a public officer; or for official misconduct or neglect of duty; or for damages for misconduct or neglect in any professional employment if the defendant is a non-resident of the county. Vol. I, 74, § 212. A warrant is the proper process in such cases. And in an action against an attorney to recover back money which it is claimed that he has wrongfully taken from the plaintiff by charging illegal fees in bills of costs collected by him of the plaintiff, a short summons is not proper even where the defendant is a non-resident. Of course, a long summons would not be proper against such a non-resident. A warrant is the only legal process in such a case. *Waters* v. *Whittemore*, 22 Barb., 593; *Whitney* v. *Shufelt*, 1 Denio, 592, 594; Vol. I, 38, § 11. It has been said that a person who has no legal residence any where may be sued by a long summons, as none are exempted from that process by statute but those who "shall *reside* out of the county. *Barnes* v. *Harris*, 375, 378, opinion of the court; and see Vol. I, 75, § 215.

The cases must be rare indeed in which the defendant has no place of residence. "Every person must have a domicil somewhere, and he can only have one domicil at one and the same time. Every person has a domicil of origin which he retains until he acquires another; and the one thus acquired is in like manner retained until he acquires a third domicil. The existing domicil always continues until another is acquired." PAIGE, J., *Crawford* v. *Williams*, 4 Barb., 518, 519. The terms residence and domicil are said to mean the same thing so far as they relate to the residence or non-residence of the defendants. CLERKE, J., in *Lee* v. *Stanley*, 9 How., 277; and see, In matter of *Wrigley*, 8 Wend., 142; 2 Kent's Com., 430, note *d*.

If this view is correct, a party who is not a resident of the county in which he is sued, and who never was such, cannot be sued by a long summons, since he must of necessity have a residence somewhere, and that residence, wherever it may be, will make him a non-resident. This construction harmonizes with the intention of the law, which evidently is, that all persons who reside out of the county, and all persons who are not residents of the county, shall not be delayed so long as might be done if a long summons were issued. The following section of the statute illustrates this view of the question: "The first process against freeholders, and against inhabitants having families, except as is otherwise hereinafter directed, shall be a summons; *but no person shall be proceeded against by summons out of the county in which he resides.*" Vol. I, 38, § 11. This section was in force before the non-imprisonment act of 1831. And before that year, there was no such process as a short summons. It was either a long summons, or a warrant, or a long attachment. And if the defendant was a non-resident of the county, he must be sued by *warrant* in all cases, whether the demand arose upon contract or for a tort. The non-imprisonment act of 1831, changed the law so far as to

prohibit a warrant in all cases arising on contract express or implied, except in certain specified cases. But in those excepted cases, and in actions for torts, the law still remains unchanged. In actions arising on contracts, the general rule established by the statute of 1831, ch. 300, was, that a short summons was the proper process, unless a short attachment was taken, which, in a proper case, was equally valid.

A summons must be either a short or a long one. There is no such process as a five days' summons, which is recognized by law as valid; and a judgment rendered on such process will be reversed. *King* v. *Dowdall*, 2 Sandf., 131. A long summons is so called to distinguish it from a short one; and because a longer time intervenes between its date and return day, than in a short summons.

"A summons shall be directed to any constable of the county where the justice resides, commanding him to summon the defendant to appear before the justice who issued the same, at a time and place to be named in such summons, not less than six, nor more than twelve days from the date of the same, to answer the plaintiff in the plea in the same summons to be mentioned." Vol. I, 38, § 12. The rules to be observed in filling up and issuing process have been already discussed. See *ante*, 42.

Form of summons.

TOWN OF MAYFIELD, } ss.
FULTON COUNTY, }

The people of the State of New York: To any constable of said county, GREETING: We command you to summon John Doe, to appear before David Kennedy, Esq., one of our justices of the peace of the town and county aforesaid, on the 12th day of November, 1864, at ten o'clock in the forenoon, at his office, in the town of Mayfield, in the county of Fulton, to answer Richard Roe, in a civil action (*to recover damages for an injury to personal property;* or whatever the cause of action may be), to his damage of two hundred dollars or under; and have you then and there this precept: Hereof, fail not at your peril. Witness our said justice at the town aforesaid, the third day of November, in the year of our Lord 1864.

DAVID KENNEDY, *Justice of the Peace.*

Where it appears from the return of a justice, on an appeal, that he issued a summons, giving the names of the plaintiff and defendant therein, and also the time and place of its return; the court will presume that the summons was in the proper form, and an objection that it does not appear from the return that the summons was directed to a constable of the proper county, is not tenable. *Potter* v. *Whittaker*, 27 How., 10. If there was any informality in the process, it was the duty of the objecting party to have caused it to appear by the return. *Ib.*

When the parties sue or are sued in their individual names, without any addition as to office, or other representative character, it will be sufficient to state the names of the parties simply. But, if the action is brought by one in an official or representative capacity, the name of the party must be stated, together with

the name of the office, or the representative character in which he sues. The Code requires all actions to be brought in the name of the real party in interest. Code, § 111. Though this does not affect the rule where the party suing is acting in an official or representative character, and where he is not the real party in interest.

The following illustrations will serve to show the manner in which the character of the parties may be stated in the process:

Infant plaintiff, by guardian.] To answer John Smith, an infant, by William Smith his guardian.

People plaintiffs for a penalty.] To answer the People of the State of New York.

Plaintiff suing for a penalty, &c.] To answer George Clark, who sues as well for himself as for the overseers of the poor of the town of Mayfield, in the county of Fulton.

Executors.] To answer A. B. and C. D., executors of the last will and testament of E. F., deceased.

Surviving executor.] To answer A. B., surviving executor of the last will and testament of C. D., deceased.

Administrator.] To answer A. B. and C. D., administrators of all and singular the goods and chattels, rights and credits, which were of E. F., deceased.

Surviving administrator.] Same as surviving executor, but saying administrator instead of executor.

Surviving partner, or other joint creditor.] To answer A. B., survivor of A. B. and C. D.

Husband and wife.] To answer A. B. and C. D., his wife.

Assignee of an insolvent debtor.] To answer A. B., assignee of C. D., an insolvent debtor.

Assignee of a jail bond.] To answer A. B., assignee of Bradford T. Simmons, Esq., sheriff of the county of Fulton.

Overseers of poor.] To answer A. B. and C. D., overseers of the poor of the town of Broadalbin, in the county of Fulton.

By supervisor.] To answer William Vail, supervisor of the town of Mayfield, in the county of Fulton.

Board of supervisors.] To answer the board of supervisors of the county of Fulton.

By a sheriff.] To answer Austin Kasson, Esq., sheriff of the county of Fulton.

By corporation.] To answer the Amsterdam and Fish House Plank Road Company. Or, if it is any other corporation, let it be stated by the actual name of the corporation.

Commissioners of highways.] To answer A. B. and C. D., commissioners of highways of the town of Johnstown, in the county of Fulton.

Superintendents of poor.] To answer A. B., superintendent of the poor of the county of Fulton.

Board of excise.] To answer the board of commissioners of excise of Fulton county. *Pomeroy* v. *Sperry*, 16 How., 211; *Board, &c., of Saratoga Co.*, v. *Doherty*, 16 How., 46.

Town is plaintiff.] To answer the town of Johnstown, in the county of Fulton.

Bank is plaintiff.] To answer the Farmers' Bank of Amsterdam. Or, if the case is proper, To answer the President, Directors and Company of the Fulton County Bank.

School district trustee.] To answer A. B. and C. D., trustees of school district number one in the town of Johnstown, in the county of Fulton.

Fictitious name for defendant, in summons or warrant.] To summon John Doe, the real name of the defendant being unknown to the plaintiff.

Where the defendant is a corporation, the name must be described in the same manner that it is done where a corporation is plaintiff.

Corporation defendant.] You are commanded to summon the Mayfield and Vail's Mills Plank Road Company, &c.

Town is defendant.] To summon the town of Johnstown in the county of Fulton, &c.

Town officer is defendant.] To summon A. B., supervisor of the town of Northampton, in the county of Fulton.

The foregoing instances are sufficient to illustrate the manner in which the names of parties or corporations are to be stated, whether suing in their own right or in an official or representative capacity. The principal point to be attended to is, to state fully and truly the actual name of the plaintiff or defendant, with such additions as to character as are required by law.

SECTION II.

SERVICE OF SUMMONS.

The law makes it the duty of every constable to serve such process as is directed and delivered to him for service. *Ante*, 49, The usual practice is for constables to serve a summons, or other process, which a justice issues for commencing actions.

But a justice may depute a private citizen to serve a summons, warrant, or attachment, or any other civil process, except a venire. *Ante*, 48, 50. But the person so deputed must be twenty-one years of age, and not a party in interest in the action. Vol. I, 72, § 196.

No plaintiff, therefore, can be *deputed* to serve a summons in his own favor.

A constable, however, may serve a summons in his own favor, when he is plaintiff. *Putnam* v. *Man*, 3 Wend., 202.

His return will be treated in the same manner as in any other case. He may charge the same fees, and he will be liable to the same actions for a false return. *Ib.* The statute requires that the summons shall be directed to any constable of the county in which the justice resides. *Ante*, 63. Any constable in the county, therefore, may serve a summons. And this was the rule before the Revised Statutes. *Mills* v. *Kennedy*, 1 Johns., 502.

The statute prescribes the time when a summons must be

served, in order to render it a valid service. A long summons must be served at least six days before the return day. A short summons must be served at least two days before the return day.

The manner of computing the time has already been explained. *Ante*, 45.

The summons and notice which the law authorizes in an action to recover the possession of personal property, differs from the ordinary long or short summons in several material particulars; and, among other things, it differs in relation to the time and manner of service, and the time and manner of making the return. This subject will be fully explained in another part of the work. See Replevin. The statute forbids the service of a summons upon Sunday, upon election days, town meetings, and upon Saturdays, when the person sued observes Saturday as the Sabbath. *Ante*, 46. It has been already seen, that a summons cannot, in every case, be made *returnable* in any town in the county. *Ante*, 52. But, if a summons is made returnable in a proper town, it may be *served* upon the defendant in any town in the county. A summons is limited to the territorial limits of the county. *Ante*, 6. So a constable is limited to the county in the service of civil process. *Ante*, 6. And when a summons is issued and is made returnable in some proper town in the county, such summons must be served in some one of the towns of the same county. If the summons is served on the defendant in any other county, the service will be utterly void. *Ante*, 6. It will not make any difference as to this rule, that the town in which service is made, adjoins the town in which the summons is returnable. If the service could be held to be valid out of the county, even in a town adjoining, it might, with the same propriety, be urged that the service would be valid in any part of the state.

The rule is positive, and inflexible, that a service of the summons out of the county where it is returnable, will not confer any jurisdiction over the person of the defendant. *Ante*, 6. If any judgment is rendered in pursuance of such a service, the person named as defendant may reverse the judgment upon an appeal, or he may treat it as a nullity.

If the return does not show where it was served, the legal presumption will be that the service was made in the proper county. *Potter* v. *Whittaker*, 27 How., 10; *Com. Excise* v. *Doherty*, 16 How., 46, 48; Saratoga county court.

A constable has no right to unlatch the outer door of the defendant's dwelling house, for the purpose of serving a summons; and such an entry will be a trespass. If, however, on knocking at the outer door, or ringing the door bell, any proper person appears, and invites him into the house, he may lawfully enter therein, and if the defendant is there he may serve the summons upon him as lawfully as in any other place.

So if a constable finds the outer door of the defendant's house open, he may lawfully enter the house to serve a subpœna. *Hager* v. *Danforth*, 20 Barb., 16. The same rule applies to the

service of a summons, and the constable may legally serve the summons, in such a case, even though he is ordered to leave the house. He is not bound to leave it until he can serve his process, and if an attempt is made to put him out of doors, for the purpose of preventing such service, he may resist such attempt, if he does nothing more than is necessary in self-defense. *Ib.*

It is frequently said that a constable is not bound to look for the defendant at any place except his dwelling house. No reported case in this state decides any such point as that; and the statement is not correct. It is not easy to lay down a rule which shall be applicable in every instance. A constable is authorized to serve a summons in any town of the county in which he may find the defendant. And it is his duty to serve the process upon the defendant wherever he may find him in the county. The law makes it his duty to look for the defendant; and the statute does not say that he need not look any where but at the defendant's residence. Again, the statute gives a traveling fee, and this is computed from the defendant's residence, or from the place *where he shall be found.* Vol. 1, 65, § 152.

So the statute permits a copy of the summons to be served by leaving it at the residence of the defendant; but that service is permitted in those cases only in which the defendant *shall not be found.* Vol. 1, 39, § 13. It is sometimes of the greatest importance to a plaintiff that the process should be served, and the object of the law was to provide a person whose duty it is to promptly and efficiently serve such process.

Now, if a constable is not bound to look for the defendant at any place but at his residence, he would not be under any obligation to go a single mile to serve the summons, when such search would be entirely successful.

A constable may not be compelled to travel over an entire county; but he can inquire at the residence of the defendant, and of any other persons who may know where he may be found. And he is bound to make some such efforts before he has discharged the duty which the law has imposed upon him. A willful refusal to discharge the duties of his office is a misdemeanor. *Ante*, 49.

And if the plaintiff necessarily sustains any loss from his willful or negligent conduct, there is no good reason why he should not be liable to pay the resulting damages.

The statute declares that a summons shall be served by *reading* it to the defendant, and, if he requires it, by delivering a copy of it to him. Vol. 1, 39, § 13.

It is a very rare thing, indeed, that a summons is actually and literally read to the defendant. The common practice is, for the constable to state the contents of the summons to the defendant, by informing him of the name of the plaintiff, of the defendants, of the name of the justice who issued the summons, and of the day, hour, and place of appearance therein mentioned. If the

defendant does not object to this mode of service it is entirely valid. The law requires the reading of the summons to the defendant, so that he may know its contents; and, if he is satisfied to have the contents stated, instead of being read, he may waive the reading. The omission to except to such mode of service is deemed a waiver of reading the process. But a defendant may insist upon having the summons served in the manner prescribed by the statute; and, in that case, the constable is bound to *read* the summons to him. When the service is made by stating the contents of the summons to the defendant, the statement should be full and explicit.

In one case, *Carroll* v. *Goslin*, 2 E. D. Smith, 376, the constable held up a piece of paper, and said to the defendant, "here is a paper for you in the marine court," and the constable then left the defendant. This service was held to be defective, and a new trial was ordered under the provisions of the Code, § 366; Vol. I, 30. If there are several defendants, the service should be made upon each of them in due time.

When the constable has once commenced the service of a summons upon a defendant, he cannot evade the service by leaving the constable, or by running away from him. The constable should continue the service in the same manner as though the defendant had remained, and the service will be entirely valid. It was the fault of the defendant himself, that he did not hear the service, and he will not be permitted to take advantage of his own wrong.

If the defendant is in his dwelling house, and he refuses to admit the constable, the summons may be served by reading it at the door in a loud voice, and by fastening a copy thereof upon the door, proclaiming at the same time that he has done so. The constable should be certain, however, that the defendant was in the house at the time of such service, or he should not return that the summons was personally served. If the defendant was absent, the service would not be personal, and the return would be false. If, however, the constable sees the defendant in his house, and commences such service, the officer may then continue it, and if the defendant leaves him, the service will be as valid as in any other case.

There are some cases in which the service *may* be by copy, and there are other cases in which the service *must* be by copy. If the defendant cannot be found, the summons may be served by leaving a copy thereof at the defendant's last place of abode, with some member of the family, of suitable age and discretion, which is fourteen years; and at the same time informing the person with whom the copy is left of the contents thereof. Such information should be the name of the justice who issued the summons, the names of the plaintiff and the defendant, and the day, hour and place of appearance mentioned in the summons.

The service by copy will not be valid, unless it is made upon some member of the family, nor will it be valid, even when served

upon a member of the family, if the person with whom the copy is left is not of suitable age and discretion. Such service must be made at the residence of the defendant, and therefore, the service of a copy upon a member of the defendant's family, at any other place will be a nullity.

The officer must learn in the best manner that he can, which is the defendant's last place of abode; so he must learn as well as he is able, whether the person on whom the copy is served, is a member of the family, or of suitable age and discretion.

No service should be made upon them, until the constable is satisfied that the service will be proper and legal if made upon them. When the defendant is a non-resident of the county, the service must be personal. If the defendant is merely traveling through the county, or if he is in the county for a single day on business, no service can be made by leaving a copy at the hotel at which he may stop for a meal. The hotel is not his place of abode within the meaning of the statute. *Dudley* v. *Staples*, 15 Johns., 196.

There are a few cases in which the service of a summons by copy may be important. If the demand is nearly barred by the statute of limitations, at the time when the summons is issued, and the statute has since attached, it may then be important that a legal service by copy should be made, since on a proper return of such service by copy, a new summons may be issued, which, if properly served, will continue the action, so as to relate back to the time when the first summons was issued. *Ante*, 56; *Cornell* v. *Moulton*, 3 Denio, 12. Such a service may also be of importance in those cases in which the plaintiff wishes to avoid a set-off which the defendant has purchased since the first summons issued. So, again, the service of a copy is sometimes material in those cases in which a warrant may be issued. See Warrant. But, unless it is in some such case, the service of a summons by leaving it at the defendant's residence, with some proper person, will never be of any value as a means of jurisdiction over the person of the defendant. The justice cannot proceed in the action and render a judgment, until there has been a *personal* service of the summons upon the defendant, either by reading or stating its contents to him; or, by delivering a copy of it to him personally. A summons, however, in replevin actions need not always be personally served. See Replevin.

There are some statutory provisions in relation to the service of process upon corporations, that ought to be given in full.

"Every railroad corporation in this state, shall, within thirty days after this act shall take effect, designate some person, residing in each of the counties through or into which such railroad may run, on whom process, to be issued by a justice of the peace, may be served, and shall file such designation in the office of the clerk of the county where the person so designated shall reside, and a copy of such designation duly certified by such clerk, shall

be evidence of such appointment; and the service of any process upon the person so named, to be issued by any justice of the peace in any civil action or matter of which such justice may have jurisdiction, shall be as valid and effectual, as if served upon the president or any director of any such corporation, as now provided by law." Laws 1854, ch. 282, § 14.

"In all cases where such designation shall not be made as aforesaid, and where no officer of such corporation shall reside in the county, on whom process can be served according to the existing provisions of law, the process mentioned in the next preceding section may be served on any local superintendent of repairs, freight agent, agent to sell tickets, or station keeper of such corporation, residing in such county, which service shall be as effectual in all respects, as if made on the president or any director of such corporation." Id., § 15.

Foreign corporations which transact business in this state, are also required to appoint or designate some person residing in each county, in which they transact business, upon whom process may be served, and to file such designation in the office of the secretary of state. Laws 1855, ch. 279, § 1. In case of a refusal or neglect to make such designation, and process cannot otherwise be lawfully served, such service may be made upon any person found acting as agent in this state for such corporation. Id., § 2.

The term process includes any writ, summons or order, issued or made for the commencement of an action, by any court, officer, or magistrate. Id., § 4.

If a justice has jurisdiction of the subject matter of the action, he may acquire jurisdiction over a foreign corporation as well as in any other case. And even before the enactment of this statute which authorizes a compulsory appearance by the corporation, it was well settled that a voluntary appearance by a foreign corporation would give the justice jurisdiction. *Paulding* v. *Hudson Manuf. Co.*, 2 E. D. Smith, 38.

A recent statute relating to express companies, may be useful in this connection: "Every corporation or association, partnership or person, doing business in this state under the name or style of an 'Express Company,' or under any other name signifying the same kind of business, shall, within thirty days after this act takes effect, designate some person residing in each of the counties in this state through or into which such express may run, on whom process to be issued by a justice of the peace may be served, and shall file such designation in the office of the clerk of the county where the person so designated shall reside, and a copy of such designation duly certified by such clerk, shall be evidence of such appointment, in all courts and places; and the service of any process upon the person so designated or named, to be issued by any justice of the peace residing in the town in which the person so designated shall reside, in any civil action or matter of which said justice may have jurisdiction, shall be as valid and effectual as if served upon the president, or any

director of any such corporation, or upon any officer of any such association, or upon any of said partners, persons or person, as now provided by law." Laws 1864, ch. 411, § 1.

"In all cases where such designation shall not be made as aforesaid, and when no such officer, person or partner referred to in the last section, shall reside in the county on whom process can be served, according to the existing provisions of law, the process mentioned in the next preceding section may be served on any local or general agent, agent to receive freight or parcels, or route agent, or messenger, of such corporation, association, partnership, or person residing in such county, when issued by any justice of the peace residing in the same town with the person upon whom it is served, which service shall be as effectual in all respects as if made on the president, or any director of such corporation, or officer of such association, or partner or person referred to in the next preceding section." Id., § 2.

Where a corporation is a defendant, the summons must be served upon the president, or other head of the corporation, secretary, treasurer, a director, or managing agent thereof. The Code provides as follows: "The summons shall be served by delivering a copy thereof, as follows: 1. If the suit be against a corporation, to the president or other head of the corporation, secretary, cashier, treasurer, a director or managing agent thereof; but such service can be made in respect to a foreign corporation only when it has property within this state, or the cause of action arose therein, or where such service shall be made within this state, personally upon the president, treasurer, or secretary thereof." Code, § 134, sub. 1.

The provisions of this section are made applicable to justices' courts, by virtue of Code, § 64, sub. 15; Vol. I, 11; and see Laws 1847, ch. 470, § 45. Such service must be made by delivering a copy of the summons personally to one of the officers, or the managing agent thereof. A managing agent is one whose agency extends to all the business of the corporation. *Brewster* v. *Michigan, &c., R. R. Co.*, 5 How., 183.

A foreign railroad corporation whose whole road and traffic are without the limits of the state, and which has no office within the state, is not a corporation doing business within this state, although tickets for passage over its road are sold by its agent here. *Doty* v. *Michigan Central R. R.*, 8 Abb., 427. One who merely sells tickets for them here, in such a case, is not to be deemed a managing agent upon whom a service of process may be made under the provisions of the Laws of 1855, quoted *ante*, 70.

An agent of an insurance company, properly appointed and qualified to procure and effect insurance for the company, residing at a different place from where the principal office of the company is located, is such a "managing agent" that legal service of a summons and complaint against the company may be made by serving him. *Bain* v. *Globe Ins. Co.*, 9 How., 448. But most of the actions which will be brought in a justice's court, will be in

those cases in which the corporation is located in the county, and a service can be made upon some of its officers.

When the defendant is a railroad corporation whose road runs into the county or through it, the summons may be served upon any officer thereof, as has been already explained. But, in addition to that, a railroad corporation is required to designate some resident of the county, through or into which such road may run, on whom process issued by a justice of the peace may be served; such designation must be in writing and filed with the county clerk of such county. *Ante*, 69, § 14. If such designation is made as required by law, the summons may be served upon such person so designated. *Id.* If no such designation is made by the company and there are no officers such as have been mentioned residing in the county, then the summons may be served on any local superintendent of repairs, freight agent, agent to sell tickets, or station keeper of such corporation, if they reside in the county. *Ante*, 70, § 15.

It must be remembered that, where the defendant is a corporation, the service of the summons upon any of the persons mentioned must be made by delivering a copy of it to them personally. Whenever the summons is properly served upon any such officer or agent in the manner required by law, that will be a valid personal service upon the corporation.

The constable is required to make and sign his return. Vol. I, 39, § 14. But it has been held that the justice may write the return, if it is done in the presence of the constable and at his request. *Reno* v. *Pinder*, 6 E. P. Smith, 298; and see *Borrodaile* v. *Leek*, 9 Barb., 611; and see *ante*, 42.

The return must be made and the summons returned, before the time for appearance mentioned therein.

The usual and the proper practice is, to return it as soon as it can be conveniently done after the service. In an action for the recovery of personal property, the statute requires that the return shall be made *forthwith* after the taking of the property and the service of the papers upon the defendant.

The return must be in writing; it must be indorsed upon the summons; it must state the *time* and the *manner* of such service; and the constable must sign his name to such return. Vol. I, 39, § 14. It is a valid service and a proper return thereof, which confers jurisdiction upon the justice to act.

The justice has no authority to proceed in the action, in the absence of any return. And if the return is defective in a material point, he will not have any authority to proceed. If the return does not show the *time* when the summons was served on the defendant, it is defective and the justice has no jurisdiction. *Wheeler* v. *Lampman*, 14 Johns., 481. The return may also be defective for not showing the *manner* of the service. The return must show that the service was a *personal* one before the justice will have legal evidence that there was a legal service, which is sufficient to authorize him to proceed and render a judgment.

The return may also show affirmatively that the service was not sufficient or legal. For instance, if the return shows that a long summons was served but five days before the return day; in that case the justice would have full and fair notice by *affirmative* evidence that the service was not sufficient. The rule may be summed up thus: The return must show distinctly that the service made was such as is in pursuance of the law, and the legality of the service must appear *affirmatively* on the face of the return itself. See *Sherwood* v. *Saratoga, &c., R. R. Co.*, 15 Barb., 650.

When there are several defendants, the return ought to show upon which of them the summons was served, and the time and manner of service upon each of them. If there are two defendants named in the summons, and a personal service is made upon one of them, but not upon the other, the return may show a valid service upon one of them, and it need not notice the other. *Fogg* v. *Child*, 13 Barb., 246. This is upon the ground that, if the defendants are joint debtors, a valid service upon one of them is sufficient to authorize a judgment against both defendants in form. Vol. I, 56, § 113. So if the action is for a tort, either defendant may be sued, and therefore the defendant not served may be disregarded, and it will be an action against the one served with process.

But, notwithstanding the case just cited, it is the better practice, to return distinctly in every case, what was done as to each of the defendants. If one is served, state the time and manner of the service. If one of the defendants was not found, or if the service was by copy, then state such facts. In this way, justice will be done to all parties, and besides that, the record will show precisely what has been done, as well as what has been omitted, in relation to the service of the process.

The proper forms for making a return will be given in a subsequent place in this work. *Post*, 74, 75.

The return upon a summons which is issued against a corporation, must state such facts as will show affirmatively, that the service was made upon a person on whom such service is valid as a service upon such corporation. It should state that the person served was the president or secretary, &c., of the company, and should show that the service was made by delivering a copy of the summons to such person, and the time of such service. When the defendant is a railroad corporation, and there are no officers resident in the county, and no person has been legally designated by the company as a person upon whom process may be served, the return should state these facts, and then show a service upon a freight agent, or other person, upon whom a service is legal. The return of the constable that the person served is an officer of the corporation, is sufficient evidence of that fact. *N. Y. and Erie R. R. Co.* v. *Purdy*, 18 Barb., 574; *Wheeler* v. *N. Y. and Harlem R. R. Co.*, 24 Barb., 414.

So, when the defendant is a railroad corporation, and there are no officers of the company residing in the county, and no

person has been designated as a person upon whom process may be served, the constable's return of those facts is sufficient evidence of such facts; and also that the person served was a freight agent of the corporation. *N. Y. and Erie R. R. Co.* v. *Purdy*, 18 Barb., 574.

If the return does not state the *time* when the summons was served, any judgment which may be rendered upon it, will be reversed upon an appeal. *Wheeler* v. *Lampman*, 14 Johns., 481; *Stewart* v. *Smith*, 17 Wend., 517; *Bromley* v. *Smith*, 2 Hill, 517. The same rule applies as to stating the *manner* of service. *Ib.*

If the return is mistaken or false, the defendant may allege that as error in fact, on an appeal; and if it is proved that the return is mistaken, or false, the judgment will be reversed. *Allen* v. *Martin*, 10 Wend., 300; *Fitch* v. *Devlin*, 15 Barb., 47; *Wheeler* v. *N. Y. and Harlem R. R. Co.*, 24 Barb., 414; *N. Y. and Erie R. R. Co.* v. *Purdy*, 18 Barb., 574.

The defendant may show on the return day of the summons, that there was no legal service of the process upon him, or that there was not any service of it at all upon him. *Wheeler* v. *N. Y. and Harlem R. R. Co.*, 24 Barb., 414; *Van Rensselaer* v. *Chadwick*, 7 How., 297. It is sometimes said that the return is conclusive whenever it comes in question collaterally. This may be true in some cases. For instance, in *Putnam* v. *Man*, 3 Wend., 202, a constable returned that he had served a summons in his own favor, in an action in which he was plaintiff. The justice rendered judgment upon this return; an execution was issued thereon, and the defendant arrested. He then brought an action for a false imprisonment, and offered to prove that the return was false. The court held that in this action the return was conclusive. It will be seen that the validity of the return was collaterally, not directly in question. But in those cases in which an action is brought upon the judgment, the defendant may show that there was no jurisdiction over his person, because there was no process served upon him. *Shumway* v. *Stillman*, 6 Wend., 447; *Noyes* v. *Butler*, 6 Barb., 613; *Hard* v. *Shipman*, 6 Barb., 621, 623.

The principle is this, a judgment is conclusive upon the parties to the action; but if there never was a service of the process upon the defendant, there is no jurisdiction, and therefore as to him it is not a judgment.

Forms of return.

Personally served, November 4th, 1864. Fees, $
JAMES PIERSON, *Constable.*

Personally served, November 4th, 1864, and copy delivered to defendant at his request. Fees, $ JAMES PIERSON, *Constable.*

Served November 4th, 1864, by leaving a copy at defendant's last place of abode, in the presence of Mary Roe, one of the defendant's family, of suitable age, who was informed of its contents, the defendant not being found. Fees, $ ALEXANDER STEWART, *Constable.*

Personally served on Richard Roe, November 4th, 1864; and personally served on Richard Fenn, November 2d, 1864. Fees, $

WILLIAM B. COMRIE, *Constable.*

Personally served on Richard Roe, November 4th, 1864, and the defendant, Richard Fenn, could not be found in the county. Fees, $

JAMES PIERSON, *Constable.*

Personally served on Richard Roe, November 4th, 1864; Richard Fenn could not be found in the county, and a copy of the within summons was left, November 3d, 1864, at his last place of abode, with Mary Fenn, one of his family, of suitable age, who was informed of its contents. Fees, $

JAMES PIERSON, *Constable.*

Corporation defendant.

The within summons served, November 4th, 1864, by personally delivering a copy thereof to John Doe, who is a director of the said corporation, and defendant. Fees, $ ALEXANDER STEWART, *Constable.*

Railroad corporation, no officers, &c., in the county.

The within summons personally served on the defendants, November 4th, 1864, by delivering a copy thereof personally to William H. Fowler, a freight agent of said defendants, no person having been designated by the defendants upon whom a summons can be served, and there not being any officer of said railroad company who resides within the said county of Fulton. Fees, $ JAMES PIERSON, *Constable.*

CHAPTER V.

SHORT SUMMONS.

This process was first authorized by chapter 300 of the Laws of 1831, usually called the "non-imprisonment act." Vol. I, 74, 75, 76, 77. And a brief review of the practice prior to that year may be the most convenient way of showing more clearly what the present practice is. And see title Warrant. Before 1831, the only process for bringing parties into justices' courts was a long summons, a long attachment or a warrant. And, as the practice then stood, a non-resident defendant must in all cases have been sued by a warrant, whether the cause of action arose upon contract, or for a tort or wrong. So a resident defendant could be sued only by warrant, long summons, or a long attachment. A non-resident plaintiff might have sued a resident defendant by warrant upon making proper proof and giving legal security, whether the cause of action arose upon contract or for a tort or wrong. Vol. I, 39, § 15, subd. 2.

As the practice then stood, there could not possibly be a question as to the proper process against a *non-resident defendant.* There was no summons but a long one, and the statute expressly declared that no person should be proceeded against by summons out of the county in which he resided. Vol. I, 38, § 11.

Then came the "non-imprisonment act" of 1831, which prohibited the arrest of any person for any cause of action arising upon contract, express or implied, except in certain specified cases, which will be noticed hereafter. And it is important to remember that the non-imprisonment act did not change the law in the least as to actions for torts or wrongs, or in any other cases

in which a warrant is a proper process since the non-imprisonment act. So that a warrant is as appropriate now in such an action, or for a tort or wrong, as it was before 1831; and indeed it is not only appropriate in such cases, but it is the only legal process that can be issued against a non-resident defendant.

So also in relation to those cases which were excepted from the effect of the non-imprisonment act. A warrant is now the only legal process against a non-resident defendant, even in those *excepted* cases which arose upon *contract.*

Those cases, so excepted, were four in number, but they are now the following: 1. An action to recover money collected by a public officer; 2. An action for official misconduct or neglect of duty; 3. An action for damages for misconduct or neglect in any professional employment. Vol. I, 74, § 212; Laws 1831, ch. 300, §§ 30, 31. A short summons is not proper in any such case; nor in actions for torts or wrongs if the defendant is a non-resident; nor in any case in which a warrant may be issued. And, as the law now stands, in every action against a non-resident defendant, for a cause of action arising upon contract, express or implied, a short summons will be a proper process if the action is not for one of the causes of action already mentioned as excepted from the provisions of the non-imprisonment act. The sections of the statute which provide for a short summons are as follows: "Whenever, by the provisions of the last preceding section, no warrant can issue, and the plaintiff shall be a non-resident of the county, and shall give the like proof of the fact and tender to the justice the security now required by law to entitle him to a warrant, the justice shall issue a summons which may be made returnable not less than two nor more than four days from the date thereof, and shall be served at least two days before the time of appearance mentioned therein, and if the same shall be returned personally served, the same proceedings shall be had and no longer adjournment granted than in case of a warrant at the instance of a non-resident plaintiff. Vol. I, 75, § 214; Laws 1831, ch. 300, § 32. The preceding section provides for the case of a non-resident plaintiff. And it is a proper process in favor of such a plaintiff against a resident defendant in *all cases* in which the cause of action arises upon *contract*, express or implied, unless it is in one of the cases which are excepted by the thirtieth section of the non-imprisonment act for moneys collected by any public officers, &c., &c. In such excepted cases, a warrant is as proper as before the non-imprisonment act. And in every case in which a warrant *may* be issued, whether the cause of action is for one of the excepted cases mentioned, or whether it is for a tort or wrong, or for a penalty and the like cases, a short summons is not a proper process; and a warrant or a long summons must be taken if the plaintiff is a non-resident. See also title Warrant.

The statute further provides for the case of a non-resident defendant who cannot be arrested, as has been heretofore explained. "Whenever, by the provisions of the thirtieth section

of this act, no warrant can issue, and the defendant shall reside out of the county, he shall be proceeded against by summons or attachment, returnable not less than two nor more than four days from the date thereof, which shall be served at least two days before the time of appearance mentioned therein, and if such defendant be proceeded against otherwise, the justice shall have no jurisdiction of the cause." Vol. I, 75, § 215; Laws 1831, ch. 300, § 33. The most important thing to be noticed in relation to the last section cited is, that in actions arising on contract (unless in the excepted cases mentioned), a short summons or a short attachment is the only legal process that can be issued against a non-resident defendant. The statute does not merely provide that a short summons or a short attachment may be issued; but it expressly prohibits any other kind of process, by declaring that if the defendant be proceeded otherwise "*the justice shall have no jurisdiction of the cause.*" But notwithstanding the language of the statute, if a long summons is served instead of a short one, and the defendant appears in the action and voluntarily joins issue upon the merits without objection, the justice will have jurisdiction, since the issue will be treated as a voluntary one without process. *Clapp* v. *Graves*, 12 E. P. Smith, 418. And a judgment which is rendered in favor of the plaintiff in such a case, will be neither void nor erroneous. *Ib.* And see *Ante*, 18.

It will be assumed that every plaintiff knows whether his cause of action arises upon contract, express or implied; or whether it arises for a tort or wrong, or upon contract for the recovery of money or damages in one or all of the cases excepted from the effect of the non-imprisonment act, or for a cause in which a warrant may issue in any case. A brief summary of the cases in which a short summons is or is not proper, will be here given, as it may be convenient for those who will feel relieved from anxiety by knowing that the proper process will be issued. In the following classes of cases a short summons is *always proper* if the *cause of action arose upon contract*, express or implied, or upon a judgment, and the defendant cannot be *arrested*, because of the provisions of the non-imprisonment act: 1. When the *defendant* or *defendants* are *all non-residents* of the county, and the plaintiff or plaintiffs are all residents of the county. 2. When the *plaintiff* or *plaintiffs* are *all non-residents* of the county, and the defendant or defendants are all residents thereof. 3. When *all* the parties to the action, both plaintiffs and defendants, are non-residents of the county in which the action is brought. 4. When the plaintiffs are all non-residents of the county, and the defendants are *joint debtors* (not joint and several debtors) and some of the defendants are residents, and some of them are non-residents of the county. *Dearborn* v. *Kent*, 14 Wend., 183. In this fourth class of cases, a non-resident plaintiff could sue a resident defendant by short summons if he were sued alone, and a non-resident defendant must be sued by a short summons. And, therefore, the joinder of a resident and non-resident defendant would not invalidate this

process, because they were sued together, when the process would be entirely proper if they were sued separately. 5. When some of the plaintiffs are residents, and some of them non-residents of the county, and the defendants are all non-residents thereof. 6. If some of the plaintiffs are residents and some of them non-residents of the county, and some of the defendants are residents and some of them are non-residents thereof; and the defendants are *joint debtors* (not joint and several debtors), a short summons may be taken; because, as to the non-resident defendant, this would be the only legal process if he were sued alone. And, in case of *joint debtors*, a legal service upon one of them is sufficient to authorize a joint judgment against both, even though no process whatever were served on the other defendant. A *long summons* would also be a legal process in the same case; because, a non-resident plaintiff and a resident plaintiff may take a long summons against a resident defendant, and if the summons is proper as to him in a case of *joint debtors*, it will not affect the validity of the judgment in a case of *joint debtors* (not joint and several), that there was no process whatever served on the non-resident defendant, or that the process itself would not have been proper if he had been sued alone. *Burghart* v. *Rice*, 2 Denio, 95. 7. If some of the plaintiffs are resident, and some of them non-residents; or, if the plaintiffs are all residents, and some of the defendants are residents and some of them non-residents, and the debt is joint and several; or, if the liabilities of the defendants are several, but they are liable to be sued together, the only safe way to sue will be to sue the non-residents with a short summons or attachment, and the resident defendant with a long summons or attachment. The makers of a *joint* note or bond, partners, and all parties *jointly* liable upon contract, may be sued in the manner specified in the 6th or 7th classes enumerated. But this rule does not extend to cases where the liability is joint and several, or to a several liability.

In the following classes of cases a short summons is *never* proper: 1. If the cause of action is founded upon a claim for money collected by any public officer; or, for damages for official misconduct or neglect of duty; or, for damages for misconduct or neglect in any professional employment. Vol. I, 74, § 212; Laws 1831, ch. 300, § 30. In such cases it may be said that the cause of action arose upon contract, express or implied. But, though this may be so, that does not affect the rule; because, as to these cases, the law remains as it was before the non-imprisonment act, when the defendant might have been arrested. An attorney who is a non-resident of the county, and who is sued for money which it is claimed that he has illegally received by overcharging his bill of costs, cannot be sued by a short summons; it must be by warrant. *Waters* v. *Whittemore*, 22 Barb., 593.

2. If the defendant is a non-resident of the county, and the action is brought to recover a penalty for the violation of any statute; or, for any penalty given by law for any wrongful act

or neglect, not connected with contract, express or implied, a short summons is not proper; it must be by warrant.

3. If all the parties to the action are residents of the county, a short summons is never proper.

4. If the cause of action arises for a tort or a wrongful and unlawful act, and a warrant may be issued, a short summons is never proper, whether the defendant is a resident or a non-resident of the county. *Whitney* v. *Shufelt*, 1 Denio, 592, 594.

5. If the defendant is a resident, and one of the plaintiffs is a resident and the other plaintiff is a non-resident of the county, a short summons is not proper. *Linnell* v. *Sutherland*, 11 Wend., 568. The reason of this is, because a short summons is not given against a resident *defendant*, unless the *plaintiff* is a non-resident. And if one of the plaintiffs is a resident, it could not be said that the plaintiffs were non-residents. And, besides, if one plaintiff is a resident, the reason of the rule giving a non-resident plaintiff a short summons fails, because the resident plaintiff may attend to the cause as well for both as though he were the sole plaintiff. And his co-plaintiff would not, in that case, be detained in the county unnecessarily. This case differs from that in the 6th and 7th propositions, *ante*, 78, because, in those cases there would be one *non-resident defendant*, and the process would be proper as to him, whether one or both of the plaintiffs were residents or non-residents; and in an action against *joint debtors*, it is sufficient to serve one party legally. When the *defendant* is a non-resident, the process must be applicable to him, without reference to the character of the plaintiff, or as to that of one of several plaintiffs, who are resident or non-resident.

6. It has been decided that a short summons is not proper when the defendant is a railroad corporation, and the road runs through the county in which the action is brought. *Johnson* v. *Cayuga, &c., Railroad Co.*, 11 Barb., 621; *Sherwood* v. *Saratoga, &c., Railroad Co.*, 15 Barb., 650; *Belden* v. *N. Y. and Harlem Railroad Co.*, 15 How., 17. The principal reason assigned by the court in the foregoing cases, why a short summons was not proper was, because the corporation was to be treated in the same manner as a resident freeholder, or an inhabitant having a family. This reason would be conclusive if the plaintiff in the action were also a resident of the county; for in that case a short summons would not be proper. But the court seem to have overlooked the very important fact, that even a freeholder, or a resident having a family, may be sued by a short summons if the *plaintiff* is a *non-resident* of the county, and the cause of action arose upon contract.

That process is expressly given by the statute. Vol. I, 75, § 214, Laws 1831, ch. 300, § 32. And, it has been the invariable practice since the enactment of this statute, for a non-resident plaintiff to take a short summons, if he chose, against a resident freeholder, or an inhabitant having a family. Corporations may be sued precisely like natural persons, except as to the man-

ner of serving the process. "And all corporations shall have the right to sue and shall be subject to be sued in all courts, in like cases as natural persons." State Constitution of 1846, art. 8, § 3. And in *Wilde* v. *N. Y. and Harlem Railroad Co.*, 1 Hilt., 302, it was expressly decided that a non-resident plaintiff might sue a railroad corporation, by a short summons, if he furnished a proper affidavit and bond.

There is precisely the same reason for permitting a non-resident plaintiff to sue a corporation which is located in the county, that there is for allowing him to sue a resident freeholder. And the statute and the constitution have placed both upon the same footing, either as to suing or as to being sued.

The rule which applies to railroad corporations is equally applicable to plank road and turnpike corporations, and, indeed, to every kind of corporation which is located in the county in which the action is brought, such as banks, insurance companies, gas companies, manufacturing corporations, and the like.

What is necessary to authorize the issuing of a short summons.] This kind of process may be appropriate in a given case; and it may, indeed, be the only process which can properly be taken in some cases. But it must be remembered that a short summons cannot be issued, *as of course*, like a long summons, without either an affidavit or a bond. There must *always* be an affidavit, though it is not always necessary to furnish a bond. Whether a bond is necessary, depends upon the residence of the *plaintiff*. No affidavit, which is made for the purpose of obtaining a short summons, need be entitled in the action. The proper forms for them will be given hereafter.

In an action by a *resident* plaintiff against a non-resident defendant, an affidavit is necessary, *Sperry* v. *Major*, 1 E. D. Smith, 361; *Davidson* v. *Hutchins*, 1 Hilt., 123; but no bond nor security of any kind need be given. Vol. I, 40, 39, § 17; *Id.*, 75, § 214; *Ackerman* v. *Finch*, 15 Wend., 652. This case has been overruled so far as it holds that there is no necessity for an affidavit, but it is still an authority that there need not be a bond. See *Taylor* v. *Heath*, 4 Denio, 592; *Bennett* v. *Brown*, 4 Comst., 254; *S. C.* again, 31 Barb., 158. In a recent case it has been expressly held that an affidavit is necessary, though no bond is required. *Waters* v. *Whittemore*, 13 Barb., 634.

If the action is brought by a *non-resident plaintiff*, there must be both an affidavit and a proper bond, whether the *defendant* is a resident or a non-resident of the county. *Allen* v. *Stone*, 9 Barb., 61; *Money* v. *Tobias*, 12 Johns., 422; Vol. I, 75, § 214; Laws 1831, ch. 300, § 32; Vol. I, 39, § 15, sub. 2. And the justice cannot dispense with the affidavit, even when he knows that the plaintiff is a non-resident. *Money* v. *Tobias*, 12 Johns., 422.

What facts should be stated in affidavit.] If the plaintiff is a resident and the defendant a non-resident of the county, the following facts ought to be stated in the affidavit, viz., that the plaintiff is a resident; that the defendant is a non-resident; that the cause

of action arose upon contract, express or implied; or upon a judgment upon contract, express or implied; that the defendant cannot be arrested because of the provisions of the non-imprisonment act; *Waters* v. *Whitamore*, 13 Barb., 634; and that the plaintiff has a good cause of action. Though it is not necessary to show whether there is a good cause of action or not, because that fact cannot be certainly known until the trial, it is usual, and therefore proper, to state in the affidavit that the plaintiff has a good cause of action, as he believes. But there is no statute requiring it, unless it is that which relates to the issuing of warrants. Vol. I, 39, § 17. And as a short summons takes the place of a warrant when the defendant is a non-resident and the cause of action arises upon contract, the only question is as to its applicability, and construction if applicable. An affidavit of some kind is necessary, as has already been shown; and this statute just cited, requires that "the affidavit shall state the facts and circumstances within his knowledge showing the grounds of his application, whereby the justice may the better judge of the necessity and propriety of issuing such warrant." This section was applicable to all cases in which a warrant could be issued, whether the defendant was a resident or a non-resident; or whether he was a freeholder, or an inhabitant having a family; or whether he was neither a freeholder nor an inhabitant having a family. And, as the law then stood, a warrant was not the first process that could be legally issued against a freeholder, or an inhabitant having a family. A summons was the first process against them, unless the plaintiff could show by affidavit that the defendant was about to depart from the county, &c., or that he would be in danger of losing his debt, unless a warrant was issued. Vol. I, 39, § 15, subs. 3 and 4. But a warrant was issued as of course against a resident who was neither a freeholder nor an inhabitant having a family, or against a non-resident defendant, if an affidavit were made showing his non-residence or that he was not a freeholder nor an inhabitant having a family. "Under the old law any person might have a warrant against a *non-resident* simply because he was so." Cowen, J., in *Ackerman* v. *Finch*, 15 Wend., 655. And the rule was the same as to a non-resident plaintiff, who was entitled to a warrant on proof of his non-residence, and giving proper security. *Money* v. *Tobias*, 12 Johns., 422. Now, as a short summons takes the place of that warrant against non-resident defendants in actions arising upon contracts, there is no reason why the affidavit need show whether there is or is not a cause of action, because the process is founded solely upon his character as a non-resident. But that there may not be room for question or doubt, the safe course will be to state, briefly, that the plaintiff has, as he believes, a good cause of action against the defendant.

Form of affidavit for short summons, by a resident plaintiff against a non-resident defendant.

Fulton County, *ss:* John Doe, being duly sworn, says, that he has, as

he verily believes, a good cause of action against Richard Roe, which cause of action arose upon contract, express or implied; and deponent further says, that said cause of action is not for the recovery of money collected by him as a public officer, nor for official misconduct or neglect of duty by him; nor for damages for misconduct or neglect in any professional employment by him, that, according to the provisions of sections thirty and thirty-one of chapter three hundred of Laws of 1831, no warrant can issue against the said Richard Roe; that the said Richard Roe resides in the county of Saratoga, and that he is a non-resident of the county of Fulton. And the said John Doe prays a short summons against the said Richard Roe.

Sworn before me this 4th day of November, 1864, } JOHN DOE.

DAVID KENNEDY, *Justice of the Peace.*

The affidavit need not be made by the plaintiff himself. Any other person who knows the facts necessary to be stated in the affidavit, may make one in behalf of the plaintiff. When the affidavit is made by any person other than the plaintiff, the form of the affidavit must be varied so as to conform to the facts. For instance, if the affidavit is made by a third person where the parties are named as in the preceding form; the affidavit may read thus: Fulton county, *ss:* A. B. being duly sworn, says, that John Doe has, as deponent, verily believes, a good cause of action against Richard Roe, &c.

Facts to be stated in affidavit by non-resident plaintiff and resident defendant.] When the plaintiff is a non-resident, and the defendant is a resident of the county, the affidavit should show the following facts, viz.: That the plaintiff is a non-resident; that the defendant is a resident; that the cause of action arose upon contract, express or implied; or, upon judgment upon such contract; that the defendant cannot be arrested because of the provisions of the non-imprisonment act; and that a good cause of action exists against the defendant.

Form of affidavit by non-resident plaintiff and resident defendant.

FULTON COUNTY, *ss:* John Doe, being duly sworn, says, that he has, as he verily believes, a good cause of action against Richard Roe, which cause of action arose upon contract, express or implied; and deponent further says, that said cause of action is not for the recovery of money collected by him as a public officer; nor for official misconduct or neglect of duty by him; nor for damages for misconduct or neglect in any professional employment by him; that, according to the provisions of sections thirty and thirty-one of chapter three hundred of Laws of 1831, no warrant can issue against the said Richard Roe; that the said Richard Roe is a resident of the county of Fulton; that the said John Doe resides in the county of Saratoga, and that he is a non-resident of the county of Fulton. And the said John Doe prays a short summons against the said Richard Roe.

Sworn before me this 4th day of November, 1864, } JOHN DOE.

DAVID KENNEDY, *Justice of the Peace.*

This affidavit need not be made by the plaintiff himself, but may be made by another person as in the case of a resident plaintiff. See *ante*, 82. The affidavits need not have a revenue

certificate stamp. Act of Congress, June 30th, 1864, § 151, schedule B. Where the plaintiff is a non-resident and the defendant is a resident, the plaintiff must give security to entitle him to a short summons.

The statute uses the word "security," so that a bond is not necessarily the form in which the security is given, as is required where an attachment is issued. Vol. I, 75, § 214; Laws 1831, ch. 300, § 32; Vol. I, 39, § 15, sub. 2. It is better, however, to give a bond in all those cases in which security is required, before process can be legally issued, because a bond will always be a valid security, and then there will never any mistakes occur from the omission to give a bond in those cases in which a bond is indispensable.

Form of bond by non-resident plaintiff and resident defendant, for short summons.

Know all men, by these presents, that we, James Den, and Richard Fen, are held and firmly bound unto Richard Roe in the sum of two hundred dollars, to be paid to the said Richard Roe, or to his certain attorney, executors, administrators or assigns; to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents, sealed with our seals, dated the 4th day of November, 1864. Whereas John Doe is a non-resident of the county of Fulton, and he has made application to David Kennedy, one of the justices of the peace in the town of Mayfield, in said county of Fulton, for a short summons against Richard Roe, a resident of said county; and whereas due proof has been made before said justice, by affidavit, that a good cause of action exists in favor of said John Doe against said Richard Roe, which cause of action arose upon contract; and that the said Richard Roe cannot be arrested because of the provisions of sections thirty and thirty-one of chapter three hundred of Laws of 1831.

Now, therefore, the condition of this obligation is such, that if the said John Doe shall pay to the said Richard Roe any and every sum which may be adjudged against the said John Doe, in the action which may be commenced by the said short summons, then this obligation to be void, otherwise to remain in full force and virtue.

JAMES DEN. [L. S.]
RICHARD FEN. [L. S.]

Sealed and delivered in presence of
DAVID KENNEDY.

This bond need not be executed by more than one person. The only object of requiring security is that the defendant shall not be harrassed by a needless and vexatious suit without security for his costs if successful; and also that he may be certain to secure the amount of any judgment which may be rendered in his favor against such plaintiff, either for costs or for any balance due upon a set-off. The justice should, therefore, be satisfied that the person or persons who sign the bond are entirely responsible for the sum of two hundred dollars and the costs of the action. The bond need not be approved in writing by the justice, nor need the surety justify, unless the justice requires it to satisfy himself as to the ability of the surety to

answer the amount of the liability. The bond should be sealed; because, all bonds must be sealed to be valid. It may not be improper to repeat, that the statute does not require a bond in this case, but merely that "security" shall be given; and it does not say whether it shall be sealed or not; still, it is clear that the security, whatever its form may be, should be legally sufficient to show a valid and binding contract on the part of the surety. A bond is clearly sufficient, and it is therefore preferred.

Facts to be stated in affidavit, when plaintiffs and defendants all non-residents.] In such case the affidavit should state the same facts as those in the last preceding affidavit, except that it should state that both parties are non-residents, instead of stating, as that affidavit does, that the defendant is a resident. The affidavit may be made by the plaintiff, or by any other person who knows the necessary facts.

Form of bond to be given when both parties are non-residents.] The bond in this case is similar to that last given, when the plaintiff was a non-resident and the defendant was a resident. The only change in the form will be to show that both parties are non-residents, &c. The remarks made in relation to that bond are equally applicable to this one.

If the plaintiff and the defendant are both non-residents, a bond must be given by a non-resident plaintiff. For, though the character of the process may be said to be so far determined, by the residence of the defendant, as to require a short summons when he is a non-resident, yet that has nothing to do with the question of giving security. For, as we have seen, *ante*, 80, no security need be given, although the defendant is a non-resident, if the plaintiff is a resident. But the statute requires security if the plaintiff is a non-resident. Vol. I, 75, § 214; Laws 1831, ch. 300, § 32; Vol. I, 39, § 15, sub. 2. And there is no distinction made by the statute whether the defendant is a resident or a non-resident. The security, in all cases in which the plaintiff is a non-resident, and commences an action by a short summons, should be for the payment of any sum that may be adjudged against him in the action, if it is one where a set-off is allowable; security for *costs* merely is not sufficient. *Money* v. *Tobias*, 12 Johns., 422; *Onderdonk* v. *Ranlett*, 3 Hill, 323. But if the defendant makes no objection before the justice as to the form of the security, he will be deemed to have waived all irregularity in this respect, and cannot therefore avail himself of it on an appeal. *Ib.* In all these cases where security is required *before* a short summons can properly issue; if such summons is issued without security, the error will not be cured by giving it *after* the process has been issued. *Ackerman* v. *Finch*, 15 Wend., 652.

Though a different rule prevails when security has been given in due time, but which is defective in some particulars. In that case the bond is amendable. 3 R. S., 870, §§ 35, 36, 5th ed. This is in cases where the defect does not affect the rights of the party for whose benefit it was given, and where, if the bond is amended,

it will be a valid security for the purpose intended when it was given. The written consent of the original surety should be obtained as to the amendments made. *Potter* v. *Baker*, 4 Paige, 290; *Shaw* v. *Lawrence*, 14 How., 94.

It is frequently an important question to determine the extent of the liability of the surety in such bonds. He will be liable, without any question, for the amount of any judgment which the justice may render against the plaintiff, together with the costs of the action before the justice. But a different question will arise if the judgment of the justice is appealed from, and on that appeal a judgment is rendered against the plaintiff for costs, whether in the county court or in the supreme court.

The statute requires a non-resident plaintiff, who wishes a short summons, "to tender to the justice the security now required by law to entitle him to a warrant." Vol. I, 75, § 214; Laws of 1831, ch. 300, § 32. The warrant and security here referred to are those which were in force before the non-imprisonment act of 1831, so that the old law must be referred to to determine what that security was. This statute is, that the non-resident plaintiff shall "tender to the justice security for the payment of any sum which may be adjudged against him in the suit." Vol. I, 39, § 15, sub. 2.

It has been expressly held that the surety is not liable for any costs, either of the county court or of the supreme court, on an appeal from the justice's judgment. The reason assigned is, that the appeal is a *new action*, and that, therefore, the costs on an appeal were not adjudged in the suit for which the bond was given. *Fenno* v. *Dickinson*, 4 Denio, 84.

That case was decided when a *certiorari* was the proper mode of reviewing that judgment. As the law now stands there is a new trial in the county court upon new evidence given; and the case is determined upon its merits upon the evidence, instead of being merely reviewed as to errors committed on the trial before the justice. Code, § 366; Vol. I, 30.

But some appeals from justices' courts are now analogous to the old *certiorari;* or rather, they are exact substitutes for it, so that the case cited is precisely in point. Under the law as it was before the enactment of the Code, a judgment of $25 or less, was reviewed by *certiorari*, in which case the justice made a return of the entire proceedings before him, and the appellate court decided the case upon that return. And, as the Code now stands, there are cases in which a new trial is had somewhat in the manner of the old system of appeals to the common pleas. Code, § 366. But under the old system, if the judgment was for more than $25, the defeated party *appealed*, and the justice made a return of the process, pleadings and judgment, and the cause was tried in the county court (or rather the common pleas), by hearing witnesses, &c., as though there had been no trial before the justice. On the trial of the *appeal* under the old practice, it was held that such trial was but a continuation of the proceedings or

trial before the justice, and that the judgment of the common pleas was a judgment in the *same suit* for which the security was given, and that therefore the surety was liable for the costs of the appeal. *Travers* v. *Nichols*, 7 Wend., 434. This case, therefore, may be held to be an authority on similar questions arising under the Code. It has been held in several cases that, on a bond given to obtain an *attachment*, the sureties are liable to pay the costs on an appeal. *Ball* v. *Gardner*, 21 Wend., 270; *Bennett* v. *Brown*, 31 Barb., 158; *Bennett* v. *Brown*, 6 E. P. Smith, 99. It is sufficient to say of these cases in relation to *attachments*, that they stand upon entirely different grounds from those relating to short summonses. In attachment cases, the *property* of the *defendant* is taken, and the bond is expressly conditioned to pay "all damages and costs which he may sustain by reason of issuing such attachment," &c. Vol. I, 41, § 27. In such cases the plaintiff may obtain an illegal or erroneous judgment before the justice, which is reversed on an appeal, and in that event the case would clearly be within the terms and spirit of the bond which requires the surety to pay all damages and costs sustained by reason of issuing the attachment; for a part of the defendant's costs and damages would be the expense of reversing such judgment. But on the other hand, the only condition of the bond for a short summons, is to pay any sum adjudged in the suit in which it issues.

The application for a short summons need not in any case be in writing. The only writings necessary are the affidavits, and the bond, where required in the case of a non-resident plaintiff.

There is a plain distinction in the law relating to the security which must be given on the issuing of attachments; and that relating to the issuing of a short summons or a warrant. In all attachment cases a *bond* is indispensable, *Homan* v. *Brinckerhoof*, 1 Denio, 184, while the *security* for a warrant or a short summons need not be in the form of a bond, as has been before shown. *Ante*, 84, 85. But, though a bond is not necessary in such cases, there must be a valid *written* agreement, or the promise of surety will be void by the statute of frauds. *McNutt* v. *Johnson*, 7 Johns., 18; *Stewart* v *McGuin*, 1 Cow., 99.

A paper in this form was held insufficient: "Mr. Brock: Please let Mr. Tobias have a warrant, and I will be answerable for the cost. John Holly. *Money* v. *Tobias*, 12 Johns., 422. The court said: "The statute requires security *not merely for costs*, but for any sum which may be adjudged against the plaintiff."

Deposit of money.] There may be set off, and at least $200 and costs should be required.

Form of short summons.] The only difference in *form* between a long summons and a short one, is in the length of time which intervenes between the date and the return day. A long summons must be returnable not less than six nor more than twelve days from its date; while a short summons must be returnable not less than two nor more than four days from the date. There are many points necessary to be observed in relation to filling

up process, and as to when it is sufficient either in form or substance; as to where and how it is to be issued; to whom and when to be issued; when and where returnable, &c., &c.

These matters are discussed at some length at a previous place, under the title, "Process." And the usual rules applicable to process in general are stated there together, so as to avoid a frequent repetition of them in relation to each kind of process.

The manner of serving a summons, and the rules relating to it, have been sufficiently explained. *Ante*, 65 to 75.

CHAPTER VI.

OF PROCESS BY WARRANT.

SECTION I.

WARRANT.

This kind of process has been a long time in use. Laws 1801, ch. 165, § 2; Revised Laws, 1813, ch. 53, §§ 2, 4. And it was retained in the revision of the laws which took effect in 1830, by virtue of the provisions of the Revised Statutes.

This process differs, in one material respect, from any other process which a justice is authorized to issue for commencing actions. Upon a summons, whether a long or a short one, the defendant is merely notified to appear and answer the complaint of the plaintiff. And, upon an attachment, whether it is a long or a short one, the same notice is given where the defendant can be personally served with the process; and, in addition to that, the property of the defendant may be taken and kept to answer any judgment which may be obtained.

But when a warrant is issued, the defendant is arrested, and he is taken personally before the justice. He is not at liberty to appear before the justice or not, as he may elect; for the law makes it the duty of the officer to take the defendant before the justice forthwith. Vol. I, 40, § 19. And, in order to determine in what cases a warrant may be issued, it will be necessary to cite the statutes in full. The provisions of the Revised Statutes are as follows: "The first process against freeholders, and against inhabitants having families, except as is otherwise hereinafter directed, shall be a summons; but no person shall be proceeded against by summons out of the county in which he resides." Vol. I, 38, § 11. "A justice shall, upon application, issue a warrant in the following cases: 1. Where the defendant is a non-resident of the county. 2. Where the plaintiff is a non-resident, and tenders to the justice security for the payment of any sum which may be adjudged against him in the suit. 3. When it shall appear to the satisfaction of the justice, by the affidavit of the applicant, or of any other witness, that the person against whom such warrant is desired is about to depart from the county, with intent not to return thereto. 4. Where the defendant is an inhabitant of the county, having a family, or a freeholder of the same county; and it shall, in like manner, appear to the satisfaction of

the justice that the plaintiff will be in danger of losing his debt or demand, unless such warrant be granted. Vol. I, 39, § 15. "A justice may, upon application, issue either a summons or warrant, at his option: 1. Against a defendant residing in the same county, who is neither a freeholder of the county, nor an inhabitant having a family. 2. Against the defendant upon whom a summons shall have been served only by leaving a copy, or in any other way than by reading or delivering a copy to him personally, and who shall not have appeared at the time and place appointed in such summons, nor shown good cause for not appearing. But the suit instituted by such summons shall be deemed discontinued, unless the warrant be issued on the same day of the return of the first summons; and if so issued, the suit shall be deemed to have been continued thereby." Vol. I, 39, § 16.

"In all cases, on application for a warrant, except where the suit shall have been commenced by summons, the person applying shall, by affidavit, state the facts and circumstances within his knowledge, showing the grounds of his application, whereby the justice may the better judge of the necessity and propriety of issuing such warrant." Vol. I, 39, § 17."

The preceding sections of the statute include any class of actions which are cognizable before a justice, whether the cause of action arises upon contract expresss or implied, or upon a demand for a wrongful act or tort. And if these sections were all of them in full force at the present time, there is scarcely a case which could not be commenced by warrant, unless the defendant were a freeholder, or an inhabitant of the county having a family. And as against them, a warrant might be issued if a proper case could be made within the provisions of the statute. These statutes are still in full force, except so far as they have been modified by the provisions of the non-imprisonment act. In those cases in which the non-imprisonment act forbids an arrest of the defendant, no warrant can be legally issued. But in all other cases, a warrant may be as properly issued now, as it was before the enactment of the non-imprisonment act. This view of the law will render the duties of a justice comparatively easy in determining in what cases a warrant may be properly issued. For the only points which will require his attention will be, to determine that the cause of action is one which is within the jurisdiction of a justice, that a warrant might have been issued by virtue of the provisions of the Revised Statutes which have been cited, and that the non-imprisonment act does not forbid an arrest of the defendant, because the cause of action arose upon contract, express or implied. These sections of the statute which forbid an arrest of the defendant are as follows: "No execution issued on any judgment rendered by any justice of the peace upon any demand arising upon contract, express or implied, or upon any other judgment founded upon contract, whether issued by such justice or the clerk of the county, shall contain a clause authorizing an arrest or imprisonment of the person against whom the

same shall issue, unless it shall be proved by the affidavit of the person in whose favor such execution shall issue, or that of some other person, to the satisfaction of such clerk or justice, either, 1 (subdivision one is repealed); or 2. That such judgment was for the recovery of money collected by any public officer; or 3. For official misconduct or neglect of duty; or 4. For damages for misconduct or neglect in any professional employment." Laws 1831, ch. 300, § 30; Vol. I, 74, § 212.

"No *warrant* shall issue against a defendant, in any case in which, by the provisions of the last preceding section, an execution on the judgment recovered could not be issued against his body, and whenever a warrant in such case shall issue, the like affidavit shall be required as for the issuing of an execution by the provisions of said section." Laws 1831, chap. 300, § 31; Vol. I, 74, § 213.

These two sections last cited, show very clearly, that the only cases in which they forbid a warrant is, where the cause of action arises upon contract express or implied.

But there is also a class of cases in which the cause of action arises upon contract, and a warrant is still as proper a process as ever, because the statute expressly excepts them from its effect, and leaves the old law as applicable to them as it ever was. If the cause of action arises upon a claim for money collected by any public officer, or for either of the other cases specified in the preceding thirtieth section, a warrant may be issued, if such proof is made, as the statute requires. The object of the non-imprisonment act was to prohibit the arrest or imprisonment of defendants upon demands which arose upon contract, express or implied, such as bills of exchange, promissory notes, matters of account, and the ordinary deal and business of men by way of contract, express or implied.

But it was not the object nor the intention to affect the law in relation to causes of action which arose out of some fraud or fraudulent act of the defendant, nor in cases in which the cause of action is founded upon some wrongful act of such defendant.

Cases in which a warrant may issue.] It will be impossible to enumerate all the particular instances in which a warrant is an appropriate process; and, for that reason, the method which will be adopted is, to point out the classes of cases in which the process is proper, and leaving it to the intelligence of the justice to make the application of the rule to each individual case as it arises. But while it is true that a warrant may be issued in each of the classes of cases specified, it is of the utmost importance to remember that a warrant cannot issue against a resident freeholder, or an inhabitant having a family, without proof of facts which will authorize a warrant against them. For, as against non-resident defendants, and against residents of the county who are neither freeholders of the county nor inhabitants having families, a warrant may be issued upon proof which would be very different from that which would be necessary to authorize a

warrant against a resident freeholder, or an inhabitant having a family. What proofs are necessary to be made in each case will be pointed out hereafter. But it was deemed necessary to say so much in relation to this point in this place, lest some justice should suppose that, because a warrant might issue in these classes of cases, it might therefore be issued against any person indiscriminately, without any reference to the proof which might be necessary.

A warrant may issue in all cases of trespasses upon real estate, whether the injury was done by the defendant in person, or by a third person by his direction, or by the cattle or beasts of any kind which belong to the defendant, or in any case whatever in which the defendant is liable in an action of trespass for injuries to real estate, such as flowing lands and the like. Code, § 53, sub. 2. So a warrant may issue when the cause of action arises from an injury to personal property, whether the injury were done by the defendant himself, or by some third person by his direction, or by his cattle or beasts, or in any case in which the defendant is liable to an action of trespass for wrongfully or unlawfully injuring personal property. So, if the defendant has procured any illegal process by virtue of which the property of the plaintiff has been injured, or has been converted, so that an action will lie therefor, a warrant may be issued. So there are numerous cases which were formerly called actions of trover, and in such cases a warrant may issue if a wrongful conversion of the property can be shown. Again, there is a numerous class of cases in which the defendant has been guilty of a fraud, in which a warrant is a proper process. It is true, that in nearly all cases it is necessary to state a contract as a part of the transaction; but the cause of action does not therefore arise upon contract. The contract is stated by way of inducement or introduction to the real ground of action, which is the fraud. And in all cases in which the defendant has been guilty of a fraud in the sale or exchange of personal property, such as goods and chattels including horses, and other animals, of course, a warrant may be issued. *McDuffie* v. *Beddoe*, 7 Hill, 578; and see the language of Lott, senator, on pages 580, 581; and of Wright, senator, on pages 581, 582; where it is said: "It is almost the universal practice in courts of law, where you seek to recover for a fraud in the sale or exchange of horses or any other property, to set out the contract or agreement in which the party made the fraudulent statement, or concerning which he fraudulently concealed some material fact. And yet no one has ever doubted that such an action was one clearly sounding in tort, in which the defendant would be liable to be imprisoned for the damages recovered, and the plaintiff to be subject to the same liability for costs, if unsuccessful." The act to abolish imprisonment for debt does not protect a fraudulent contractor from imprisonment in any case. *Keeler* v. *Clark*, 18 Abb., 154; Code, § 53, sub. 9.

There is also a numerous class of cases in which particular

statutes give a penalty for acts or omissions of parties, and a warrant may be issued in such cases. To enumerate all the instances in which a penalty is given would be useless, since a warrant is applicable to any such case, unless some statute gives a different remedy in the particular instance, or unless it forbids a warrant in that case. Actions are brought every day for penalties for illegally passing toll gates, and for violations of the excise law, and in various similar cases. Code, § 53, sub. 3. But, in every instance in which a warrant is issued for the collection of a penalty, there must be an indorsement upon the warrant, which shows under and by virtue of what particular statute the penalty is claimed to have been given. The whole subject upon this point has been already explained. *Ante*, 47.

When an action is brought against any public officer, for money collected by him, a warrant may be issued. A constable and a school district collector are instances of such officers, and there are numerous others. So, if the action is brought to recover damages for the official misconduct, or for the neglect of duty of any public officer, a warrant may issue.

A constable or other officer may refuse to serve process, or he may so neglect his duties that a debt is lost in consequence; in such cases, if the act has been such that he is liable to an action, a warrant may issue. Again, if the action is brought to recover damages for misconduct or neglect in any professional employment, a warrant is proper. An action which is brought in a justice's court against an attorney to recover back money which it is claimed that he has taken from the plaintiff, by charging illegal fees in bills of costs collected by him, is a case in which a warrant may issue. *Waters* v. *Whittemore*, 22 Barb., 593. There are cases in which the legal rights of the plaintiff are injured, and for which the law gives a remedy by action, although the injury does not relate to either real or personal property.

The hiring of a person of full age, for wages, by the year, creates the relation of master and servant between the parties, and will enable the employer to maintain *case* against one who imprisons the person so employed for the loss of his service, *Woodward* v. *Washburn*, 3 Denio, 369; and a warrant may be issued in such a case. See also *Haight* v. *Badgeley*, 15 Barb., 499. The foregoing illustrations are sufficient to show the nature of the cases in which a warrant may be issued if the plaintiff prefers it.

Cases in which a warrant must issue.] There are many instances in which a party or the justice may elect which kind of process shall be issued, as, whether it is to be a summons or a warrant. But there are also cases, in which neither the plaintiff nor the justice has any option, and if any process whatever is issued, it must be a warrant. *When the defendant is a non-resident of the county, and a warrant may be issued against him, then no process but a warrant can be legally issued*, unless it is in an action for the recovery of personal property. In that action a warrant cannot issue. It must be a summons by the express terms of the statute;

and see Replevin. In all actions of trespass to real estate, injuries to personal property, money collected by a public officer, or money claimed of an attorney as has been mentioned, and in actions for penalties, if the defendant is a non-resident of the county, a warrant must be issued, and any other process will not confer jurisdiction. *Waters* v. *Whittemore*, 22 Barb., 593. The reason for this is, because under the law as it was before the non-imprisonment act, the statute expressly declared, that "no person shall be proceeded against by summons, out of the county in which he resides." See the statute, *ante*, 87, § 11. There was no short summons at that time; and when the non-imprisonment act was passed, it expressly declared that a short summons might issue against a non-resident defendant, in case *no warrant could issue.* Laws 1831, ch. 300, § 33; Vol. I, 75, § 215.

A short summons is not applicable therefore, in any case in which a warrant can be issued, if the action is brought for the recovery of damages for a tort, and the defendant is a non-resident. A long summons is forbidden by the statute cited. An attachment must be issued upon a demand arising upon contract, express or implied, or upon judgment; so that a warrant is the only process left which a justice can issue. Actions are frequently commenced by short summons against non-resident defendants for the collection of penalties; such, for instance, as for illegally passing a toll gate; but in every such instance the justice acts without any jurisdiction. And if the defendant does not appear and in some manner waive the error, the justice will be liable as a trespasser if he renders a judgment against the defendant, and enforces it by execution against his property. And the same rule applies to every case in which the defendant is a non-resident, where a warrant *may* be issued; for, in such a case, the process *must* be a warrant. There are two exceptions which may be mentioned here. The statute declares thus: "No female shall be arrested or imprisoned upon any execution issued from a justice's court." Vol. I, 61, § 142. It would be proper therefore, for the justice to refuse to issue a warrant against a female in any case, whether she is a resident or a non-resident, or whether the cause of action arose upon a tort, or for some other case in which a warrant would be proper if issued against a man. There is still one more exception, and that is in actions for the recovery of the possession of personal property. No warrant can be issued in that action. It must be a summons, and therefore, in that action, a short summons may issue against a non-resident defendant for a tort.

Actions against freeholders, &c.] A suit may be commenced upon a cause of action which is included within some of the classes of cases in which a warrant is a proper process; but it does not follow that a warrant is therefore the first process which may be issued in every instance. The statute has made some exceptions, which are important in their application to the practice in issuing warrants. If the defendent is a resident of the

county, and he is a freeholder of that county; or if he is an inhabitant having a family, a different rule is applied from that which governs the case of a non-resident defendant, or that of a resident defendant who is neither a freeholder nor an inhabitant having a family. The statute provides: "The *first* process against freeholders, and against inhabitants having families, except as is otherwise hereinafter directed, shall be a summons; but no person shall be proceeded against by summons out of the county in which he resides." Vol. I, 38, § 11.

This section, which thus provides that a summons shall be the first process in such cases, also excepts the cases which are to be hereinafter mentioned. In these excepted cases a warrant may be issued as the first process, if those provisions of the statute are complied with which authorize a warrant to issue. The following are the excepted cases referred to, and in which a warrant may issue against a freeholder or an inhabitant having a family. "A justice shall, upon application, issue a warrant in the following cases: 1. (This subdivision is not important in this connection); 2. Where the plaintiff is a non-resident, and tenders to the justice security for the payment of any sum which may be adjudged against him in the suit; 3. When it shall appear to the satisfaction of the justice, by the affidavit of the applicant or of any other witness, that the person against whom such warrant is desired, is about to depart from the county with intent not to return thereto; 4. Where the defendant is an inhabitant of the county, having a family, or a freeholder of the same county, and it shall, in like manner, appear to the satisfaction of the justice that the plaintiff will be in danger of losing his debt or demand, unless such warrant be granted." Vol. I, 39, § 15.

There is one other instance in which a warrant may issue against such defendants, and that is, where a summons has been issued as the first process, and it was not served personally, but was served by copy, and the defendant does not appear at the return day of such summons, nor show good cause for not appearing. In such case the justice may issue a warrant if he chooses, though it is important to remember, that a warrant cannot issue in this case unless the cause of action is one of that class which authorizes a warrant to issue. If a summons were to be issued in an action upon a promissory note, and the summons were served by copy, instead of personally, the non-appearance of the defendant would not be a ground for a warrant in any such case. But, before a warrant is issued, the justice should require the constable to make a return upon the first summons, which clearly shows that there is a case for issuing a warrant. In this particular instance the constable's return will be sufficient evidence to authorize the issuing of a warrant without an affidavit. *Reed* v. *Gillett*, 12 Johns., 296.

A constable acts under oath in making his return, and he is liable if that return is false. The return should be in the following form:

Form of constable's return.

"I hereby certify and return that I served the within summons on the within defendant, by copy, by leaving the same at his dwelling house, with his wife, on the 4th day of November, 1864, and said summons was not personally served on said defendant, either by reading the same to him, nor by delivering a copy thereof to him personally.

JAMES PIERSON, *Constable.*"

An other form.

"The within summons was served by copy on the defendant, on the 4th day of November, 1864, and said summons was not read to defendant, nor a copy thereof personally delivered to him.

JAMES PIERSON, *Constable.*"

The warrant must be issued on the same day of the return of the first summons, or the suit instituted by such first summons will be deemed to be discontinued; but if the warrant is issued on such return day of the first summons, that suit will be deemed to have been continued by the warrant. Vol. I, 39, § 16. The justice may issue a summons instead of a warrant, if he prefers to do so, and the suit will be as regularly continued thereby as though a warrant had been issued. And if the second summons is personally served, the suit will be deemed to have been commenced at the time when the first summons was delivered to the constable to be served, even where the statute of limitations is in question. *Cornell* v. *Moulton*, 3 Denio., 12.

If the defendant appears on the return day of the first summons, there will not be any occasion for a warrant; and the justice would not have any right to issue one in that case.

And if the defendant does not appear in person, but shows good cause why he did not appear, a warrant should not be issued. The statute leaves it entirely optional with the justice, in this case, whether he will issue a summons or a warrant, even if no cause is shown by the defendant. And, therefore, the explanation of a friend of the defendants, or if a member of his family, or some other agent is sent by him to the justice, and a satisfactory explanation is made, that will be sufficient. The justice has a right to require that the cause shown shall be upon oath. And he may, therefore, swear the person who makes the defendant's excuse, or who appears for the purpose of proving the cause why the defendant did not appear. If the justice swears any person as to this matter, the oath may be in this form: "You do swear that you will true answers make, to such questions as shall be put to you touching the cause why Richard Roe, the defendant named in this summons, does not appear at the time and place mentioned therein for the return thereof." The justice may then interrogate the person sworn. And if it appears that the defendant is sick and unable to attend; or if sickness in his family requires his personal attendance; or if he is attending some court as a witness; or if he shows good cause of any kind, a warrant ought not to issue. If good cause is shown, the statute does not authorize a warrant to be issued.

The proper course will be to issue an other summons, but that must be done on the return day of the first summons, if it is desired to continue the action which was commenced by delivering the first summons to the constable. Where the service of the first summons is by copy, but not personally served on the defendant, and the defendant does not appear on the return day, the justice cannot proceed and render judgment on such return day, on such service by copy. He must issue an other summons or a warrant, which must be personally served before a judgment can be legally rendered. And if such second summons or warrant is not issued, the action commenced by the first summons will be discontinued. *Reed* v. *Gillett*, 12 Johns., 296. There was formerly some question as to the time within which such second summons or a warrant should issue, and it was said in one case that twelve days was a reasonable time. *Gold* v. *Bissell*, 1 Wend., 210. But the statute has now settled that point, by declaring that such second summons or the warrant, must issue on the return day of the first summons, or that the action will be discontinued. Though if the second summons or a warrant is issued on that day, the action commenced by the first summons will thereby be continued. Vol. I, 39, § 16.

There may be justices who do not know with certainty what persons are freeholders, and a few remarks may be of service to them. A freehold estate relates exclusively to lands, and the estate in the land must be one of inheritance or for life. No less estate is a freehold. An estate of inheritance is one which may descend from the owner to his heirs-at-law. When, therefore, a man owns lands in fee, or for his own life, or for the life of an other person, he is a freeholder; though where lands are held during the life of a third person, the estate of freehold terminates at his death. And when lands are granted to A. during the life of B., the freehold estate will terminate at the death of A., notwithstanding that B. is still alive. 3 R. S., 10, § 6, 5th ed. A man may become a freeholder in several ways. He may purchase lands and get title by a deed; or he may have received title by a devise in a will; or he may have inherited the lands by descent, as the heir-at-law of the deceased owner. It is not necessary that one should be the sole owner of lands to constitute a freeholder; for if there are ever so many persons who own lands together as joint tenants or as tenants in common, the estate of each one is a freehold. There are many cases in which a person has an interest in lands which are not a freehold. An interest in lands by way of being tenant at will or by suffrance, is not a freehold. So a lease of land for a time certain, whether for one year or for several years, or even for a term of a thousand years, is not a freehold; it is a mere chattel interest. 3 R. S., 10, § 5, 5th ed. A person may have contracted for the purchase of lands, and he may have paid a portion or all of the purchase price, but he will not be a freeholder until he gets a deed of the lands. What constitutes

an inhabitant having a family is so generally understood that no explanation is deemed necessary.

Non-resident defendants.] It has already been seen that a non-resident must be proceeded against by a warrant if the case is one in which a warrant may issue. See *ante*, 92.

Resident defendants, not freeholders, nor inhabitants having families.] There is a material difference in relation to issuing warrants against resident freeholders or inhabitants having families, and the case of resident defendants who are neither freeholders nor inhabitants having families. The justice may issue either a summons or a warrant, at his option, against a resident defendant, if he is neither a freeholder nor an inhabitant having a family, upon proof being made by affidavit, that the cause of action is one for which a warrant may issue, and that the defendant is neither a freeholder of the county, nor an inhabitant thereof having a family. No warrant could issue against a resident freeholder or an inhabitant having a family, upon such proof alone. The statute points out what kind of a case must be proved, before a warrant can issue against them. *Ante*, 93.

Affidavit for warrant.] The statute requires that in all cases there shall be an affidavit showing the facts and circumstances which will authorize a warrant to issue. Vol. I, 39, § 17. The statute makes a single exception, and an affidavit is dispensed with in case a summons was issued as the first process, and it was not personally served, but was served by copy, and the defendant did not appear at the return day nor show cause for not appearing. In that case, a warrant may be issued upon a proper return made on the summons by the constable. There is still one case more in which a warrant may be issued without an affidavit, and that is in case some statute authorizes a warrant to issue in a particular instance, or class of cases without proof; as for instance, where a city charter provided that penalties imposed by the ordinances of the common council, might be recovered "in an action of debt in any court having cognizance thereof," and that "the first process in any such action, brought before a justice of the peace, should be by warrant," it was held that the penalties might be sued for in a justice's court, and that the warrant might issue without the preliminary affidavit required by the statute, because the charter had been granted since the passage of the general statutes on that subject. *Walker* v. *Cruikshank*, 2 Hill, 296. There are no other exceptions than these to the rule; and in every other instance, a proper affidavit must be made before a justice has any jurisdiction to issue a warrant.

The importance of observing this rule cannot be too strictly enforced, because there is one case which has frequently been the cause of misleading justices of the peace, and even the supreme court itself. In *Rogers* v. *Mulliner*, 6 Wend., 597, it was held, that a justice of the peace was not liable in an action for a false imprisonment for issuing a warrant without oath

against a freeholder, where it was not shown that the justice acted in bad faith.

The difficulty in relation to this case is, that it was *decided* since the present Revised Statutes took effect; but the important fact that the *case arose under the old statute* is entirely overlooked. This case is, therefore, of no authority whatever in construing the present Revised Statutes; and, in relation to the case itself, as applied to the old law, it is very material to know that, under the old law which existed before the present Revised Statutes, a justice might issue a warrant against a person who was a non-resident of the county; or if he was a resident thereof, but not a freeholder, nor an inhabitant having a family, a warrant might issue against them as of course, without any proof whatever. *Clark* v. *Luce*, 15 Wend., 481. Opinion of SAVAGE, Ch. J.; Cowen's treatise, 253, 1st ed.; 1 Revised Laws, 1813, ch. 53, §§ 2, 3, 4; *Ackerman* v. *Finch*, 15 Wend., 655, by COWEN, J.; and see the Laws of 1824, page 280, &c. Under such circumstances, there would be some cases in which a justice would be authorized to issue a warrant against some persons, without proof; and, if the plaintiff should falsely represent to the justice that the person for whom the warrant was intended was liable to be arrested without proof, it would be proper to hold, as was done in the case of *Rogers* v. *Mulliner*, 6 Wend., 599, that the plaintiff who obtained the warrant was liable, while the justice was not liable, if he acted in *good faith*. But the present statute is entirely different from the one under which that case was decided; and a justice cannot now issue a warrant in this case without proof by affidavit, unless it is in the two excepted instances mentioned *ante*, 96. This rule is now so strictly enforced, that a plaintiff was held liable for obtaining a warrant upon a defective affidavit. *Loder* v. *Phelps*, 13 Wend., 46. Most surely the case would not be improved by not having any affidavit at all. But the justice himself will be liable if he issues a warrant without an affidavit. And the fact that he acted in good faith will not be of any avail, even when he has followed a decision of the supreme court, if that decision has been overruled, for the reason that it was decided upon an erroneous construction of the statute. A justice who issues an attachment without proof by affidavit, and a bond, will be held liable as a trespasser for any injury done by the attachment. *Davis* v. *Marshall*, 14 Barb, 96, and the cases there cited. And if a man's property cannot be thus taken without due proof and security, it is most strange indeed, that he may be deprived of his liberty upon less evidence, or upon no evidence at all, when the statute expressly declares that there shall be proof by affidavit before a warrant can be issued. *Gold* v. *Bissell*, 1 Wend., 210, 213.

The next point of inquiry relates to what the affidavits shall contain. The statute has not required merely that there should be an affidavit; but it has also prescribed what shall be proved in each instance to authorize the issuing of a warrant. And

these requirements must be strictly complied with, if the party and the justice would avoid liability for their acts. This statement in the affidavit is to be considered in relation to *what facts* are required to be stated, and also in relation to the *manner* in which those facts should be set forth.

And first, in relation to the manner of stating the facts. An affidavit in the following form is defective: "Stephen M. Phelps being duly sworn, deposes and says, that he has, as he supposes, good cause of action against Mitchel Loder, and that he believes there will be danger of losing the said debt or demand, unless warrant issue forthwith."

The defendant, Loder, was a freeholder, or an inhabitant having a family, and he was arrested on the warrant issued on an affidavit, of which the foregoing is a copy.

The supreme court held, that the plaintiff, Phelps, was a trespasser for procuring a warrant upon such an affidavit. *Loder* v. *Phelps*, 13 Wend., 46. It will be seen that the affidavit did not state a single fact or circumstance upon which the justice could determine, from the evidence, whether a warrant ought to issue against a freeholder or an inhabitant having a family. But, more than this, the entire statement was nothing more than the mere belief of the party. The belief of a party is not evidence; and it is astonishing how frequently parties will state their belief of the existence of facts, without showing a single fact or circumstance to prove that there is cause for issuing the process. The courts have declared, time and again, that such affidavits are defective. See also *ante*, 81. It is a common practice to state that the plaintiff *believes* that he has a cause of action against the defendant; but there is no occasion for stating the cause of action in that manner, as will be seen in the forms hereafter given. But it has recently been held, that in an affidavit to procure a warrant for a tort, it will be sufficient to state that the plaintiff believes he has a cause of action against the defendant for a tort; but he must then set out how and when it arose, so that it may be seen that it arose for a tort or wrong. *Pope* v. *Hart*, 35 Barb., 630; *S. C.*, 23 How., 215. A statement by the plaintiff that he has, *as he verily believes*, a good cause of action against the defendant for fraud and deceit, in the sale by him of a certain pair of horses to the plaintiff, in a specified year, has been held sufficient. *Ib.* And where a plaintiff applies to a justice for a warrant against a non-resident of the county, for a tort, it is sufficient for him to state positively in his affidavit that he is a resident of the county in which the action is brought, and that the defendant is not a resident of that county, but is a resident of a county specified. *Ib.* The affidavit should show clearly and affirmatively that the cause of action is one upon which a warrant may be legally issued, such as a trespass upon land, or in the other classes of cases which have been mentioned. *Ante*, 90, &c.

The language of the statute is, that the parties shall show by

affidavit, to the satisfaction of the justice, &c.; Vol. I, 39, § 15, subs. 3 and 4; and again, that the facts and circumstances shall be stated, that the justice may the better judge of the necessity and propriety of issuing a warrant. Id., § 17.

It is not the meaning of the statute that the justice may issue a warrant whenever he is satisfied to issue it, whether with proof or without it. If such a construction prevailed, a justice might issue a warrant when there was no legal proof whatever to authorize it. For this reason, a justice cannot issue a warrant upon his own knowledge, upon the pretense that he is satisfied from such knowledge, that a warrant ought to issue. *Money* v. *Tobias*, 12 Johns., 422. The meaning of the statute is, that the affidavits shall state such facts and circumstances as would warrant any court acting in a judicial capacity, in determining that a proper case for a warrant is proved. And, unless enough is stated in the affidavits to show that the justice was fairly called upon to weigh the evidence, the judgment will be reversed upon an appeal. If there is some evidence upon all the material points to be established, the court above will not interfere. But if there is a total defect in the proof in a material point, that will be fatal to the sufficiency of the affidavit. There are many points in relation to the manner of drawing these affidavits, which are so similar to those in attachment cases, that it is not necessary to repeat them here. As to the following points, see the remarks in relation to attachment affidavits, viz.: Entitling affidavits; when and where made; how often used; hearsay; stating facts affirmatively; signing affidavit; jurat and venue; swearing to affidavits; when sufficient collaterally; and the manner of drawing affidavits.

It will never be sufficient for the affidavit to state a case for a warrant in the language of the statute, unless it is in those cases in which the residence of the plaintiff, or that of the defendant, is a ground for a warrant, in a proper case for such process; or, unless it relates to the character of the defendant as to his being a resident of the county, who is neither a freeholder, nor an inhabitant having a family. For though the very language of the statute is stated, that will not do; because there must also be a statement of such facts and circumstances as will prove that a case exists within the statute, and the justice must have such evidence that he can *judicially* adjudge the question. *Stewart* v. *Brown*, 16 Barb., 367. The case just cited was an attachment case, but the same rule is applicable to a warrant.

Where there are several defendants, and the action is for a tort, the general rule is, that any of the defendants may be sued separately; or, if the trespass was committed by several persons jointly, they may, if the plaintiff elects, be all sued together. The affidavit will be varied, when that is necessary, to meet the facts and circumstances of each case.

Fictitious name of defendant.] The statute provides: "Whenever the name of any defendant shall not be known to the plain-

tiff, he may be described in the summons or *warrant* by a fictitious name; and if a plea in abatement be interposed by such defendant, the justice before whom the suit is pending, shall amend the proceedings according to the truth of the matter, and shall thereafter proceed therein in like manner as if the defendant had been sued by his right name." Vol. I, 74, § 207; Laws 1830, ch. 320, § 37.

This amendment of the law was made to prevent actions against justices and parties, in that class of cases in which the defendant could be readily identified and arrested, but when he was a stranger whose name was not known. *Griswold* v. *Sedgwick*, 6 Cow., 456; *Scott* v. *White*, 4 Wend., 555; *Mead* v. *Haws*, 7 Cow., 332.

As the statute now stands, the plaintiff may state in the affidavit that he does not know the name of the defendant, and may then name him as John Doe, or by any other fictitious name; and then the affidavit should show as in other cases, that there is a cause of action for which a warrant may issue, and also show that the defendant is a non-resident; or state any other sufficient facts to show that he is a person against whom a warrant may issue as a first process.

Amount of demand.] The statute does not require the plaintiff to state the amount of his demand, as is done in attachment cases. But if any amount is stated, care should be taken that the sum named does not exceed two hundred dollars or the extent of this jurisdiction of the justice.

Affidavit, by whom made.] The statute provides that the affidavit may be made by the applicant, or by any other person, in those cases in which a warrant is authorized against freeholders, or inhabitants having families. Vol. I, 39, § 15, subs. 3 and 4. In the section which applies to warrants generally, the language is, that the person applying shall, by affidavit, state the facts, &c.

Taking all the provisions of the statute together, it seems clear that the affidavit may be made by the plaintiff, or by his agent or attorney, or by any other person who knows the requisite facts. *Hunter* v. *Burtis*, 10 Wend., 358, 360. It is not probable that it was intended that there should be two different rules of evidence, one of which would require the affidavit of the person applying for the warrant, and the other dispensing with his affidavit and taking that of any other person. If legal competent proof is made of all the facts and circumstances which are necessary, it will be sufficient that the proof is made by any person who knows the requisite facts. It is, however, best in all cases to comply literally with the statute if it can be reasonably done. And the construction which has been given, is one which is deemed to be a compliance with the spirit and intention of the law, although not literally following the precise language of it. A literal compliance with the statute, would permit affidavits against freeholders and inhabitants having families, to be made by the applicant for the warrant, or by any other person; while in all other cases, it

would be necessary that the affidavit should be made by the applicant and not by any other person. The effect of such a rule would be to permit an affidavit to be made in the most important cases by any person, while in other cases of less importance, the applicant alone could make the affidavit.

Original affidavits defective.] If a warrant is issued upon an affidavit which is defective, and the defendant is arrested upon the warrant issued thereon, the plaintiff will be liable as a trespasser. *Loder* v. *Phelps*, 13 Wend., 46. No amendment of the affidavit will be of any avail, nor can new affidavits be furnished. The right to issue the warrant must be sustained upon the original affidavits, or the party who obtains it will be liable for the injury which the defendant suffers from the arrest. See also *ante*, 90.

Quashing warrant.] Whenever a justice is satisfied that the affidavit upon which a warrant has been issued is defective, he should at once discharge the defendant from the arrest. And more than this, a defendant is permitted to controvert the truth of the facts stated in the plaintiff's affidavits, even when they make a *prima facie* case upon their face.

In one case, a warrant was issued against the defendants on the ground that the affidavit stated that they were non-residents of the state; and the defendants, before pleading, moved to quash the proceedings, for the reason that they were not subject to arrest by warrant on that ground; and the plaintiffs, for the purposes of the motion, admitted that the defendants were then residents of the county in which the warrant was issued, and that they had been such residents for more than thirty days preceding the issuing of the warrant. The justice decided that the warrant was properly issued, and the county court affirmed the judgment. But the supreme court reversed both judgments; and they said, by COWEN, J.: "Upon the motion to quash the warrant, the plaintiffs, before the justice, admitted that the defendants were residents of Granville, in Washington county, and had been so for more than thirty days before the warrant was taken out. The justice had jurisdiction of the process, and the affidavit on which the warrant issued, made it regular in the first instance; but certainly the affidavit was not conclusive. It was still open to be met by the defendants, on proof that it was made under a plain mistake. That was admitted, and the justice should, therefore, have dismissed the suit; or, to speak more technically, he should have set aside the proceedings for irregularity." *Shannon* v. *Comstock*, 21 Wend., 457, 459.

That decision was made under the statute as it stood when originally enacted. Laws 1831, ch. 300, § 30, sub. 1. A non-resident of the state was then liable to arrest, even in actions upon ordinary contracts, if such defendant had not resided in this state for the space of thirty days immediately preceding the issuing of the warrant. This clause was repealed subsequently, so that no warrant can now be issued upon such grounds. But the repeal of that clause does not in the least impair the force of the

decision as to the principle, that the defendant may show that there is no ground for issuing a warrant against him. The rule is general, and the effect of that decision is to permit a defendant, in any case, to controvert the truth of the facts stated in the plaintiff's affidavits. The defendant may make such proof by affidavits, or he may prove the facts by swearing witnesses before the justice.

Application, how made.] The application for the warrant need not be in writing. It is sufficient to apply to the justice, and to request him to issue the process upon proper proofs, &c. The application may be made by the defendant in person, or by his agent or attorney. And the plaintiff need not apply in person, even when he is a non-resident of the county. His agent may make the necessary affidavit and procure the process. *Hunter* v. *Burtis*, 10 Wend., 358, 360.

In what town to sue.] This question has been fully discussed, *ante*, 52. A *non-resident plaintiff* may sue a resident defendant by warrant, in any town in the county in which such defendant resides. *Hunter* v. *Burtis*, 10 Wend., 358, 360; and see *Onderdonk* v. *Ranlett*, 3 Hill, 323. But a *non-resident defendant* must be sued in the town in which he may be at the time when the action is commenced. This rule of law is equally applicable to a summons, whether long or short, or to an attachment, whether long or short, or to a warrant. See *ante*, 52.

What the affidavit should show.] The manner of stating the facts having been explained, the next point which requires notice is, to show *what facts* should be stated in the affidavit. The first general rule is, that the affidavits should show clearly and affirmatively all the facts which are necessary to authorize a warrant in the particular instance in which it is demanded; and such facts cannot be too directly and positively stated.

The next rule is, that the affidavit shall show affirmatively, that the case is one of that class in which a warrant is a legal and proper process. Again, the affidavit should show the residence of both parties, and especially so, when that is one of the grounds upon which the warrant is sought.

When the defendant is a freeholder, or an inhabitant having a family, there must always be proof of the particular acts which the statute specifies as grounds for a warrant against them, unless it is in the case of a non-resident plaintiff, or when a summons has been issued as a first process, or when some statute authorizes a warrant without proof. See *ante*, 96. When the plaintiff is a resident of the county, and the defendant is a non-resident, it will be sufficient if the affidavit shows a cause of action upon which a warrant may issue, that the plaintiff is a resident, and that the defendant is a non-resident of the county. *Whitney* v. *Shufelt*, 1 Denio, 592; *Pope* v. *Hart*, 35 Barb., 630. No security need be given in such a case.

Where the plaintiff and the defendant are both residents of the county, and the defendant is neither a freeholder, nor an inhabit-

ant having a family, it will be sufficient to show in the affidavit that the cause of action is one upon which a warrant may issue, that both parties are residents of the county, and that the defendant is neither a freeholder of the county, nor an inhabitant thereof, having a family. No security need be given.

Where both parties are non-residents, and the cause of action is one for which a warrant may issue, the affidavit should show that the cause of action is one for which a warrant may issue, and that both parties are non-residents. The plaintiff must then give security for any sum that may be adjudged against him in the suit.

Where the plaintiff is a non-resident of the county, and the defendant is a resident thereof, it will be sufficient to show that there is a cause of action upon which a warrant may issue, and that the plaintiff is a non-resident of the county. In the case of a non-resident plaintiff, a warrant may issue against all resident defendants alike, whether they are freeholders or inhabitants having families, or whether they are not freeholders or inhabitants having families. The reason of this is, because this process is given to the plaintiff on account of his character as a non-resident, and no distinction is made on account of the character of the defendant who is a resident. In this case, however, the plaintiff must give security. The statute provides as follows, in relation to non-resident plaintiffs: "A justice *shall*, upon application, issue a warrant in the following cases: 1. (Not important here.) 2. Where the plaintiff is a non-resident, and tenders to the justice security for the payment of any sum which may be adjudged against him in the suit." Vol. I, 39, § 15, sub. 2.

Where there are two plaintiffs in the action, and one of them is a resident, and the other is a non-resident, no warrant can be issued merely on the ground of the non-residence of one of the plaintiffs. *Linnell* v. *Sutherland*, 11 Wend., 568. There must be the same proof in such a case, as is required where all the parties to the action are residents of the county. The form of the security will be given hereafter, and the liability of the surety stated.

Where the parties, both plaintiff and defendant, are residents of the county, and the defendant is either a freeholder of the county, or an inhabitant thereof, having a family, the plaintiff must show in his affidavits that the cause of action is one upon which a warrant may issue; that both parties are residents of the county; that the defendant is a freeholder of the county, or an inhabitant thereof having a family; and, 1. That the defendant is about to depart from the county, with intent not to return thereto; or, 2. That the plaintiff will be in danger of losing his debt or demand unless a warrant is granted. But it will not be sufficient to merely state either or both of the grounds last mentioned. The statute requires that such grounds shall be stated, and that the affidavit shall then state the facts and circumstances which prove that such grounds exist; and when such facts and

circumstances are stated, the justice can "the better judge of the necessity and propriety of issuing such warrant." Vol. I, 39, § 17.

When the name of the defendant is not known to the plaintiff, he may give the defendant a fictitious name, as John Doe. And in such case, the affidavit should show that the name of the defendant was not known to the plaintiff; that the defendant is named by a fictitious name, to wit, John Doe; that a cause of action exists upon which a warrant may issue; and that the defendant is a non-resident of the county, which is all that is required. But if the defendant is a resident freeholder, or inhabitant having a family, then state such facts as have just been mentioned; and also show in addition, those facts which are required to be shown against defendants who are freeholders, &c.

Affidavit when defendant is not a freeholder, &c.

FULTON COUNTY, *ss:* John Doe, being duly sworn, says that he desires to commence an action against Richard Roe, by warrant; that the cause of action upon which such warrant is desired, is for wrongfully and unlawfully taking and converting to the use of the said Richard Roe, one wagon which was the property of this deponent; that this deponent and the said Richard Roe are both residents of the county of Fulton, and that the said Richard Roe is neither a freeholder of said county, nor an inhabitant thereof having a family. JOHN DOE.

Subscribed and sworn before me, this
7th day of November, 1864.
LABAN CAPRON, *Justice.*

Affidavit when defendant is a freeholder, &c.

FULTON COUNTY, *ss:* John Doe being duly sworn, says that he desires to commence an action against Richard Roe, by warrant; that the cause of action upon which such warrant is desired, is for wrongfully and unlawfully breaking and entering upon the lands of this deponent, which are situated in the said county of Fulton; that this deponent and the said Richard Roe are both residents of the said county of Fulton; that the said Richard Roe is a freeholder of said county (or an inhabitant thereof, having a family); that the said Richard Roe is about to depart from said county of Fulton, with intent not to return thereto; that the said Richard Roe is utterly insolvent; that he has been borrowing money of several persons; that he borrowed the sum of five hundred dollars this day of one John Denn, and gave to said Denn a mortgage upon a house and lot belonging to said Richard Roe, and situated in the said county of Fulton; that the said Richard Roe has sold all his personal property and converted the same into money; that the said Richard Roe this day told this deponent, that he, the said Richard Roe, had mortgaged his real estate, for nearly or quite all that it was worth, and that he did not intend to pay the mortgage thereon; that said Richard Roe further told this deponent, this day, that he, the said Richard Roe, had got all the money out of his property in this county that he ever expected to get; that he intended to leave the said county of Fulton this night after dark; that he was going to the state of Wisconsin to reside, and that he did not intend to return to the county of Fulton.

JOHN DOE.

Subscribed and sworn before me, this
7th day of November, 1864,
LABAN CAPRON, *Justice.*

The foregoing forms have been given for the sole purpose of showing the manner in which the facts and circumstances, and the grounds for a warrant, ought to be stated.

To give a form for every case would be impossible, because the circumstances of each case are in some respects peculiar to itself. But an intelligent justice will be able to draw an affidavit which is appropriate in any case, if he will carefully examine the statements which have been made for the purpose of showing what facts ought to be set out in each instance, see *ante*, 102. The only correct method of practice which any justice can adopt, is to make himself entirely familiar with the law applicable to each class of cases. And he should know what facts ought to be stated in each instance to authorize a warrant, so that he would be able to draw a sufficient affidavit even if he had no form for a guide. A precedent is convenient when a person is in haste; because the formal parts of the affidavit are not, in that case, overlooked. But no well informed justice will ever rely upon any precedent for full information as to what an affidavit should contain.

Form of bond by non-resident plaintiff.

Know all men, by these presents, that we, James Jackson, and John Styles, are held and firmly bound unto Richard Roe, in the sum of two hundred dollars, to be paid to the said Richard Roe or to his certain attorney, executors, administrators or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals. Dated the 7th day of November, 1864.

Whereas application has been made by John Doe, to Laban Capron, Esq., a justice of the peace of the town of Broadalbin, in the county of Fulton, for a civil warrant against Richard Roe, who is a resident and freeholder of the said county of Fulton; and such application is made in pursuance of the statutes in such case made and provided; and whereas, also, the said John Doe is a non-resident of the county of Fulton.

Now, therefore, the condition of this obligation is such, that if the said John Doe shall pay to the said Richard Roe any sum which may be adjudged against the said John Doe in said suit, which is commenced by said warrant, then this obligation to be void, otherwise to be of full force and virtue.

JAMES JACKSON. [L. S.]
JOHN STYLES. [L. S.]

Sealed and delivered in presence of
LABAN CAPRON.

Approval indorsed on bond.] I approve of the sureties in the within bond. November 7th, 1864. LABAN CAPRON, *Justice.*

The statute does not require any approval to be made in writing, in the case of issuing a warrant. But it is a correct practice to do so; and there will then be less danger of omitting it in those cases in which a written approval is essential. There are but two instances in which it is necessary for the plaintiff to give security for the issuing of a civil warrant; one of these cases is, where the justice orders the detention of a canal boat, in which

case, security must be given, as is hereafter explained. The other case is, where the plaintiff is a non-resident of the county; in which case he must give security for any sum which may be adjudged against him in the suit. There is no case in which the sureties are liable to any costs or damages, except such as are given in the suit before the justice; unless it is in the case of detaining a canal boat, or unless a judgment should be rendered which is large enough to authorize a new trial in the county court. The sureties in a bond for a non-resident plaintiff, are not liable for the costs of an appeal in any case. *Fenno* v. *Dickinson*, 4 Denio, 84. This case was one in which a short summons was issued in favor of a non-resident plaintiff, and security was given by such plaintiff; it was held, that the surety was not liable for the costs of an appeal. The statute which requires security to be given by non-resident plaintiff is precisely the same, whether he takes a short summons or a warrant. Vol. I, 39, § 16, sub. 2, and Laws 1831, ch. 300, § 32; Vol. I, 75, § 214.

The statute does not require that the security which is given by a non-resident plaintiff, shall be in the form of a bond. But a bond will unquestionably be a proper form in which the security may be given. For that reason, therefore, the form of a bond is preferred, and in addition to that, the manner of giving security will then be uniform, since the form of the security which has been given in any case, has invariably been that of a bond. See also title Short Summons, Security for.

The statute does not require more than one surety, if he is entirely responsible. The case of a warrant is materially different from that of an attachment, so far as it relates to the security. Ordinarily the sum which can be adjudged against a plaintiff in a suit commenced by warrant is a trifling one, usually not exceed- the costs of the action. But in attachment actions, there is almost always a considerable liability assumed by the sureties. See Attachment.

The bond should describe the names of the parties correctly, see *ante*, 43. The *execution* of the bond will be similar to that of an attachment bond. See Attachment. A mere verbal promise to answer as a surety, would be void by the statute of frauds. And a letter in the following form was held to be insufficient: "Mr. Brock—Please let Mr. Tobias have a warrant and I will be answerable for the cost. John Holly." The court said of this letter, "It was a promise to pay the cost of a warrant, without specifying in what suit. The statute requires security *not merely for the costs*, but for any sum which may be adjudged against the plaintiff." *Money* v. *Tobias*, 12 Johns., 422. The present statute says, for "any sum which may be adjudged against him *in the suit*." In one case in which the plaintiff was not a non-resident and the action was trespass, the court held that a deposit of money with the justice was sufficient, when the amount deposited was equal to any costs that could be rendered against the plain-

tiff, since there could not be any set-off in such an action. *Wheelock* v. *Brinckerhoof*, 13 Johns., 481.

The passage of the non-imprisonment act has had the effect of limiting nearly, if not quite all actions to that class in which a set-off is not admissible, so that the decision referred to will frequently be in point as an authority. This case decides not merely that a deposit of money will be sufficient as a mode of giving security, but that the justice is bound to accept of such security if the amount is sufficient. And since a surety in this case is not liable to the costs on an appeal, the only question as to the amount of the security, will be as to what sum may be rendered against the plaintiff in the suit which is then commenced. It cannot exceed two hundred dollars, and the costs of the suit before the justice, even if there were any case in which a set-off could be allowed. And in all other cases (except detaining canal boats, &c.) the amount of the recovery would be limited to the costs of the judgment against the plaintiff in the action before the justice. The best practice, however, is for the plaintiff to furnish a bond such as has been given on a preceding page, *ante*, 105. There will not then be any question as to the sufficiency of the form of the security, and neither the plaintiff nor the justice will need to have any fears that the proceedings may be irregular or illegal as to that point. The form of a warrant is prescribed by the statute thus: "A warrant shall be directed to any constable of the county where the justice issuing the same resides, and shall command such constable to take the defendant and bring him forthwith before such justice, to answer the plaintiff in a plea in the same warrant to be mentioned, and shall further require the constable, after he shall have arrested the defendant, to notify the plaintiff of such arrest." Vol. I, 40, § 18.

Form of civil warrant.

FULTON COUNTY, *ss:* The People of the State of New York: To any constable of said county, GREETING: We command you to take Richard Roe, and bring him forthwith before Laban Capron, Esq., one of the justices of the peace in Broadalbin, of said county, at his office in said town and county, to answer John Doe in a plea or action for wrongfully and unlawfully breaking and entering upon the lands and close of the said John Doe, situated in said county, to the damage of the said John Doe of two hundred dollars or under; and after you shall have arrested the said Richard Roe, you are further commanded to notify the said John Doe of the said arrest; and also to make due return of your proceedings hereupon as by law required. And have you then and there this precept. Hereof fail not at your peril. Witness our said justice at the town of Broadalbin, in said county the 7th day of Nov., 1864. LABAN CAPRON, *Justice.*

The statute provides: "All process issued by any justice of the peace shall be signed by him, and may be under seal or without seal." Vol. I, 66, § 158.

The statute says that the defendant is to be required to answer the plaintiff in a plea in the same warrant to be mentioned. But the abolition of forms of action which the Code has

effected, does not leave any actions of the names then in common use. And since the Code, it has been the common practice to disregard this manner of stating any plea in a summons. See *ante*, 46.

The same rule would probably apply to a warrant. But it is a very easy matter to state in the warrant the nature of the action as has been done in the form given. And it will be best, in practice, to always state briefly the nature of the action in the warrant. If the action is for converting personal property, the warrant can state that the defendant is to answer, "in an action for wrongfully and unlawfully taking and converting to his own use one wagon belonging to the plaintiff, of the value of two hundred dollars." Or, in other cases, stating the cause of action in some similar manner.

There is one point in which a warrant differs from a summons or attachment. There is no return day mentioned in a warrant. The only command as to the return of the warrant is, that the constable shall take the defendant *forthwith*. There is one class of persons who will, for that reason, be benefited by the use of a warrant. When the cause of action is one for which a warrant may issue, a non-resident plaintiff will be able to dispose of a cause with greater expedition than by any other process. And when the cause of action is one in which a warrant may issue; a non-resident plaintiff must take a warrant or a long summons, for he cannot, in such a case, take a short summons. *Ante*, 76; and Laws 1831, ch. 300, § 32; Vol. I, 75, § 214.

Detention of canal boats.] The law in relation to this class of cases can be best discussed in a separate article by itself. The statute provides as follows: "If any boatman, or person on board of any boat on any canal, shall take, without right, any rails, boards, planks or staves, firewood or fencing posts, from the banks or vicinity of the canal, the master of the boat shall forfeit to the owner treble the value of the property taken, and the possession of such property on board the boat, shall be presumptive evidence of such taking." 1 R. S., 246, § 169, as amended by ch. 117 of Laws of 1830; 1 R. S., 628, § 290, 5th ed.

"Any person or boatman who shall violate the provisions of the last section, shall forfeit twenty-five dollars to any person who will prosecute therefor." 1 R. S., 247, § 170, 1st ed.; 1 R. S., 628, § 291, 5th ed.

"Every penalty and forfeiture, prescribed by this article, and which is declared to be recoverable against the owner, master, boatman, navigator, or other person, having charge of any boat or other float when incurred, shall be chargeable on such boat or float, and a suit for the recovery thereof, may be brought against any person, being in the possession, or having the charge of such boat or other float, at the time such suit is commenced." 1 R. S., 247, § 271. 1st ed.; 1 R. S., 629, § 293, 5th ed.

"When any suit shall be prosecuted for any such penalty or forfeiture, the magistrate issuing the process, by a clause to be

inserted therein, may direct the officer executing the same to detain such boat or float, and the furniture and the horses belonging thereto, until the suit shall be determined, or until adequate security shall be given for the payment of any judgment that may be recovered." 1 R. S., 247, § 172, 1st ed.; 1 R. S., 629, § 293, 5th ed.

"If such security shall be given, or the defendant in such suit shall prevail, the magistrate shall order the boat or other float and property detained, to be released; but if no such security shall be given, and a judgment shall be recovered for such penalty or forfeiture, and the same, together with the costs, shall not be immediately paid, an execution shall be issued, under which the property so detained, may be sold, in like manner, as if the judgment had been obtained against the owners thereof." 1 R. S., 247, § 173, 1st ed.; 1 R. S., 629, § 294, 5th ed.

"Whenever an action shall be brought to recover any penalty imposed by law for taking any rails, boards, planks or staves from the banks or vicinity of a canal, in which a justice is authorized to direct the detention of any canal boat, he shall not indorse such direction on any warrant, unless a bond, as prescribed in the next section, shall be executed and delivered to such justice." Vol. I, 40, § 21.

"Such bond shall be in the penalty of at least one hundred dollars with one or more sureties, to be approved by such justice, conditioned that such action shall be prosecuted to judgment with all convenient speed, and that if judgment be rendered in favor of the defendant, the obligors will pay the costs and charges which shall be adjudged against the plaintiff, and all damages which may ensue from the detention of such boat and the cargo thereof, and the crew navigating the same." Vol. I, 40, § 22.

There must be an affidavit in this case as much as in any other. And the affidavit must show that some property, such as is specified in the statute, has been taken from the banks or the vicinity of some canal, specifying the name of it; that the property was taken by some boatman or person on board the canal boat or float, and giving the name of the boat or float if it has one; and it should also state in what city, town and county the property was taken and the value of the property. The affidavit may, in other respects be similar in form to the ordinary affidavit. The bond is materially different from the bond which is given by a non-resident plaintiff.

Form of bond to authorize detention of canal boat.

Know all men by these presents, that we, John Doe and James Den of Fultonville, in county of Montgomery, are held and firmly bound unto Richard Roe, in the sum of one hundred dollars, to be paid to the said Richard Roe, his executors, administrators or assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals. Dated the 7th day of November, 1864.

Whereas, application has been made by the above named John Doe to Austin Fish, Esq., a justice of the peace of the town of Glen, in the county of Montgomery, for a warrant against the said Richard Roe, and an action is about to be commenced against the said Richard Roe, before the said justice, in favor of the said John Doe, to recover the penalty which is given by law, for taking, without right, any rails, boards, planks or staves, firewood or fencing posts, or some of them, from the banks or vicinity of the Erie canal. And whereas, the said John Doe prays process to detain the canal boat called the Saratoga, and the furniture and the horses belonging thereto, until adequate security shall be given for the payment of any judgment that may be recovered.

Now therefore, the condition of this obligation is such, that if the said John Doe shall prosecute such action to judgment with all convenient speed, and in case judgment shall be rendered in favor of said Richard Roe, if the said John Doe and the said James Den shall pay the costs and charges which shall be adjudged against the said John Doe, and also all damages which may ensue from the detention of the said boat and the cargo thereof, and the crew navigating the same, then this obligation to be void, otherwise to remain in full force and virtue. JOHN DOE. [L. S.]

JAMES DEN. [L. S.]

Sealed and delivered in presence of
AUSTIN FISH.

The statute requires that the justice shall approve of the sureties, and the approval may be in the following form, by indorsing it upon the bond:

I hereby approve of James Den, as the surety in the within bond. Dated November 7th, 1864. AUSTIN FISH, *Justice.*

Form of Warrant for Penalty.

MONTGOMERY COUNTY, *ss:* The people of the State of New York: To any constable of said county, GREETING: We command you to take Richard Roe, and bring him forthwith before Austin Fish, Esq., one of our justices of the peace in the town of Glen, in said county, at his office in said town, to answer John Doe in a plea or action to recover a penalty of twenty-five dollars, and also to his damage of seventy-five dollars or under, for taking, without right, certain rails, boards, planks and staves, or firewood or fencing posts, from the banks of the Erie canal, or the vicinity thereof; and after you have arrested the said Richard Roe, you are further commanded to notify the said John Doe of the said arrest. And whereas, a bond in due form of law has been executed and delivered to me, the said justice, and the sureties have been approved by me, you are further commanded to detain the said boat Saratoga, and the furniture and horses belonging thereto, until the suit shall be determined, or until adequate security shall be given for the payment of any judgment that may be recovered; and also to make due return hereupon, as by law required. Hereof fail not at your peril. Witness our said justice, at the town of Glen, in said county, the 7th day of November, 1864. AUSTIN FISH, *Justice.*

The direction to detain the said boat is contained in the body of the process, instead of being indorsed thereon, because the statute says that the clause authorizing the detention of any such boat, is to be directed by a *clause* to be *inserted* in the warrant. See § 172, *ante*, 108, 109.

There is also an other important point to be remembered. In

every action for the recovery of a penalty, there must be an indorsement upon the process, which refers to the statute, by virtue of which the penalty is given. See the matter discussed fully, *ante*, 47.

The indorsement upon the warrant in this case may be in the following form:

Issued according to the provisions of article eight, title nine, chapter nine, of the first part of the Revised Statutes, and entitled Regulations and Penalties concerning the navigation of the canals and the collection of tolls.
AUSTIN FISH, *Justice.*

SECTION II.

SERVICE OF WARRANT.

A warrant must be served by arresting the defendant, and taking him forthwith before the justice who issued the warrant.

Arrest, what it is.] An arrest is the apprehension of a person by virtue of a lawful authority to answer the demand against him in a civil action. No manual touching of the body, or actual force is necessary to constitute an arrest. It is sufficient if the party be within the power of the officer and submits to the arrest. And, therefore, if a constable has a warrant, and he goes to the defendant and informs him of that fact, it will be an arrest if the defendant voluntarily accompanies the officer. *Gold* v. *Bissell*, 1 Wend., 210, 215.

Who may arrest.] Warrants, in civil actions, are usually executed by some constable of the county, though the justice who issues a warrant may depute a private person to execute it. But the person deputed must be of lawful age, and not a party in interest in the action. See *ante*, 48. A plaintiff cannot be deputed to serve a warrant in his own favor. Nor can a constable, who is plaintiff in an action, execute a warrant in his own favor. *Bennet* v. *Fuller*, 4 Johns., 486; *Tuttle* v. *Hunt*, 2 Cow., 436; *Putnam* v. *Man*, 3 Wend., 202. The constable should see that the warrant is properly directed. *Ante*, 43; *Reynolds* v. *Orvis*, 7 Cow., 269.

When to arrest.] It is the duty of a constable to make the arrest as soon as it can be conveniently done. There may be cases in which an arrest cannot be made in a considerable time. The defendant may be absent, or he may leave the county to avoid an arrest. In such cases, the officer must make the arrest at the first opportunity that offers. The statute does not prescribe any time within which an arrest must be made; nor does it prescribe how long the warrant may be kept in the constable's hands before it is served. Resort must be made, therefore, to the general rules of law for the determination of such questions. The constable may keep the warrant in his hands, and he may, within any reasonable time after he receives it, arrest the defendant. What is a reasonable time must depend upon the circumstances of the case. A month would not be an unreasonable time, if the defendant was absent, or if he kept out of the

way to avoid arrest. *Arnold* v. *Steeves*, 10 Wend., 514. But if the defendant cannot be arrested within a few days, say a week or ten days, the better course would be to take out a new warrant. A defendant cannot be arrested on Sunday, nor on election day, nor on a town meeting day, nor can a person be arrested on Saturday, if he keeps that as the Sabbath. This matter has been fully explained. *Ante*, 46.

Where to arrest. [The defendant cannot be lawfully arrested out of the county in which the warrant is returnable, for two reasons: one is, that a civil warrant is of no force whatever out of the county; the other is, that a constable has no authority to serve a civil warrant out of the county. *Ante*, 6.

Who exempt from arrest.] There are many instances in which the defendant is exempt from arrest on a civil warrant. There are some persons who cannot be arrested at any time. There are others who may claim a temporary exemption. It will not be possible, nor, in a work of this kind, will it be necessary, to enumerate all the instances in which parties are exempt from arrest. Those instances which are most likely to occur in practice will be noticed, and all others will be omitted.

Attorneys, solicitors and counselors are exempt from arrest during the sitting of any court of which he is an officer, provided he is employed in some cause pending, and then to be heard in such court. 2 R. S., 290, § 86, 1st ed.; 3 R. S., 480, § 74, 5th ed. This exemption extends to an attorney while attending a special term of the supreme court, for the purpose of making or resisting a motion, *Humphrey* v. *Cumming*, 5 Wend., 90; or while attending a general term to argue causes; or while trying a cause before a referee; or while arguing or trying a cause in a county court or court of sessions, *Gibbs* v. *Loomis*, 10 Johns., 463; or while trying a cause in a justice's court. In the supreme court, the privilege exists during the term, and until a reasonable time to return home; but in a justice's court, only during the time of going to the place of trial, and while actually engaged in the trial of the cause, and during the usual proceedings of the cause, from the commencement of the trial until the rendition of the verdict, and a reasonable time to return home. If the attorney is arrested while at home, he is not exempt, although he was intending to start for the court the next morning, if such court is not then in session, but is to commence within two or three days. *Corey* v. *Russell*, 4 Wend., 204. In such a case, the attorney would not be either going to court or returning from it, although he was intending to do so. Attorneys are not exempt from arrest when they are sued with other persons. See the statute above cited. *Tiffany* v. *Driggs*, 13 Johns., 252; *Gay* v. *Rogers*, 3 Cow., 368.

The statute cited, also exempts all other officers from arrest, during the actual sitting of the court, unless they are sued with other persons, when they are not entitled to any exemption. This would include the clerk, constables and justices of the peace, if attending as members of the court, or if they are engaged in

holding a court themselves. Sheriffs are not exempt. *Hill* v. *Lott*, 10 How., 46; *Day* v. *Brett*, 6 Johns., 22.

Parties to a suit, in any court, are exempt from arrest while going to the court and attending it, and while returning home. They are exempt, during the trial, until the verdict of the jury is rendered, or they are discharged by the court, and a reasonable time thereafter to return home. *Clark* v. *Grant*, 2 Wend., 257.

A party attending a reference, is entitled to the same exemption as when attending a trial in court. It extends to the time in going, and during the time of the hearing, and until a reasonable time to return home. *Ib.* The general rule is, that the parties and all persons who have any relation to the suit, are exempt from arrest while going to court, attending it, and returning home. This would include bail, guardians, next friends, and the like. Gra. Pract., 129, 2d ed. Jurors are exempt while going, attending and returning home from the court, at which they are summoned.

Witnesses are also exempt. The statute is, "Every person duly and in good faith subpœnaed as a witness to attend *any* court, officer, commissioner or referee, or summoned to attend any judge, officer or commissioner in any case where the attendance of such witness may be enforced by attachment, or by commitment, shall be exonerated from arrest in any civil suit, while going to the place where he shall be required by such subpœna to attend, while attending such place and while returning therefrom." 2 R. S., 402, § 51, 1st ed.; 3 R. S., 685, § 65, 5th ed.

Before this statute it would have been sufficient to exempt a witness from arrest, if he had attended court without being subpœnaed. *Coles* v. *McClellan*, 4 Hill, 60, note *a*. But since the statute, a witness is not exempt unless he has been actually and duly subpœnaed. *Coles* v. *McClellan*, 4 Hill, 59; *Hardenbrook's case*, 8 Abb., 416.

"No acting commissioner, superintendent of repairs, collector or lockkeeper on any canal shall be held to bail, or taken by warrant in any civil suit for any act done, or omitted to be done by him in the exercise of his official duties." 1 R. S., 224, § 43, 1st ed.; 1 R. S., 588, § 61, 5th ed. Married women and all other females are exempt from arrest upon any civil warrant issued by a justice of the peace. *Ante*, 92. This section cited relates to executions. But there would not be any propriety in arresting a female upon a warrant, if she could not be arrested nor imprisoned upon the execution.

"No person belonging to the military forces shall be arrested on any civil process, while going to, remaining at, or returning from any place, at which he may be required to attend for election of officers or other military duty." Laws 1858, ch. 129, § 17; 1 R. S., 771, § 22, 5th ed. "For the purpose of preserving order on the day of parade, the militia shall be considered as under arms from the rising of the sun to its setting on the same day, and shall be

exempted from arrest on civil process during that time." 1 R. S., 303, § 27, 1st ed.; 1 R. S., 742, § 38, 5th ed.

Members of the state legislature, which includes senators and members of assembly, are exempt from arrest for fourteen days preceding the session, during their attendance there and while returning home, if the time of returning does not exceed fourteen days; so each member is exempt during any adjournment if it does not exceed fourteen days, and in all cases during the time he may be absent by leave of the house. No officer of either house is liable to arrest while in actual attendance of the house. 1 R. S., 154, §§ 6–9, inclusive, 1st ed.; 1 R. S., 455, §§ 6–9, inclusive, 5th ed. This exemption is not allowed if the process is issued against the defendant for any forfeiture, misdemeanor or breach of trust in any office or place of public trust held by him. *Ib.* So the exemption is at an end if the defendant has returned home, although the fourteen days have not expired. *Corey* v. *Russell*, 4 Wend., 204. Senators and representatives in congress, foreign ministers, &c., are exempt. But there are so few cases in which a justice would be authorized to issue a warrant against a member of congress, or a member of the state legislature, or a foreign minister, that no further notice will be given to the subject.

Voters at an election or a town meeting are exempt from arrest on that day, and in the town in which they are entitled to vote. *Ante*, 47.

When the name of the defendant is not known, he may be arrested although a fictitous name is given to him in the warrant. But, in this case, the constable must exercise great care, for if he arrests any other person than the one intended, he will be liable to an action for a false imprisonment. If the defendant is not present, the constable should require the plaintiff to accompany him in making the arrest, or to send some other person to point out the individual whom he wishes to have arrested. If the plaintiff refuses or neglects to do either, the constable should refuse to execute the process.

The manner of making an arrest has been partially explained, and so far as relates to what may constitute an arrest. But a few more remarks are necessary, since there may be cases in which the defendant will not peaceably accompany the officer. The first duty of an officer is, to notify the defendant that he has a warrant for his arrest. The officer may at the same time lay his hand gently upon the shoulder or the person of the defendant, although this is not necessary if the defendant submits to the arrest and accompanies the officer. If the defendant should attempt to evade an arrest by running away, or by attempting to secrete himself, it is the duty of the constable to pursue him and take him into actual custody; and if it is necessary, the officer may use such force as may be necessary to accomplish the arrest. And in all cases of resistance to the officer in executing the warrant, it is his duty to meet and overcome such resistance.

And if any third persons aid the defendant, they should be arrested and carried before a justice or other proper magistrate to be held to bail for trial. For it is an indictable offense to resist an officer in the execution of the duties of his office, or to aid an other person in doing so. As we have already seen, *ante*, 48, a justice may depute a private citizen for the purpose of executing the warrant. In such a case, the person so deputed is bound to show his process if the defendant requests him to do so. And if the person deputed refuses to show the process, the defendant will be justified in resisting an arrest. *Frost* v. *Thomas*, 24 Wend., 418. The rule is otherwise as to a constable. He is a known public officer, and he is not bound to show his process even if it is demanded. *Arnold* v. *Steeves*, 10 Wend., 515; *Bellows* v. *Shannon*, 2 Hill, 86, 90, 91. But he must notify the defendant that he has a warrant for his arrest, and must state the substance of it to the defendant. And a defendant will be justified in resisting a constable, if no notice whatever is given that the officer has a warrant. *Bellows* v. *Shannon*, 2 Hill, 86, 90, 91. In such a case, he will not be liable to an indictment, nor in an action by the officer for an assault and battery. *Ib.*

A constable cannot, in any case, break open the defendant's dwelling house to arrest him in the first instance. And a breaking, in such a case, need not be a violent forcing of the locks or fastenings of the doors. If the outer door is merely latched, it will be a breaking to merely unlatch it and enter the house. If a constable does thus unlawfully enter the defendant's house, the defendant, and any other person therein, may lawfully resist the officer in making the arrest. *People* v. *Hubbard*, 24 Wend., 369; *Curtis* v. *Hubbard*, 4 Hill, 437; *Glover* v. *Whittenhall*, 6 Hill, 597.

If the outer doors of the house are any of them open, the officer may lawfully enter the house and arrest the defendant if he is found therein. If the front door of the defendant's house is usually kept fastened, the constable may enter by a back door if it is open, and he may then break any inner doors for the purpose of making an arrest. *Hubbard* v. *Mace*, 17 Johns., 127; and see *ante*, 66. He should make a demand to have the door opened, however, before breaking it open. The officer will not be justified in obtaining an entrance into the outer door by a fraud; nor, if the door is opened by any person in answer to a knocking at such door, or by ringing the door bell, will he be justified in forcibly rushing in, and thus gaining admission. Crocker on Sheriffs, § 312. A dwelling house is a protection to all persons who are members of the family. And it is also a protection to all the persons who board there, and make it their home, including servants of the family, &c. But it is no protection to a stranger; and if a stranger is in the house, it is the duty of the owner, on the demand of the constable, to open the door. And if the owner refuses to do so, after a proper demand, the constable may lawfully break the door, though he should do no unnecessary

damage to the house. But, in such a case, the constable should be certain that the person whom he wishes to arrest is in the house; for if it should turn out that no such person was in the house, at the time of the breaking, the officer will be liable to an action for the trespass. Where the defendant owned a house, and he let all of the house but one room, which he reserved for himself; it was held, that a constable might enter the outer door of the house, which was open, and that he might then break the inner door and arrest the defendant. *Williams* v. *Spencer*, 5 Johns., 352.

This privilege from arrest in the defendant's dwelling house extends to all buildings which constitute a part of the dwelling house itself. But it does not extend to a barn or shop, or store, or warehouse, and the like buildings, if they are disconnected from the dwelling house, and they do not form a part of the curtilage. *Haggerty* v. *Wilber*, 16 Johns., 287. The curtilage is the open space situated within a common inclosure belonging to a dwelling house. There are instances in which an officer may break open the defendant's dwelling house, although it cannot be done in the first instance. If the defendant has been arrested outside of his dwelling house, and he escapes from the officer without his consent, and against his will, and he then seeks to shelter himself from being rearrested, by shutting himself into his dwelling house, this will not be of any avail. If the officer immediately pursues the defendant, he may break open the door for the purpose of retaking the defendant, and he is not bound in such a case to demand admittance before breaking the outer door. *Allen* v. *Martin*, 10 Wend., 300. But it is the better practice in all cases, to demand admission before breaking open the outer door.

The duty of the constable, in relation to taking the defendant before the justice, after the arrest, is declared in language too explicit to be misunderstood. It must be done *forthwith*. This is the requirement of the statute in relation to the command which the warrant shall contain; and it is the requirement which is made upon the constable after the arrest.

The constable has no right to consult his own convenience, his interest, nor his inclinations in the matter. If the defendant is arrested at any time in the day, so that he may reasonably be taken before the justice by eight or nine o'clock in the evening, it is the duty of the constable to do so. And, especially, is it the duty of the officer to do it if the defendant insists upon having it done.

Circumstances may make it more convenient for the officer in some cases than in others. The defendant and the plaintiff, the justice and the constable, may, in some cases, all reside in the same city, village or neighborhood. In that case there would not need to be much delay in attending before the justice. In other cases, all the parties may reside at considerable distance from the justice, or the defendant may be arrested at a distance from the justice's office. In such cases the officer should act diligently

in relation to taking the defendant before the justice. He need not travel all night, nor later than the usual hours of the evening. There may be causes which will unavoidably delay an officer. His conveyance may become useless, and other similar things may hinder and embarrass him. His duty is to act as promptly as possible to remedy the difficulty, and to discharge his duty.

There is no rule of law which will now permit an officer to do any thing less than to act as promptly as he is able. Any unnecessary delay in taking the defendant before the justice, will make the constable liable in an action. In one case, *Pratt* v. *Hill*, 16 Barb., 303, a justice had issued a criminal warrant, and the defendant had been arrested late on Saturday night. The defendant was not taken before the justice at his office; but the justice had indorsed upon the warrant, before it was issued, an indorsement as follows: "Commit the within named Rufus Pratt till next Monday for examination," which was dated and signed by the justice. The defendant was accordingly committed, because the justice and the constable were both held liable for a false imprisonment. The court said: "The law watches personal liberty with vigilance and jealousy; and whoever imprisons another in this country, must do it for lawful cause, *and in a legal manner*." 16 Barb., 308. The constable was held liable for obeying the indorsement, which was no part of his warrant, and was entirely illegal. His duty was to take the defendant before the justice forthwith. If the justice cannot authorize the constable to disregard the command which is contained *within the warrant*, it is quite clear that the constable will not be any better off if he neglects his duty of his own motion.

If the justice who issued the warrant is absent, or if he is unable to hear or try the cause, or if he is a material witness for the defendant, the constable must then take the defendant before the next justice of the city or town. Vol. I, 40, § 19. The term next justice evidently means the nearest justice. If the justice who issued the warrant is at home, but is unable to try the cause, or he is a material witness for the defendant, it would be well for him to certify that fact on the back of the warrant, thus:

"I, the within named justice, am unable to hear or try the within cause, November 11th, 1864.

JOHN FROTHINGHAM, *Justice*."

Or,

I, the within named Justice, am a material witness for the defendant within named, November 11th, 1864.

JOHN FROTHINGHAM, *Justice*.

This indorsement is not required by the statute, but it will be found convenient in practice. It will be legal evidence for the justice before whom the constable subsequently takes the defendant; and it will be evidence for the constable of the fact that the justice who issued the warrant could not hear or try the cause; and besides that, the proceedings will all appear regular upon their face. When the justice who issued the warrant is

not able to hear or try the cause, or where he is a material witness for the defendant, it is made the duty of the next justice to take cognizance of the action in the same manner as though he had issued the warrant. In such a case, the justice should make a full entry in his docket of the facts, so as to show that he had jurisdiction of the cause. The certificate of the justice who issued the warrant would be evidence to show why he did not hear the cause; and in other cases, the return of the constable to the facts may be competent evidence; or the justice may swear the constable as to the reason why the defendant was not taken before the justice who issued the warrant, or why he did not try the cause. It is said, that if neither the justice who issued the warrant nor the next justice, can hear the cause, that the constable should then go before some other justice in the same city or town. *Arnold* v. *Steeves*, 10 Wend., 514. The point was not decided in that case, though the court took it for granted that such a right existed. In the absence of express authority, each one must judge for himself, as to the true rule in such cases. It seems to me that such a construction is very reasonable. The object of sending the cause to an other justice was, that the action should be heard; and if neither of the first two justices can try the cause, there is no good reason why the third one may not do so if he is able to attend to the cause. It is the duty of the plaintiff to make such arrangements that he may be able to be present before the justice, either in person or by attorney, within twelve hours after the arrest of the defendant. Generally, the plaintiff is notified, so as to be present at the return of the warrant, to the justice. And the constable is required to return specifically, whether he has notified the plaintiff or not.

The defendant cannot, in any case, be detained in custody for more than twelve hours after he is brought before the justice, unless the trial shall commence within that time; or, unless the defendant shall himself delay the cause for a longer time. The object for allowing twelve hours in such cases is, that the plaintiff may be notified within that time of the arrest, if that was not done before the return of the warrant, and also that he may have a reasonable time to secure the attendance of his witnesses. A constable ought not, in any case, to delay the taking of the defendant before the justice, for the purpose of notifying the plaintiff of the arrest. The twelve hours given by the statute are sufficient for that purpose. The statute does not prescribe the manner in which the constable shall notify the plaintiff of the arrest. It may, therefore, be a verbal notice, and this is the general practice, especially when the constable himself is the person who notifies the plaintiff.

There are some cases in which it will not be convenient for the constable to go in person to notify the plaintiff. In such cases, the officer may send a messenger for that purpose. And the better practice will be to send a written notice, which should be

served by delivering a copy thereof to the plaintiff; and retaining the original to prove the service if that should become important.

The notice may be in the following form:

JUSTICE'S COURT.—JOHN FROTHINGHAM, *Justice*.

John Doe
agt.
Richard Roe.

FULTON COUNTY, *ss:* To John Doe, plaintiff, &c. Sir: Take notice that I have arrested the defendant, Richard Roe, and that I took him before the said justice this day at ten o'clock in the forenoon. Dated Nov 7th, 1864.

JAMES PIERSON, *Constable*.

If the plaintiff appears at the return of the warrant, and he is ready to try the cause, the trial should proceed at once, if the defendant is ready and willing to do so. If the plaintiff is not ready at that time, the justice should allow him such reasonable time to get his witnesses as may be necessary, not exceeding twelve hours from the time when the defendant was brought before him.

So on the other hand, if the defendant can be ready to try the cause on the return day, and he desires to do so, the justice should allow him a reasonable time to get his witnesses, and counsel if he desires such assistance. And in that case, it would probably be proper to allow the defendant the same time which the statute gives to the plaintiff, viz., twelve hours. During this twelve hours, the defendant is to be detained in the custody of the constable. And at the end of that time, the justice must direct the constable to discharge the defendant, unless the trial has commenced within that time, or unless the defendant himself has delayed the cause.

Nothwithstanding the right of a defendant, who has been arrested on a civil warrant, to be discharged from the custody of the constable at the expiration of twelve hours from the time when he was taken before the justice, if the trial of the cause is not commenced within that period, still the plaintiff is entitled to have the cause adjourned, if he shows good legal grounds to authorize it. *Pope* v. *Hart*, 35 Barb., 630; *S. C.*, 23 How., 215. But if the plaintiff obtains an adjournment in such a case, the defendant must be discharged from custody. *Ib.*

The cause will not be discontinued by the adjournment, or the discharge of the defendant from the custody of the constable. *Ib.*

After the defendant is arrested, he must be taken personally before the justice, or he will not have jurisdiction of the person of the defendant. In one case *Colvin* v. *Luther*, 9 Cow., 61, the defendant was arrested upon a civil warrant by a constable. The defendant was then about eighteen miles from the justice's office, and he requested the constable to leave him where he was, and to appear for him before the justice as his attorney and confess judgment. The constable made a regular return upon the war-

rant, and appeared in behalf of the defendant, and judgment was entered against the defendant. This judgment was held to be utterly void, because the defendant was not brought before the justice; and see *Bigelow* v. *Stearns*, 19 Johns., 39. The constable is not authorized to take bail or security of any kind of the defendant for his appearance before the justice. Any such bail bond will be void; and if any securities are delivered to the constable, they may be recovered of him by the defendant, in an action. *Millard* v. *Canfield*, 5 Wend., 61. The duty of the constable is plain; he must forthwith take the defendant before the justice. If the defendant has been brought within the jurisdiction of the justice by fraud, for the purpose of arresting him, the justice should discharge him. See *ante*, 51. After the defendant has been arrested, if he escapes from the custody of the constable, without his consent, he may be re-arrested on the same warrant. *Arnold* v. *Steeves*, 10 Wend., 514; *Allen* v. *Martin*, 10 Wend., 300.

If the defendant is privileged or exempt from arrest, he must plead his privilege, or move for his discharge, before answering on the merits, for such an answer will be a waiver of the right to a discharge, since it admits that the defendant is properly in court. *Randall* v. *Crandall*, 6 Hill, 342. During the time that a constable is required to detain the defendant, the officer may keep him in any proper manner, so that he shall be present at the time when required. If the defendant attempts to escape, he may be confined in some proper room, if that is necessary, in order to prevent his escape. But if the defendant does not attempt to escape, nor make any threats of doing so, he ought not to be unnecessarily confined, nor restrained of his personal liberty. The law will justify an officer in taking such precautions as are necessary to secure the detention of the defendant, and his appearance before the justice, and until he is discharged by due course of law.

The constable may command the assistance of any of the male persons of the county to assist him if that is necessary.

Forms of Returns to warrant.

The defendant arrested, and before the court in custody; plaintiff not notified. Nov. 7th, 1864. JAMES PIERSON, *Constable.*

The defendant arrested, and before the court in custody; plaintiff notified. Nov. 7th, 1864. JAMES PIERSON, *Constable.*

The defendant cannot be found in the county of Fulton. Nov. 7th, 1864.
JAMES PIERSON, *Constable.*

The defendant James Denn arrested, and before the court in custody, and the plaintiff notified. The defendant Richard Fenn could not be found in the county of Fulton. Nov. 7th, 1864.
JAMES PIERSON, *Constable.*

CHAPTER VII.

ATTACHMENT.

SECTION I.

GENERAL REVIEW OF THE SUBJECT.

The very frequent difficulties which occur in practice in relation to this kind of process, will justify a careful and somewhat extended examination of the subject. The importance of this matter so far as it relates to the liability of the justice, arising from a want of jurisdiction has already been discussed, *ante*, 14. Parties are equally interested in being correct in their proceedings, since if there is a want of jurisdiction, they may be liable for all injuries arising from the illegal process; and again, if the proceedings are not void, but are merely irregular, and therefore erroneous, a party may be subjected to great expense and delay if the judgment is reversed, while finally, such errors may ultimately terminate in the loss of a debt which would have been secured if proper legal steps had been taken in the first instance. If all the statutes in relation to attachments were entirely unaffected by judicial decisions, it would be difficult to declare in every case with entire certainty, what the correct practice is. But in addition to this difficulty, some of the decisions are directly conflicting, while others of them are, to say the least, not entirely correct expositions of the various sections of the statute. This difficulty and conflict of decisions arose very naturally from the circumstances of the case. In the first place different judges frequently take widely different views as to the true construction of a statute. Again, some of the cases were decided without the advantage of having all the former adjudications cited and examined. So too, some of the cases were decided without a full examination of all the statutes which were material to a correct decision. And finally, some of the more recent cases expressly repudiate and overrule the authority of earlier adjudications. To harmonize all the decisions, is therefore impossible. To determine which of them is correct is a delicate undertaking. And to point out with accuracy and certainty what is the correct practice is a most difficult task.

Under such circumstances the most that can be properly attempted, is to resort to the various statutes themselves and endeavor to give a correct exposition of them as they apply to the various cases, and to cite and comment upon the cases which relate to these various sections. A general preliminary view of the subject will be of service to the justice, and to the student at law, because from such a review, they will be better able to judge of the reasons upon which the statutes or the decisions are founded.

It is the object of the law to give to every person a prompt and effective remedy, and, as nearly as possible, to provide for every particular case. For ordinary cases, an ordinary remedy is sufficient. But when that fails, or when, if resorted to, it would

be ineffectual, then other modes of proceeding are provided. A summons followed by a judgment and execution thereon, is usually a sufficient remedy if the delinquent party has property sufficient to pay the demand, and if such property may be sold on an execution.

But this mode of proceeding may be entirely useless in some cases, for the defendant may leave the county, or he may keep concealed therein for the purpose of avoiding the service of civil process upon him, and thereby preventing the recovery of any judgment against him. Or if he does not do this, he may remove his property from the county, or dispose of, assign or secrete it for the purpose of defrauding his creditors by rendering a judgment and execution fruitless when obtained. The law discountenances every act which is done with such an intention. And when legal proof is made that such facts exist a more prompt and certain remedy is given.

When a debtor is disposed to prevent, or to hinder and delay the ordinary course of the practice in obtaining legal remedies, or when he removes, secretes or disposes of his property for the purpose of defrauding his creditors, he is not entitled to any especial favor from the laws, nor from the courts whose process he would evade or set at open defiance.

The law has therefore provided that the property of such debtors may be immediately taken by a proper officer, and securely kept by him until a judgment and execution can be duly obtained, when such property may be sold and the avails applied to the payment of the judgment.

It must be remembered, however, that such a mode of proceeding is a statutory one; that it is in its nature summary; that the defendant has no opportunity to show cause why it ought not to issue; that it assumes to dispose of a person's property before any judgment has authorized it to be done; that it is frequently a serious injury to the person whose property is seized, by affecting his credit, or subjecting him to unnecessary costs, and that the issuing of this process is always based upon a charge of *fraud* which has been made and *sworn* against him. It is for these, among other reasons, that the courts require a strict compliance with the law before an attachment can be legally issued. And the first steps to be taken require due and legal proof that there is a legal demand, and that the defendant has done or is about to do, some of the fraudulent acts specified. And in addition to this the plaintiff must give ample security for the indemnification of the defendant if the claim made should prove groundless. Claims are sometimes made which are unjust; or, at all events, they are not such as the law will enforce; and, therefore, the law carefully requires security against the damages which may be sustained by the party against whom such claim may be made. The law thus regards and protects the rights of both parties. And neither unjust claimants, nor fraudulent debtors are permitted to have any legal advantage over the

other. The foregoing remarks are sufficient to show the general nature of this process. And it may seem to a casual reader that the entire matter is plain enough. But it must be remembered that there are frequent difficulties in the way of applying the plainest principles to actual practice.

One of the difficulties in the case of attachments is, that there have been several changes in the law in relation to them; and therefore it is necessary to examine the old law in order to fully understand the present statutes and decisions. The process of long attachment has long been in use in some form and under some circumstances. But it will not be necessary to notice the practice prior to the year 1813. A review of the law from that time will be useful, because several of the decisions which are now frequently cited were made while the law of 1813 was in force. By the provisions of sections two and twenty-two of chapter fifty-three of the 1 Revised Laws of 1813, an attachment might be granted upon legal proof in the following cases, viz.: When the plaintiff proved "that any person against whom he may have a demand not exceeding twenty-five dollars, hath departed, or is about to depart, from said county, or is concealed within the same, with intent to defraud his or her creditors, or to avoid being personally served with any process to be issued by virtue of this act." The kinds of process referred to, and which were the only ones in use at that time, were a long summons, a warrant and a long attachment. A plaintiff was required to furnish security, in all cases, before an attachment could be issued, under the provisions of that law. It will be observed that the only cases in which an attachment was authorized, were those which related to some act of the debtor, in relation to his *person*, such as keeping concealed, and the like. No attachment was authorized by that law for a fraudulent disposition of the debtor's *property*. The reason for this distinction may be found in the fact that at that time a warrant was a common mode of commencing actions, and that whether the action were commenced by warrant or summons, if a judgment was obtained the defendant was liable to arrest on the execution, and to imprisonment. This was the general rule at that time, and the exceptions need not be noticed in a general review. No distinction was made as to causes of action, and a warrant was as proper in an action on a promissory note, as in an action for a tort or wrong.

A non-resident defendant must have been sued by a warrant, in all cases, for a summons was expressly forbidden. In all cases, therefore, where a judgment could be obtained, and the defendant could be found in the county, it was supposed that he would pay a debt, if he had property, rather than be imprisoned upon an execution, and there was not so much danger of a fraudulent disposition of the debtor's property, under such circumstances. The law remained in this condition from 1813 until the Revised Statutes took effect in 1830, when substantially the same practice was adopted by them. The law was again changed in

1831, when imprisonment for debt was abolished by virtue of what is called "The Non-Imprisonment Act." And that act was the first one which gave an attachment on account of a *fraudulent disposition of property* by a debtor. It will be seen, therefore, that the Revised Statutes provided solely for those cases which relate to the *person* of the debtor, while the non-imprisonment act relates solely to the *disposition of property*. That divides the subject into two classes of cases; though it is difficult, if not impossible, to make any general division of the subject in such a manner that an examination of the provisions of one statute shall not include some of the cases or provisions of the other statute.

So, again, the subject is sometimes divided into cases of long attachment and those of short attachment. This division, it will be seen, will include cases under both statutes, in some instances, and in others it will include only the cases under one statute. For instance, a long attachment may be issued under either the Revised Statutes or the non-imprisonment act, in a proper case. But the non-imprisonment act also provides for a short attachment in certain cases, so that the non-imprisonment act and a long attachment are not convertible terms as to all classes of cases. The most convenient method of arranging the subject will be, perhaps, to divide the cases on the subject into long attachment and short attachment. And, under the title, Long Attachment, to discuss the general principles applicable to attachments either long or short. And then to treat of the peculiarities of short attachments, under the title, Short Attachment.

SECTION II.

LONG ATTACHMENTS.

By the statutes which are now in force, a long attachment was first given in 1830 by the Revised Statutes; though, as has been seen, it was also in use under the Revised Laws of 1813. The sections of the Revised Statutes of 1830, which gave an attachment when a debtor kept concealed, &c., are the only ones which now authorize an attachment for acts of the debtor in relation to his *person*. This statute is as follows: "An attachment against the property of any debtor may be issued on the application of a creditor, in the manner hereinafter prescribed, whenever it shall satisfactorily appear to the justice that such debtor has departed, or is about to depart from the county where he last resided, with intent to defraud his creditors, or to avoid the service of any civil process; or that such debtor keeps himself concealed, with the like intent." Vol. I, 41, § 24. This section of the statute is very plain as to the classes of cases provided for: 1. If the debtor has departed from the county where he last resided. 2. If he is about to depart therefrom. 3. If he keeps concealed, with the *intent*, either, 1. To defraud his creditors; or, 2. To avoid the service of any civil process. But, in some cases, a debtor may do all the acts specified, and with the intent to avoid the service of

civil process, or to defraud his creditors, and yet an attachment cannot be legally issued.

Whether an attachment may be issued, depends upon the nature of the plaintiff's demand, as well as the acts of the debtor. And if the demand is not one of those specified in the statute, no attachment can properly be issued. The statute which defines the nature of the claim is as follows: "Such application may be made by any creditor, or by his personal representatives, having a demand against such debtor personally, whether liquidated or not, arising upon contract, or upon a judgment rendered within this state, amounting to one hundred dollars, or any less sum." Vol. I, 41, § 25. The cases in which an attachment can issue under the above sections must be for demands which are as follows: 1. The demand must be one against the debtor *personally*, and not in any representative capacity, as executor, administrator, trustee and the like cases. 2. The demand must arise upon *contract*, though the amount need not be liquidated. 3. It must be upon a judgment rendered *within this state;* though, when the demand is in a judgment, it need not have been obtained upon a cause of action arising on contract, as the language is general, viz., upon a judgment, which means any judgment, if rendered within this state. If the plaintiff's claim is for a tort or wrong, such as trespass to lands, an injury to personal property, or a conversion of it, no attachment can issue.

The law remained as has been just stated, until 1831, when imprisonment for debt was abolished. But the same act made a material change in the law relating to attachments, by extending this process to a new class of cases in which an attachment could not have been issued before that year. The statute was amended in 1842, and it now reads as follows: "In addition to the cases in which suits may now be commenced before justices of the peace, by attachment, any suit for the recovery of any debt or damage arising upon any contract, express or implied, or upon any judgment for one hundred dollars or less, may be so commenced whenever it shall satisfactorily appear to said justice that the defendant is about to remove from the county any of his property, with intent to defraud his creditors, or has assigned, disposed of, secreted, or is about to assign, dispose of, or secrete, any of his property, with the like intent, whether such defendant be a resident of this state or not." Laws 1831, ch. 300, § 34, as amended by Laws of 1842, ch. 107; Vol. I, 75, § 216. The class of cases provided for by this section relate solely to the disposition which the defendant may make or be about to make, of any of his *property.* Such disposition must be made or about to be made, with an *intent* to *defraud* his creditor. And the following are the acts which are sufficient to authorize an attachment if done with such intent: 1. If the defendant is about to remove any of his property from the county; 2. If he has assigned any of it; 3. If he has disposed of any of it; 4. If he has secreted any of it; 5. If he is about to assign any of it; 6. If he is about

to dispose of it; 7. If he is about to secrete any of it. The language of the statute is very broad; and it is also in the disjunctive, so that it will be sufficient to show that the defendant has done any of the acts specified, or that he is about to do any of them. But it is important to observe here, as was done in relation to the section of the Revised Statutes which has been cited, that all or any of these acts may be done, and yet no ground for an attachment exist. Whether an attachment may issue, even when such acts are done by the debtor, depends upon the nature of the plaintiff's demand. For this statute, like the Revised Statutes, does not permit an attachment to issue unless the plaintiff's claim is one specified in the statute. Under the section last cited, the plaintiff's demand must arise: 1. Upon *contract*, express or implied; but the cause of action may be for the recovery of a debt, or for *damages* arising upon any contract, express or implied, which includes for the breach of any such contract. 2. Upon any judgment for one hundred dollars or less. This section of the statute differs from the Revised Statutes, because, by this section it is sufficient that there is any judgment, whether rendered within this state, or in some other state. If the cause of action arises for any tort or wrong to real or personal property, or any other cause of action of that nature, no attachment can issue. The sections which have been cited specify all the cases in which any act of the defendant in relation to either his person or his property will authorize a long attachment. And they also specify all the demands upon which an attachment may in any case be issued. There need, therefore, be no difficulty as to what acts, or what demands are necessary to exist before this process is authorized.

SECTION III.

AFFIDAVITS.

The chief difficulty which has been found to exist in practice, as to issuing an attachment, has been that in relation to the sufficiency of the affidavits on which the process was issued. This branch of the subject, therefore, requires a very careful consideration so as to aid in the attainment of a knowledge of the correct practice. In the first place, resort should be had to the statutes themselves for directions; and, afterwards, the adjudged cases should be examined so as to know what construction the courts have determined to be correct; and also to ascertain in what manner the facts of the case must be stated in the preliminary affidavit. The section of the Revised Statutes, in relation to the affidavit, originally read as follows: "Such application shall be in writing, and shall be accompanied by the affidavit of the creditor, or of his agent, in which shall be specified, as near as may be, the sum in which the debtor is indebted over and above all discounts to the person in whose behalf application is made, and the grounds upon which the application is founded; and the facts and circumstances to establish such grounds, shall also be

verified by the affidavits of two disinterested witnesses; and it shall be the duty of the justice, on being requested so to do, to issue his subpœna, to compel the attendance of any witness forthwith, to make such affidavit." This section was modified by the non-imprisonment act, which repealed that portion of it which requires the affidavits of two disinterested witnesses. And the affidavit of the plaintiff alone, or that of some other person in his behalf, is now sufficient, as will be seen from the section of the statute next to be cited. The following section was enacted as a part of the non-imprisonment act, which gave an attachment for the disposition of the defendant's property as has been stated. It reads as follows:

"Before any attachment shall issue in such case, or in the cases provided for in article second, title fourth, chapter second, part third of the Revised Statutes, the plaintiff shall, by his own affidavit, or that of some other person or persons, prove to the satisfaction of the justice the facts and circumstances to entitle him to the same, and that he has such a claim as is specified in the last preceding section against the defendant, over and above all discounts which the defendant may have against him, specifying, as near as may be, the amount of such claim or the balance thereof; and such plaintiff, or some one in his behalf, shall also execute, in the cases provided for by this act, a bond in the penalty of at least one hundred dollars, with such sureties and upon such condition as is required in section twenty-ninth of said article; and so much of said article as requires any other or different proof for the isuing of an attachment, than that required by this section, is hereby repealed." Laws 1831, ch. 300, § 35; Vol. I, 75, § 217. The statute as amended will be found, Vol. I, 41, § 26.

The non-imprisonment act also expressly adopted the existing provisions of the Revised Statutes, in relation to attachments, in this language: "All the provisions of said title fourth, not hereby expressly repealed, and not inconsistent with the provisions of this act, are hereby declared to be in full force, and to apply to the provisions of this act, so far as the same relate to proceedings in courts before justices of the peace." Laws 1836, ch. 300, § 43; Vol. I, 77, § 224. The practical effect of this section is, to require the same construction to be put upon the sections of both acts (the Revised Statutes, and the non-imprisonment act), as though they had both been enacted at the same time. And it was by virtue of this section that the courts held, that an affidavit and bond were both necessary before a short attachment could issue even against a non-resident defendant. *Taylor* v. *Heath*, 4 Denio, 592; *Bennett* v. *Brown*, 4 Comst., 254; *Bennett* v. *Brown*, 6 E. P. Smith, 99; *S. C.* again, 31 Barb., 158. The courts having thus held that an affidavit and bond are necessary to authorize a short attachment, it would seem to be an irresistible conclusion that the affidavit should be required to show the same facts in all cases whether the attachment is a

long or a short one. This question, however, will be discussed under the title, Short Attachment. It will now be proper to discuss minutely and in detail, *what facts* should appear in the affidavit, and in what *manner* they would be stated.

Must be affidavit in all cases.] There must be an affidavit in all cases, to authorize the issuing of an attachment. There is no exception to this rule, whether the attachment is a long or a short one. It must also be in writing; for no verbal sworn statement will be sufficient, however fully the witness may state the facts, because the proof required by the statute is by *affidavit.* Nor, will it be sufficient, that a part of the facts are stated in an affidavit, and the remainder of them are *verbal* statements, whether sworn to or otherwise, if they are not taken down in writing. *Comfort* v. *Gillespie*, 13 Wend., 404. This rule is a wise one, and it is invariably enforced by the courts.

When the evidence upon which an attachment issues, is in writing, and filed with the justice, the interests of all parties will be subserved; for the justice will be able to show definitely what evidence he proceeded upon; the plaintiff will show on the face of the papers the grounds of his claim, and the facts and circumstances upon which he relies to sustain his attachment; and the defendant will be able to know precisely all the evidence that exists to authorize this process against him. These matters would all be left in uncertainty, if verbal evidence alone, or in conjunction with affidavits, was sufficient.

The affidavits should in all cases be filed by the justice, and retained by him, as a part of the proceedings in the cause. They may be important evidence for him if he is sued for issuing the attachment, or they may be necessary for the purpose of being copied if he is required to make a return on an appeal. *McCoy* v. *Hyde*, 8 Cow., 70. It is not any part of the legal duties of a justice to draw the affidavits for parties. But it is the common practice for them to do so, from the very nature of the case. If the plaintiff is not a lawyer, he could not prepare affidavits which would be sufficient, and the justice therefore finds it necessary to do it himself. And even then, with all his care, the affidavits are but too frequently found defective. Formerly no compensation was given by law to justices for drawing affidavits. But the law has been changed in that respect.

It is now provided by statute, that the justice may charge five cents a folio for drawing affidavits, applications and notices, where they are required by any law. Laws 1860, ch. 493, § 1; Vol. I, 63, § 150. A folio is one hundred words, and every figure which is necessarily used as a word is counted. The law requires applications and affidavits for attachments to be in writing, so that the justice may charge five cents a folio for drawing these papers, and the fees so paid to the justice will be a part of the taxable costs, to be entered in the judgment in favor of the plaintiff.

Affidavits are not to be entitled.] There is no action pending

before the issuing of process to commence it; and, therefore, there is no action in which to entitle the affidavits. For this reason, affidavits in attachment actions should never be entitled.

The title of an action includes the name of the court, the names of the parties, and usually the name of the justice before whom the action is pending. Thus:

JUSTICE'S COURT.

James Smith *agt* George White.	Before JOHN FROTHINGHAM, Esq.

After an action is commenced, it is usual to entitle all the subsequent papers in the action.

Affidavit, when to be made.] This question will generally be settled before an action is commenced. But there may be more than usual importance attached to this question in relation to attachments. In no case is it proper to commence an action before a cause of action exists. And on the other hand, no action should be commenced by attachment, if the claim is clearly barred by the statute of limitations. In ordinary cases, if the action fails, the penalty imposed on the plaintiff is the payment of the costs. But in an attachment case the plaintiff must give a bond to pay all such damages and costs as the defendant may sustain by reason of issuing such attachment, if the plaintiff fails to recover judgment thereon.

It will not be necessary to observe that the affidavits should be made within a reasonable period of time before they are used, because, in nearly all cases, they are made in so great haste, at the moment they are wanted, that they are defective from the want of care in their preparation.

Affidavit, how often used.] An affidavit which has been once used for the purpose for which it was designed, cannot be again used as the foundation of a new action or proceeding. As where proceedings are taken, and a verdict is found for the tenant, under the statute authorizing a summary proceeding by a landlord to oust his tenant, the original affidavit cannot be used as the foundation of a new proceeding under that act. And where it was so used, and the tenant turned out of possession, it was held, that the proceedings were *coram non judice*, and void, and that trespass lay against both the landlord and the judge. *McCoy* v. *Hyde*, 8 Cow., 68; and see *Cutler* v. *Biggs*, 2 Hill, 409; *Belden* v. *Devoe*, 12 Wend., 223; *Robinson* v. *Sinclair*, 1 How. Pr., 106; *Colegate* v. *Marsh*, 2 How. Pr., 137.

In one case, where a plaintiff applied to a justice for an attachment, and the affidavit made by him was insufficient, but the justice took into consideration an other affidavit made at the same time, by an other person, and for the purpose of obtaining an attachment against the same defendant, in favor of this third party as plaintiff, and that affidavit was before the justice at the same time that both applications were made and the attachments

issued, it was held, that the attachment first mentioned was regular. *Colver* v. *Van Valen*, 6 How. Pr., 102. Two reasons were assigned by the court in that case for sustaining the attachment; one of them was that the defendant appeared and moved to quash the attachments, but not for this ground. In such cases the rule is familiar that the defect would be waived. The other reason assigned was, that the same affidavit might apply to both actions. In that view it might be said that the affidavit was not twice used, but that it was once used in relation to two different actions, which is frequently done in courts of record. And the affidavit of the third person was entirely legal and proper, because the statute expressly authorizes it.

Where to be made.] An affidavit ought to be made before a justice within the county in which he resides. See *ante*, 5, 6, Jurisdiction, where exercised. The affidavit is almost invariably made before the justice who issues the attachment. But there is nothing in the statute which forbids the use of affidavits that have been made before some other justice of the same county. And it may, in some cases be very convenient to use such affidavits. For instance, there may be some person at a distance from the justice who issues the attachment, and whose affidavit might be important, and it could also be most conveniently taken before such other justice. No objection is perceived to the use of such an affidavit, nor to the use of such an affidavit in any case, simply because it was made before an other justice. The place where an affidavit is made may also be material, when it is made before the justice who issues the attachment, not merely because of the place of making it, but because the justice who takes it has no jurisdiction of the person of the defendant. When both parties are residents of the county, the right to sue in some towns is forbidden in certain specified cases. See title Actions, where brought, *ante*, 52. But when the defendant has absconded from his residence, then the action may be brought in any town in which such defendant or his property may be. This class of cases is peculiarly one for which an attachment is an appropriate remedy.

Nature of plaintiff's demand.] One man may have a clear right of action against an other, and yet he may not have any grounds for obtaining an attachment, even when the conduct of the defendant is fraudulent as to his property or his person.

The only demands upon which an attachment can be legally issued, are such as arise upon contract, express or implied, or upon judgment. So that all actions which are founded upon torts or wrongs of whatever nature, not connected with contract, would not authorize an attachment.

The principal thing to be attended to, if the claim is one for which an attachment may issue, is to state such facts as prove it fully and clearly in the affidavits. And therefore, if the claim arose upon contract, express or implied, that fact should be plainly and distinctly stated. It need not be stated whether the demand is liquidated or unliquidated, nor whether the contract is express

or implied. Nor need the affidavit state that the demand is for the recovery of damages for the breach of any contract, express or implied, although that is one of the class of demands upon which an attachment may be issued. It is sufficient to allege directly and positively in the affidavits, that the demand arose upon contract.

If the plaintiff's demand is founded upon a judgment, the affidavit should state that fact plainly and positively. There is a difference in one respect between the language of the Revised Statutes and that of the non-imprisonment act in relation to judgments. The Revised Statutes provide that an attachment may issue in the class of cases which it specifies, if the demand is upon a judgment rendered *within this state.* And therefore, in cases under the Revised Statutes, it would be proper that the affidavit should allege that the judgment was rendered within this state, though this is not indispensable, and its omission would not be error. The non-imprisonment act does not limit the demand to a judgment rendered within this state. The language is, "upon any judgment for one hundred dollars or less." And therefore, if the attachment is obtained under this act, it will be sufficient to state that the demand arose upon judgment, without stating where it was rendered. When the plaintiff's demand is founded upon a judgment, it will not make any difference what the nature of the claim was for which the judgment was obtained. If the original cause of action was for a tort or wrong, but it is reduced to a judgment, such judgment will then be as valid a demand upon which to apply for an attachment, as though the judgment had been rendered upon a promissory note, or any other claim upon contract.

There is one other consideration in relation to judgments which ought not to be overlooked. The Code was enacted since either or both of the statutes cited. And I have not found any case which decides any thing in relation to its effect upon attachment cases. The Code, § 71, Vol. I, 12, provides: "No action shall be brought upon a judgment rendered in any court of this state, except a court of a justice of the peace, between the same parties, without leave of the court for good cause shown, on notice to the adverse party; and no action on a judgment rendered by a justice of the peace, shall be brought in the same county within five years after its rendition, except in case of his death, resignation, incapacity to act, or removal from the county, or that the process was not personally served on the defendant, or on all the defendants, or in case of the death of some of the parties, or where the docket or record of such judgment is or shall have been lost or destroyed."

It is very clear that the proceeding by attachment is an action. And the language of the Code is, that *no* action shall be brought, &c., within five years from the rendition of the judgment, unless in the cases excepted. If this section of the Code is held to be applicable to actions in attachment cases, no great harm will

result from such a construction. For the object of an attachment is, to secure the property of the defendant so that it may be sold on an execution. And where the party has a judgment on which an execution can be issued, there is no such need of an attachment. By subdivision twelve, of section sixty-four of the Code, it is provided that an execution may be issued on a justice's judgment at any time within five years after the rendition thereof. The true construction of § 71 clearly is, that it applies to actions by attachment as much as to actions by summons. And the important question then arises, how does this section affect the statement of facts in an affidavit for an attachment? Should the affidavit which states that the demand upon which an attachment is demanded arose upon judgment, also state that the judgment was not rendered within five years before the application? I think not. It will be sufficient to state now, as it has heretofore been sufficient to state, that the demand arose upon judgment. And if an action is commenced by attachment upon a judgment in the cases forbidden by the seventy-first section of the Code, the plaintiff will fail in his action. And the defendant will have his remedy as in other cases in which such a plaintiff fails in an attachment action.

The statute of limitations is a valid defense to an action upon a judgment, if legally pleaded as a defense and proved in evidence by the defendant. But it was never considered necessary to state in an affidavit for an attachment that an action upon the judgment was not barred by the statute of limitations. So of this section of the Code in relation to actions upon judgments. It may be important for a plaintiff to consider whether it will be safe to take an attachment upon a judgment within five years after its rendition, since he may fail at the trial. Yet, if he concludes to take it, it will not be necessary to state in his affidavit any thing in relation to the time when it was rendered. Besides this, there is no part of the statutes which authorize attachments, that requires as a part of the proof any evidence as to the time when the judgment was rendered, or whether it is not barred by the statute of limitations. And again, in actions upon contracts, express or implied, it has never been held that there is any necessity for alleging that the plaintiff's demand is not barred by the statute of limitations, nor of alleging that it is due at the time when the attachment is obtained. That is a matter of evidence at the trial; and if the plaintiff has no legal case, he must fail in the action and pay the defendant the damages and costs required by law. The same rule is equally applicable to an action by attachment upon a judgment.

It is enough in all cases, to allege in the affidavit that the cause of action, or the demand of the plaintiff, arose upon a judgment which is all that is required upon that point.

Demand must be due from defendant personally.] The statute requires, not merely that the demand shall arise upon contract or judgment, but that the defendant must owe the debt in his

individual character as a debt of his own. And therefore, if the claim or demand is one which is made against the defendant in a representative capacity, such as an executor, administrator, trustee of an other person, and the like cases, no attachment can be issued against him. There are, however, many cases in which a person is acting in a representative capacity, in which he voluntarily makes an agreement by which he assumes a *personal liability*, and, in such cases, he would be as liable to be proceeded against by attachment, as though the original demand had been one for which he was personally liable. There are some cases, too, in which the law imposes a *personal* liability of the party, even though he acts in an official or representative character, and in such cases an attachment may issue if the other necessary facts are proved. But it will be best to be very careful how an attachment is issued if the demand is not clearly one for which the defendant is personally liable.

There are frequently demands which are due from the defendant personally, and the person to whom they are due, assigns or sells them to an other person. In such cases, the person to whom the demand is assigned, &c., may have an attachment as well as though the demand had been originally due to him from the defendant.

Joint liabilities of defendants.] There are many cases in which the defendants are jointly indebted to the plaintiff, upon demands which are personally due from them. Partners are liable jointly for the debts of the partnership, unless there is some agreement to the contrary.

There are also many demands, such as bonds and promissory notes, on which the parties are jointly liable. So of a judgment where all the defendants are jointly liable to pay it. In all such cases in which the liability of the defendants is joint, and not joint and several, an attachment may be issued and levied upon the joint property of the defendants, or upon the separate property of any one or more of the defendants upon whom the attachment is personally served, or upon whose property a levy can be made.

But in all such cases of proceedings by attachment against joint debtors, the attachment must issue in form against all the debtors. And the statute then permits a joint judgment to be taken against all the debtors, if any one of them is personally served with process. And since each of the debtors is liable for the whole debt, the separate property of any one of them may be sold on execution, or attached to pay the whole debt. If the attachment is not taken out in form against all the joint debtors, even when it is known that a service cannot be made on some of them, the defendant who is sued by a personal service of process, may plead in abatement the non-joinder of the other defendants in the action. And this would be a valid defense to an action thus commenced. But if the attachment is issued against all the defendants in such a case, no such answer will be available, even

if but a single defendant is personally served with process, or if his property alone is taken; for the statute authorizes a joint judgment against all the defendants in such a case. As to the further proceedings against joint debtors, see the title Joint Debtors. If the debt is due from the defendants jointly and severally, the plaintiff may proceed by attachment against any one or more of them, or against them all at his option. And if he chooses to proceed against any one of them alone, an answer in abatement that the other debtors were not joined in the action would be of no avail, because the plaintiff is not compelled to join them. And therefore, such an answer is no defense to the action.

Demands against corporations.] It is sometimes said that an attachment cannot be issued by a justice of the peace against a corporation. But it is difficult to see how this remark can be correct. A justice has jurisdiction of actions against corporations when they are commenced by summons. And the proceedings are in all respects similar to those in actions against natural persons, except that the process must be served on some proper officer of the corporation. The state constitution declares that, "All corporations shall have the right to sue and shall be subject to be sued in all courts, in *like cases* as natural persons." Const. 1846, art. 8, § 3.

One of the cases in which a natural person may be sued is, when he is indebted on contract or judgment, and he is about to dispose of his property for the purpose of defrauding his creditors. If a corporation is indebted in like manner, and its agents are fraudulently disposing of the corporate property, it is difficult to see any good reason why an attachment may not be issued. The rights of the plaintiff require it as much as in the case of a natural person who is doing similar acts. I have not been able to find any adjudged case upon this point, and these suggestions are thrown out as my own views upon the question. The language of the constitution is, in "*like cases*," &c. And it appears to me that the real intention was, that it should also be in *like manner*, since it would be difficult to permit one to sue a corporation in a *like case* that a natural person may be sued by *attachment*, if the corporation could not also be proceeded against by attachment as a natural person may be.

Fictitious names of defendant.] In a *summons* or *warrant* the defendant may be sued by a *fictitious* name, if the real name of the defendant is not known. Laws 1830, ch. 320, § 37; Vol. I, 74, § 207. But this statute does not extend to attachments, and no such action can be legally commenced against a defendant by a fictitious name. See *ante*, 45; and see also *McCabe* v. *Doe*, 2 E. D. Smith, 64; *Davenport* v. *Doady*, 3 Abb., 409.

Amount of demand.] The statute expressly limits the amount of the demand to two hundred dollars. And therefore, if an attachment is issued, or if a judgment is rendered for more than that amount, the judgment will be erroneous, if it is not entirely

void. In one case it was held to be entirely void. *Mattison* v. *Baucus*, Hill & Denio, 321. The amount for which the attachment issued in that case was $105.87. The court said: "A justice has no power to issue an attachment for any sum exceeding one hundred dollars. If he can do so for one hundred and five dollars, he can for five thousand." If the plaintiff's demand exceeds two hundred dollars, he may remit the excess and claim but two hundred dollars in affidavits and application, and take judgment for that amount. This would be entirely legal. Vol. I, 56, § 116.

Affidavits, by whom made.] The Revised Statutes formerly required that the facts and circumstances which constitute the plaintiff's grounds for an attachment, should be verified by the affidavits of two disinterested witnesses. 2 R. S., 230, § 28, 1st ed. This provision was repealed by the thirty-fifth section of the non-imprisonment act. Laws of 1831, ch. 300, § 35; Vol. I, 75, § 217. And that section now provides, that, "Before any attachment shall issue in such case or in the cases provided for in article second, title fourth, chapter second, part third of the Revised Statutes, the plaintiff shall, by his own affidavit, or that of some other person or persons, prove to the satisfaction of the justice," &c. And therefore, as the law now stands, it will be sufficient if the affidavit is made by the plaintiff alone, or if it is made by any other person or persons, or if it is made by the plaintiff with any other persons. There is no necessity now that the affidavit shall be made by the plaintiff or his agent, as was formerly required by the Revised Statutes, whether the attachment is issued under the Revised Statutes or under the non-imprisonment act. It will be sufficient if proper legal affidavits are made by any person.

As we have already seen, Vol. I, 41, § 26, it is the duty of the justice, on being requested to do so, to issue his subpœna to compel the attendance of any witness forthwith, to make such affidavit. Where the law requires an officer to do such an act, it vests him with all the power which is necessary to make the act effectual. And in case the person subpœnaed should fail to appear before the justice, in obedience to the command of the subpœna, the justice would have the same power to attach or punish the witness that he has in any other case of disobedience to a supœna.

Form of Subpœna.

FULTON COUNTY, *ss:* To John Smith and George Perry, GREETING: In the name of the People of the State of New York, you and each of you are hereby commanded forthwith to appear personally before me, the undersigned, a justice of the peace of said county, at my office in the town of Johnstown, in said county, to make an affidavit of all and singular those things, which you or either of you may know touching an application made to me by John Doe, for an attachment against the property of Richard Roe, and of any facts and circumstances tending to establish the grounds of said application. Given under my hand, this 12th day of November, 1864.

JOHN FROTHINGHAM,
Justice of the Peace.

When the person subpœnaed shall appear before the justice, it

is his duty to state fully and fairly such facts as he knows, if they are requested by the plaintiff to be stated in the affidavit; and it is also his duty to sign and swear to the affidavit if it truly states the facts and circumstances which he knows. A refusal to do so would subject him to the same liabilities that any other refusal to testify as a witness would do. And he would, perhaps, be also liable to the plaintiff for any loss which he might suffer in consequence of such refusal.

Should show that cause of action arose upon contract or judgment.] This question was fully discussed when treating of the nature of the demands upon which an attachment might be issued. *Ante,* 130 to 133.

Facts should show a case affirmatively.] This rule is a most important one. And in every case the affidavit ought to show clearly and affirmatively every fact which is material to constitute a case for issuing the attachment. What facts ought to appear will be found fully discussed in the various portions of this chapter.

Hearsay evidence not competent.] There is scarcely any single cause of more frequent errors in attachment cases, than that which relates to hearsay, rumors, information and belief. All such evidence is just as insufficient in these cases as it is on the trial of a cause. Hearsay and common rumor do not constitute a legal ground for summarily seizing any man's property.

When a person states in an affidavit that some third person told him that the defendant had done, or was about to do, some fraudulent act, it is very plain that this is not that legal proof which the statute intended should be made. If a third person knows material facts, within his own personal knowledge, he should be subpœnaed and required to state them in an affidavit. It is true that such affidavits are generally made in great haste, because a fraudulent debtor is seldom disposed to proclaim openly what he has done, or what he intends to do. And a creditor is, therefore, compelled to act promptly if he would secure his debt. But the law does not accept any such excuses as a substitute for that full and clear statement of the facts and circumstances which ought to appear in the affidavits. If proper care is exercised, there need be very few attachment judgments reversed, or held to be entirely void. And if parties will not take such care, they must be content to abide the consequences.

Should show amount of debt, or balance, &c.] The statute expressly requires that the affidavit shall specify, as near as may be, the amount of the plaintiff's claim, or the balance thereof, over and above all discounts which the defendant may have against him. Laws 1831, ch. 300, § 35; Vol. I, 75, § 217; Id., 41, § 26. When the demand of the plaintiff consists of items of an account, he can readily state the amount very nearly. So, if there are items of account on both sides, the balance may generally be easily stated. But the plaintiff is entitled to an attachment for damages for the breach of a contract, express or implied. And,

in such cases, the amount which is due to the plaintiff, must, of necessity, be uncertain until they are assessed at the trial. The proper practice in such cases, will be for the plaintiff to state the amount of his claim at such a sum as he believes to be justly his due, not exceeding two hundred dollars.

Must not state facts on belief.] It is very strange indeed how frequently this rule is disregarded. It is an every day occurrence for parties to state in their affidavits that they believe that the defendant is about to leave the county, or that he is about to dispose of his property and the like facts. No man's belief is legal evidence of the existence of a fact. And if the affidavit should state every fact and circumstance which would be sufficient to authorize the issuing of an attachment, if they were directly and positively stated, the affidavit would still be held defective and insufficient, if all the facts, or if any of the material ones, are stated merely on belief. There are many cases in which the affidavit states facts and circumstances enough to warrant the issuing of an attachment, and yet the affidavits have been held totally defective on the sole ground that the facts were stated merely on belief. The following case will illustrate this: The plaintiff stated in his affidavit that the defendant was indebted to him upon contract in the sum of six dollars, as near as he could calculate, over and above all discounts, and that the attachment was applied for on the ground that the defendant had fled from the county of Jefferson into the county of Lewis, as the deponent believed, to defraud his creditors, that the facts and circumstances upon which such belief was predicated were that said Dewey had that day fled from said county of Jefferson, where he last resided, in a secret and clandestine manner as the deponent believed.

The supreme court said: "That the defendant had fled from Jefferson to Lewis, was stated in the affidavit of the plaintiff as a mere matter of *belief;* he did not profess to have any knowledge on the subject, nor even to have been so informed. As I read the affidavit, every thing therein stated is on belief, and not as a matter of fact within the knowledge or information of the plaintiff. *This was not enough to authorize an attachment.*" *Dewey* v. *Greene*, 4 Denio, 94, 95; see also *Camp* v. *Tibbetts*, 2 E. D. Smith, 20.

In an other case, the plaintiff's affidavit stated that he *believed* that the defendant had departed from the county with intent to avoid his creditors, or to avoid the service of any process, and from reports and information, he *believed* that he kept out of the county to avoid paying his debts. Two other parties made affidavits which stated similar facts, but they were stated on *belief*, or on information of third persons. These affidavits were held to be totally defective, and the judgment of the justice was reversed. *Tallman* v. *Bigelow*, 10 Wend., 420. There is one fact which may be stated upon *belief*, and that is as to the *intent* of the debtor. No man can know the actual intent of an other, except in so far as the intent may be inferred from his acts.

And, for this reason, the law permits the plaintiff to swear to his belief as to the intent of the debtor, if he states positively the facts and circumstances upon which that belief is founded. *Johnson* v. *Moss*, 20 Wend., 145; *Fulton* v. *Heaton*, 1 Barb., 552. A statement of facts and circumstances from the information of third persons is insufficient, as has just been seen. But, when the information is given by the defendant himself, such facts may be properly stated in the affidavit, upon the principle that the admissions of a party are evidence against him. And therefore, if the defendant has said any thing in relation to his intention of leaving the county, or as to his keeping concealed, or as to disposing of his property, or any other facts which will authorize an attachment; such statements are proper evidence, if they are stated in the affidavits of the persons who heard the debtor make them.

Facts not to be stated by way of recital.] The facts and circumstances ought to be stated positively and directly, and not by way of recital. For instance, an affidavit was made for the purpose of removing a tenant in summary proceedings, and the affidavit commenced thus: "City and county of New York, ss. Patrick Henry, agent for Peter Goelet, being duly sworn, doth depose and say, &c."

This affidavit was held to be defective because it did not show that Henry was the agent of Goelet. The Supreme Court said: "Although Henry, in his affidavit, *describes* himself as agent for Goelet, he does not swear that he was such agent." *Cunningham* v. *Goelet*, 4 Denio, 71, 72. The affidavit should show that the party was sworn, and then proceed to state in plain and direct statements all the material facts which are required to be stated.

Satisfactory to the justice.] The expression in the statute, that the party shall prove the facts and circumstances, &c., to the satisfaction of the justice, is sometimes misconstrued. Some persons have supposed that it was sufficient, if they could satisfy the justice that an attachment ought to be issued, without any reference to the character of the evidence which should satisfy him. It is very obvious that such a construction is erroneous. For, the safeguards which the law intended to throw around the rights of the defendant, would be utterly useless in such a case. It was the intention of the law, and it is the true construction of this statute, that such facts and circumstances should be stated as are legally sufficient to satisfy the mind of the justice when he is acting judicially in weighing the evidence. *Mott* v. *Lawrence*, 9 Abb., 196; *Stewart* v. *Brown*, 16 Barb., 367; *Frost* v. *Willard*, 9 Barb., 440. When all the facts are stated, the justice is to examine and compare them, and then determine whether they are sufficient to prove that the defendant has done the fraudulent acts which are charged. When the facts are thus stated, a court of review can examine the decision of the justice, so as to see whether there was sufficient legal evidence to authorize him to issue the attachment; and, if there was not, to reverse his judgment. Any other rule would leave it entirely

to the arbitrary discretion of a justice, whether to issue an attachment, even upon the most frivolous pretense of evidence. For, if the construction were to be, that it is enough to satisfy the justice, then the fact of issuing the attachment would be conclusive evidence that he was satisfied, or he would not have issued the process. And, upon the construction that nothing more is required than to satisfy the justice, a court of review would be precluded from reviewing the decision at all upon the question whether he was satisfied. But it will not be enough even if there are facts enough to satisfy the justice. The law requires in addition to that, that the facts shall be stated in the affidavit. The justice cannot act upon his own knowledge, even though he may know ever so well that an attachment ought to be issued. *Money* v. *Tobias*, 12 Johns., 422. The court said, in that case: "The justice had no right to dispense with the oath, under pretense that he was satisfied of the fact without oath." And he has no right to dispense with an affidavit now, nor to act upon an affidavit which does not state facts and circumstances sufficient for him to draw a judicial conclusion that a proper case is made.

A constable's return to an execution which was issued against the person of the defendant, that he could not find the defendant in the county, is not sufficient evidence that the defendant keeps concealed with intent to defraud his creditors. *Vosburgh* v. *Welch*, 11 Johns., 175. The return of the officer would be legal evidence in the action in which it was issued, but it was no evidence whatever in the action for obtaining an attachment. And the justice had no right to be satisfied by such evidence. The return was not an affidavit, and whether the defendant had left the county fraudulently or not was not proved, even if the justice was satisfied of the truth of that fact, by the return on the execution. It is not necessary that the facts stated in the affidavit should establish *conclusively* that the defendant has done acts which authorize the issuing of an attachment. If the facts proved are such, that they are fairly susceptible of such a legal construction as will make a case for the process, that will be sufficient. And this is so, notwithstanding the fact, that a court of review would have drawn a different conclusion had the question been originally submitted to it for decision.

The reason of this rule is, that where a question is properly before a justice for his decision, upon legal evidence which is susceptible of the construction which he gives it, that is conclusive. And it is as much so upon a jurisdictional question as upon any other. *Parker* v. *Eaton*, 25 Barb., 122; *Sheldon* v. *Wright*, 1 Seld., 497. The next question will be, when such facts are presented as will be sufficient to authorize a justice to make a decision which is conclusive upon the question, or in other words, what facts must be stated to be sufficient.

Facts and circumstances must be stated.] No part of the statutes relating to attachments has been more frequently and

more generally misconstrued than that just mentioned. And the difficulty seems to have arisen from an entire misapprehension as to what the statute requires. The true meaning of the statute is, that the affidavits shall state the *grounds* upon which an attachment is asked, and, in addition, that the *facts and circumstances* shall be stated which *prove* that those grounds exist.

The statute prescribes what acts furnish sufficient *grounds* for an attachment. Such, for instance, as fraudulently disposing of the property of the debtor. But it will not be sufficient to state merely the *grounds* upon which the process is demanded. The statute also requires that the *facts and circumstances* shall be stated as the *evidence* upon which the justice is to *decide judicially* whether those grounds are *proved* to exist from the evidence laid before him in the affidavits. This view of the matter will show why affidavits are insufficient, though they state positively, in the *very language of the statute*, that the defendant is about to dispose of his property with intent to defraud his creditors. Such affidavits would show clearly enough the *grounds* upon which an attachment was sought; but they would be fatally defective if they did not also contain other sufficient *facts and circumstances* to prove the existence of those grounds. In one case the affidavit read thus: "I know that John A. Brown has disposed of his property, for the purpose of defrauding his creditors. And this deponent further says, that the wife of said Brown told this deponent that said Brown had disposed of his property and left said county, for the purpose of defrauding his creditors." An attachment was issued upon this proof, and a judgment rendered for the plaintiff.

The supreme court reversed the judgment, and ALLEN, J., said: "The affidavit of the plaintiff does not show any fact or circumstance in support of the grounds; nor is it pretended that it does. But it is contended that the affidavit of Van Vranken is sufficient for that purpose. He swears positively, as a fact within his own knowledge, that the defendant has disposed of his property for the purpose of defrauding his creditors; that is, he swears to the law, without disclosing a single *fact* or *circumstance* to show whether such intent is to be inferred or not. A man may dispose of his property, and dispose of it honestly, for the purpose of paying his debts or supporting his family, and the law will so infer, unless facts and circumstances are shown going to prove that he makes such disposition with a fraudulent intent. The witness is not to judge, himself, of such intent, but is to disclose the facts to the justice, who is to be satisfied, *judicially*, and upon legal proof." *Stewart* v. *Brown*, 16 Barb., 367, 368, 369; see also *Frost* v. *Willard*, 9 Barb., 440.

There are other cases in which the party makes a statement of facts, though not such as will warrant the issuing of an attachment. The grounds of the application were, that the defendants were about to depart from the city and county where they last resided, with intent to defraud their creditors, and that they had

disposed of their property with the like intent. The only facts sworn to on the application to sustain these charges were, that the defendants had sold out their stock, closed their store, declared to their landlord their intention to leave the state, and avowed a design to go to California. On this proof an attachment was issued, and on the return day the plaintiff proved his case and had judgment, which was reversed. The court said: "In this case there was no evidence whatever laid before the justice of any intent to defraud, except that the defendant, Lydia Harker, had sold her property at auction, and was about to remove. There was nothing in this to warrant the inference of fraud or fraudulent intent." *Taylor* v. *Harker*, 1 E. D. Smith, 391, 392. This case was not decided solely upon the above ground. In an other case, *Mott* v. *Lawrence*, 9 Abb., 196, the grounds alleged were, that the defendant was about removing all his property out of the city and county of New York, with the intent to defraud his creditors.

The only facts sworn to in the affidavit to prove that intent were, that the defendant closed up his place of business on the 21st of October, 1858, and immediately commenced packing up his goods, and continued packing them up until midnight, ready to be removed; that his store was closed in the morning of the following day, before the attachment issued, and that on the preceding day, the twentieth, he removed his family, without informing the deponent or his family, who resided in the same building over the store. This proof was held to be insufficient, and the judgment reversed. The court said: "This case affords a good illustration of the necessity of requiring a strict compliance with the statute to prevent an abuse of this process, for the defendant, upon the return of the attachment, offered an affidavit which the justice could not receive, to show that three or four days before the attachment issued, he had rented a store and dwelling house in an other part of the city, and that he had removed the most of his goods to the store, where they were seized upon the attachment. As the whole proceeding is *ex parte*, and the defendant cannot move to discharge the attachment upon counter proof, the affidavit must disclose facts from which the legal and logical conclusion would be, that the defendant meant to remove property from the county with the fraudulent intent specified by the statute, and the existence of any such intent, or of a design to remove any property from the county, is not a necessary or presumable legal conclusion from men being engaged in packing up the goods of his store, having the previous day removed his family, which is in substance all that appears by the affidavit. The affidavit, in accordance with the ruling in numerous cases, was wholly insufficient."

In an other case, *Miller* v. *Brinkerhoof*, 4 Denio, 118, the application was on the ground that the defendants had assigned and disposed of their property, and were about to remove their property from the county, with intent to defraud their creditors.

The facts and circumstances to prove that intent were stated thus: "And this deponent further saith, that the said James I. Brinkerhoof and Israel S. Hoyt (the defendants in the attachment suit) made an assignment of some of their property last spring to L. P. Hand, of Albany; and that said Brinkerhoof and Hoyt told this deponent that they had made an other assignment to the same man last week; and also that the said Hand, or his agent, was going to remove some of the property out of the county on the 11th instant; and also that they said they had no property, and could pay no debts." This affidavit was held defective, and the attachment proceedings and judgment thereon utterly void, so that the plaintiff was liable in trespass for taking the property of the defendants by virtue of it. The court said, of this affidavit: "It is entirely silent as to the most material fact—the intent to defraud creditors. That the applicant for the attachment had a debt arising upon contract, was sufficiently proved; but the only 'facts and circumstances' set forth as a ground for issuing the process are, that the debtors had made two assignments of their property; and that the assignee was about to remove a part of the property from the county. To which it was added, that the debtors said that they had no property, and could pay no debts. There is no fact or circumstance to show, nor is there even the intimation of a belief, that the debtors had assigned the property, or were about to remove it from the county, with intent to defraud their creditors. Stat. 1831, p. 404, §§ 34, 35. The affidavit was bad within all the cases; and the proceedings founded upon it were void, as well as erroneous." In support of the attachment in the preceding case, it was said that there was some proof for the justice to act upon, and that, therefore, the decision of the justice was conclusive.

The court conceded the existence of such a rule, but they said that this would not help out the case, for although the affidavit was sufficient in some particulars, it was totally defective in others. And then followed the remarks above quoted. This case shows that a single defect in a material point will be fatal to the validity of the affidavit, if the defect consists in a total absence of evidence upon that point. The affidavit should distinctly allege the intent to defraud creditors. If this is not done, the main ground for an attachment will be wanting. It will not do to omit that allegation, and then leave the justice to *infer* the intent from the facts and circumstances, because the law requires that both the intent and the facts and circumstances shall be stated. *Comfort* v. *Gillespie*, 13 Wend., 404; *Miller* v. *Brinkerhoof*, 4 Denio, 118, 119. In an other case, *Colver* v. *Van Valen*, 6 How. Pr., 102, the affidavit read thus: "That the application is made on the ground that the defendant has departed from the county with intent to defraud his creditors; and further, that the said James Van Valen has failed in business and stopped payment to his creditors. That a large portion of his property is under execution and has been assigned away, and that the said James has a large

quantity of personal property concealed in a house or outbuildings of Lewis Bogardus, liable to be taken on execution, and further deponent says not." The supreme court said of this affidavit: "I think this affidavit is not sufficient according to the decisions in 4 Denio, 120, and 1 Barb., 554. The plaintiff should have added his belief that the acts set forth in the affidavit, were done by the defendant with intent to defraud his creditors. Belief of fraudulent intent standing alone is not sufficient. But I think the requisite facts and circumstances are here stated, had the plaintiff's belief been superadded."

The cases of *Colver* v. *Van Valen*, 6 How., 102; and *Miller* v. *Brinkerhoof*, 4 Denio, 118, which have been cited, seem to require that the grounds on which the attachment is asked shall be stated; that the facts and circumstances which prove such grounds shall be stated; and, in addition to that, that the affidavit shall state upon belief, or otherwise, that the acts specified as facts were done with an intent to defraud creditors. It will be prudent therefore, to state the facts in that manner when drawing affidavits. It seems to me, however, that, when the plaintiff states the grounds on which he demands an attachment, and then proves the truth of those grounds by proper facts and circumstances, he has complied with all the requirements of the statute.

In *Rosenfield* v. *Howard*, 15 Barb., 546, the affidavits alleged that the defendant was about to dispose of his property with intent to defraud his creditors, and the affidavits stated the following facts as evidence of that intent, viz., that the defendant left the county of Chemung two months before, and went to the province of Upper Canada, with intent to remain there, and had taken with him some portion of his personal property; that he had no family, and but little property; that he was offering his property in Chemung county for sale; and that he told plaintiff that he would be damned glad if he ever got his pay of him; that no civil process could be served on him because he kept out of the state, and he refused to pay any thing on the plaintiff's debt. And the court upon this said: "To my mind, the above facts prove a strong case of *intent* to dispose of property to defraud creditors. And at all events, there was some evidence for the justice to act on, and the proceedings ought not to be reversed for the insufficiency of proof in this respect." It will be noticed that in this case the grounds on which the attachment was asked were stated, and then the facts and circumstances were given which proved the grounds that were alleged. The affidavit of the plaintiff did not a second time repeat his belief, or a statement that the facts &c., were done, with the intent to defraud creditors, and yet it was held sufficient. The intent to defraud creditors was, however, once distinctly alleged as the grounds for attachment.

In *Fulton* v. *Heaton*, 1 Barb., 552, the plaintiff's affidavit stated that the defendant was indebted to him in the sum of sixteen dollars, arising on contract, over and above all discounts; that he had often demanded the pay of Heaton, and he had refused

to pay said demand, and Heaton told him, and one Northrop, that he was going to leave the country and go to Canada, and that he, Fulton, believed, with an intent to defraud his creditors, and was about to take with him all his effects. This affidavit was held to be sufficient. The only fact stated on belief was that in relation to the intent, which we have seen is sufficient as to that. See *ante*, 138. It may seem to some persons that the foregoing statement of cases is too full and minute. But, it must be remembered, that a mere statement of the rules of law does not always prove sufficient to prevent the commission of errors. A principle may be ever so clearly stated, and yet very many intelligent persons may be perplexed as to its application in practice. In the method which has been adopted, the principles have been stated, and then the reported cases have been given by way of illustrating their practical application. These cases will probably render a most important service to those persons for whom the work was designed, since it will place clearly before them the construction of the courts upon the question.

Affidavit, when sufficient collaterally.] This question is somewhat different from that which holds that if there is some evidence upon all the points required, that the decision of the justice cannot be reversed upon an appeal.

A judgment may be erroneous, and therefore reversible upon an appeal, for a defect in the proceedings, which would not render the judgment entirely void in a collateral suit. Such a judgment would be valid until reversed. But, in other cases, there are such defects that the proceedings are entirely void for all purposes, and in all places. The rule in relation to the validity of attachment proceedings in collateral actions is the following.

When facts and circumstances are proved before a justice, in such a manner that there is some legal evidence upon all the material points in the case; and when he is legally called upon to adjudicate judicially upon the weight of that evidence, his decision will be final in all cases where that decision comes in question collaterally. *Skinnion* v. *Kelley*, 4 E. P. Smith, 355; *Fulton* v. *Heaton*, 1 Barb., 552; *Miller* v. *Brinkerhoof*, 4 Denio, 118; *Kissock* v. *Grant*, 34 Barb., 144. In such cases the evidence need not be conclusive, nor need it be such as would be sustained upon on appeal; because, if there is evidence which is sufficient to fairly call upon the justice to decide upon its weight and sufficiency, that decision will be final. See cases last cited.

The remarks which have been made in the last two divisions of the subject, have related more particularly to the *manner* in which the facts, &c., should be stated in the affidavits. There is still an other view of the subject which is important, and that relates to the question what facts will constitute *grounds* for an attachment.

The statutes have been cited for the purpose of showing what those grounds were. But it will be equally necessary to notice the reported cases, for the purpose of ascertaining what construc-

tion has been given to the statutes. The discussion of the various points has necessarily, in some degree, anticipated these remarks, but their practical importance will induce me to risk such repetition as may occur.

Revised Statutes, what is a case under. 1. *Departed from the county, &c.*] The mere fact that a person has departed from the county in which he last resided, is not of itself alone of any legal importance. There must be an *intention* on the part of the person so leaving to defraud his creditors.

No man's intentions can be within the actual knowledge of any other person. The law therefore furnishes a rule by which his intentions may be legally judged.

The acts and the declarations of a person are always evidence in these cases upon the question of intent. And, for that reason, the courts have invariably required that the acts of the party or his declarations shall be proved before the justice, so that he may determine the intent from such evidence. And the courts have repeatedly held affidavits defective, which stated merely that the defendant had left the county, &c., when they did not also state such acts and declarations of the defendant as facts and circumstances. *Stewart* v. *Brown*, 16 Barb., 367; *ex parte* Robinson, 21 Wend., 672; *Johnson* v. *Moss*, 20 Wend., 145. The departure must relate to the county in which the defendant *last resided.* This is the very language of the statute.

2. *About to depart from the county.*] The same remarks are as applicable to this subject as to the preceding one.

3. *Keeps concealed, &c.*] It is not every concealment of a defendant that will authorize an attachment to issue against his property. This concealment must be for the purpose of avoiding the service of *civil* process upon him. And if the defendant keeps concealed for the purpose of avoiding the service of a *criminal* warrant, that does not furnish any ground whatever for an attachment. And therefore, the affidavit must show *affirmatively* that the process avoided was *civil* process. *Lynde* v. *Montgomery*, 15 Wend., 461.

In one case the party was a resident of the county of Schoharie, and while he was in the county of Schenectady, a civil warrant was there issued against him, and proof was made before the justice that the defendant ran away to avoid the service of such warrant when an attempt was made by the officer to serve it. It was held that this did not authorize the issuing of an attachment. The court said: "The obvious intention of the act was, to give the process of attachment against the property of a person who had absconded, or departed from his usual place of residence, and not where he might be occasionally traveling through a county; besides, the mere fact of not being able to serve a single warrant upon a traveler, who, for many reasons, might wish to avoid the arrest, without being chargeable with intent to defraud his creditors, is not that kind of evidence of concealment contemplated by the act." *Dudley* v. *Staples*, 15 Johns., 196, 197.

These decisions were made under the provisions of the Revised Laws of 1813; but the present Revised Statutes are substantially similar. In an other case, *Schroeppel* v. *Taylor*, 10 Wend., 196. it was held that an attachment might be issued against the property of a person who temporarily resided in the county for the purpose of working upon a job which he had taken to clear up some land, although his usual place of residence was in an other county.

The language of the statute relates to cases when such debtor has departed or is about to depart from the county where he *last resided*, &c., or when *such* debtor avoids the service of civil process, or keeps concealed with that intent. The Revised Statutes do not authorize an attachment unless it is against a person who has left the county in which he last resided, either generally or temporarily; and unless the application is also made in that county. And the rule is the same as to keeping concealed, or avoiding the service of civil process. And therefore, it may be true that such persons do avoid the service of civil process, and yet they do not thereby subject their property to attachment. The foregoing remarks relate exclusively to cases of attachments issued under the provisions of the Revised Statutes. The non-imprisonment act gives an attachment for a fraudulent disposition of property. And this statute is not limited to residents of the county. It expressly authorizes a short attachment against non-residents of the county. Laws 1831, ch. 300, § 33; Vol. I, 75, § 215. And when the defendant is a non-resident of the county, a long attachment cannot be legally issued. *Bowne* v. *Mellor*, 6 Hill, 496.

Non-imprisonment act, what is a case under. 1. *About to remove property.*] In all cases under this statute it must be shown that the intention of the removal of the property is to defraud creditors. And the fact must be shown *affirmatively*. The removal will be presumed to be legal, unless that intendment of law is overcome by the facts proved. *Miller* v. *Brinkerhoof*, 4 Denio, 118, 120; *Mott* v. *Lawrence*, 9 Abb., 196; *Fulton* v. *Heaton*, 1 Barb., 552.

2. *Has disposed of property.*] This is the common ground of applying for an attachment, and yet how frequently affidavits are defective in those cases. There must be a *fraudulent intent* on the part of the debtor in disposing of his property. The term "disposed of" is very extensive and it may apply to a sale or a mortgage of the property, or to any other disposition of it. The usual grounds upon which parties apply for an attachment are, that the debtor is converting into money such of his property as would be liable to sale on execution, or that he has transferred it to some friend for the purpose of covering it up from the claims of creditors. Every disposition of property will be intended to have been honestly made until affirmative proof is made that it was fraudulent. *Stewart* v. *Brown*, 16 Barb., 367, 368; *Taylor* v. *Harker*, 1 E. D. Smith, 391, 392. A debtor may give a mortgage

to secure a just debt due to one of his creditors, and that will not be a ground of itself for an attachment in favor of an other creditor. And the intendment of law in the absence of proof is that the transaction was honest. *Connell* v. *Lasscells*, 20 Wend., 77.

Has assigned his property.] This is a common ground of asking for an attachment. It is frequently supposed that an individual is insolvent, and that he is about to make a general assignment of his property for the benefit of his creditors, and that he intends to prefer some of his creditors by paying the debts due to them, leaving others unprovided for. This, of itself, is not a sufficient ground for an attachment; because the law permits a debtor who is in failing circumstances to make an assignment of his property for the benefit of his creditors; and it also permits the debtor to prefer some creditors in the payment of their demands, if the transaction is fair and honest. And it will be a legal presumption that such was the character of the assignment.

In one case, *Wilson* v. *Britton*, 26 Barb., 562; *S. C.*, 6 Abb., 97, the defendant was negotiating with one of his creditors for a compromise of his debts, by paying a portion thereof, and the defendant told the creditor, that if he did not agree to take a certain proportion of the debt, which was specified, he would go home and make an assignment of his property, and that the plaintiffs would not get anything of their said claims, and that he would put his property out of his hands sooner than pay them more than 33⅓ per cent of the amount of their debt. And, upon the refusal of the creditors to take less than the amount of their claim, the defendant declared that he would go home and put his property out of his hands.

The court held that these facts did not constitute sufficient grounds to sustain an attachment, and it was set aside. The reasons for the decision were, that it is lawful to make an assignment which gives "preferences;" that no act was shown by which any fraudulent disposition was about to be made; that the threat to dispose of his property was accompanied by a declaration of the nature and manner of that disposition; and that the law would presume that there was no fraudulent intention, so far as appeared from the facts disclosed.

This case was decided in reference to section 229 of the Code of Procedure, in an action in the supreme court. But the statute is almost identical in language with the statutes which relate to justices' attachments, and therefore, the construction would be the same in both cases, as was held to be the law in relation to justices' courts, in the case of *Miller* v. *Brinkerhoof*, 4 Denio, 118; see Vol. I, 645 to 654.

About to assign, &c.] The same rules that govern the construction of the statute in relation to the past disposition of property, are equally applicable to a future fraudulent disposition of it.

Venue in affidavit.] The term venue relates to the place where the affidavit is made, and the reference is to the county in which it is sworn to. It is expressed in this manner: "Fulton

county, ss." The venue is an essential part of an affidavit, and is *prima facie* evidence of the place where the affidavit was taken. An affidavit without a venue is a nullity, although sworn to before an officer whose residence is mentioned in the jurat. *Cook* v. *Staats*, 18 Barb., 407; *Lane* v. *Moss*, 6 How., 394. An affidavit which states the venue thus, "Fulton county, ss," will be defective if the jurat shows that it was sworn to before a justice of the peace of Montgomery county. *Davis* v. *Rich*, 2 How., 86; *Sandland* v. *Adams*, 2 How., 127; *Snyder* v. *Olmsted*, 2 How., 181. The *jurat* is that part of an affidavit which states the time when, the place where, and the person before whom it is sworn to. Thus: "Subscribed and sworn before me, this 14th day of November, 1864. John Frothingham, a justice of the peace in and for Fulton county." If the *venue* is laid in one county, and the *jurat* shows that the affidavit was sworn to before a justice of an other county, the affidavit will be defective and void. See the cases last cited.

Oath to affidavit.] The oath to an affidavit is administered in the usual manner, and in this form: "You do swear that the contents of this affidavit, by you subscribed, are true, according to the best of your knowledge and belief." Or it may be in this form: "You do swear in the presence of the ever living God," &c. Or in this form: "You do solemnly, sincerely and truly declare and affirm," &c.

Signing affidavit.] It is almost invariably the case that an affidavit is signed by the party who makes it. This is sometimes omitted by mistake. But, if the affidavit is duly sworn to before a proper officer, it will be sufficient though it is not signed by the party making it. In *Millius* v. *Shafer*, 3 Denio, 60, there was an affidavit which was regular in form, and which tended to make a case. There were also two other persons who were sworn by the justice, whose statements were written down by the justice as the witnesses stated the facts and circumstances. And the justice certified at the foot of these depositions that they were taken before him, but the statements of the witnesses were not signed by them. The supreme court said of these statements: "I think there was no error in acting upon these sworn statements, although not signed by the deponents. The statute requires proof to be made by affidavit, Laws of 1831, ch. 300, § 35; and these were affidavits, although not signed." See also *Jackson* v. *Virgil*, 3 Johns., 540. This case is sufficient to show that a mistake in respect to signing the affidavit will not be cause for a reversal of the judgment. And if a justice should make a similar mistake, this case would perhaps sustain his judgment. But the practice of taking proof in this manner is not proper. The statute requires that the proof shall be made by affidavit, which means a written, signed, and sworn statement. See *Comfort* v. *Gillespie*, 13 Wend., 404. No justice ought to issue an attachment upon any other proof. It ought to be an inflexible rule with every

justice that he will not, knowingly and intentionally, depart from the strict letter and intention of the statute.

Joinder of classes of cases.] It is very commonly the case that a debtor is about to leave the county where he last resided, with the intention of taking his personal property with him, or in some other manner of removing or disposing of it to avoid the payment of his debts. Such acts would make a case under both statutes, since one relates to the *person* of the debtor, and the other to the disposition of his *property*. It is frequently the case, therefore, that a party desires to prove all the facts and circumstances of the case, and he is then at a loss how to proceed, because he is not certain how the attachment will be affected by such proof. In such cases nothing can be more likely to mislead a justice than the impression that the attachment provided by the Revised Statutes, is a different one from that given by the provisions of the non-imprisonment act. The attachment is really the same thing under both statutes.

There are not two different attachments provided as is sometimes supposed. That error has probably arisen from the fact, that under the Revised Statutes, the only cases which authorize an attachment relate to the *person* of the debtor, such as absconding, keeping concealed, &c.; while the non-imprisonment act gives an attachment for a fraudulent disposition of *property*. But it does not follow that the extending of the old remedy to new cases is the creation of a new kind of process. The non-imprisonment act declares that the attachment is extended to the *cases* which it specifies in *addition* to those existing by the Revised Statutes.

The attachment is therefore the same in all cases under both statutes. Though it is further modified in one particular, and that is the case of non-resident defendants. It must be a short attachment that is issued against them, and the only alteration of the old attachment in such cases is the shortening of the time between the date and the return day of the process. The form of the attachment and the nature of the proofs need not make the least trouble. If the plaintiff can show facts and circumstances enough in the affidavits to make a case for an attachment under either class of cases, such as leaving the county, keeping concealed, &c., or as to the fraudulent disposition of property, let that be done. And if the affidavit can be made to show a plain case under the provisions of either, or of both statutes, it is important that it should be done. The statute expressly requires that the affidavits shall state the *grounds* for the attachment.

And it will be proper to state all the grounds which are sufficient cause for an attachment under either statute, or under both of them. Stating unnecessary grounds can do no harm. But it may be supposed that a difficulty will occur on the return day of the attachment, for, if the attachment issues under any of the cases mentioned in the Revised Statutes, and the property of the defendant is attached, but no personal service of the attachment

is made on the defendant, the justice must, in such a case, proceed with the trial on the return day thereof. Vol. I, 44, § 44; *Stewart* v. *Brown*, 16 Barb., 367. And, on the other hand, if the attachment issues in any of the additional cases specified in the non-imprisonment act, and the property of the defendant was attached, but no personal service of the process was made on the defendant and he does not appear on the return day, the justice must, in that case, issue a summons against the defendant. This summons must be returned with a return of personal service, or that the defendant cannot be found after diligent inquiry. When either return is made, the justice may proceed as in the case of a summons personally served. Laws 1831, ch. 300, § 38; Vol. I, 76, § 220.

This provision, which requires a summons in one class of cases, and none in the other, need not cause any difficulty.

If the affidavits have made a clear case under the provisions of the Revised Statutes, then take judgment upon the return day. If they do not make such a case, but they do make a plain case under the non-imprisonment act, then take a summons, as has been stated.

The only important matter as to the affidavit will be, that it shall make a full case under the particular statute by virtue of which the party elects to proceed. The plaintiff need not make an election by words, in order to proceed under either statute. If he takes judgment on the return day, the law will determine that he elects to proceed under the provisions of the Revised Statutes; and if he takes a summons, the law will also determine that he has proceeded under the cases provided for by the non-imprisonment act. Thus much has been said as to the manner of stating the *grounds* of the application in the attachment, and also as to the facts and circumstances which must be stated in order to prove the truth of the existence of such grounds. The statement in the application will be discussed elsewhere. See title Application for Attachment.

Original affidavits defective.] The affidavits should be complete and entirely sufficient, before an attachment is issued upon them. There are many cases in which the proceedings of a party are amendable if a mistake is made, or if they are defective; but an attachment affidavit is an exception to that rule. If the attachment has been issued upon defective affidavits, and it has been served, the mistake cannot be corrected, either by amending the original affidavits, or by furnishing new and sufficient affidavits. The proceedings must stand or fall upon the sufficiency of the original proceedings.

And if the affidavits are so totally defective as not to confer jurisdiction upon the justice, and he is sued for issuing the attachment and the injury done in pursuance of it, he will not be permitted to show, in his defense, that the defendant in the attachment suit had actually done acts which would have authorized an attachment to issue against him. The question is not, whether the defendant had done such acts, but, whether the affidavits

upon which the attachment issued showed the existence of such acts, because the justice is to act upon the evidence which is laid before him, and not upon those acts which might have been proved, though it was not done. The defects which have been here spoken of relate to the sufficiency of the affidavits as to the statement of facts in them, or as to some matter which is material to the legal sufficiency of them.

Quashing attachments for defective papers.] By quashing the proceedings is understood to be the discharge, the dismissal, or the setting aside of what has been done in the action. If the affidavits upon which an attachment is issued are materially defective, the justice is bound to dismiss them upon the motion of the defendant. *Dudley* v. *Staples*, 15 Johns., 196; *Dewey* v. *Greene*, 4 Denio, 93; *Colver* v. *Van Valen*, 6 How., 102, 105; *Money* v. *Tobias*, 12 Johns., 422; *Smith* v. *Luce*, 14 Wend., 237. By a motion to quash the attachment is meant, when the defendant appears before the justice in person, or by attorney, on the return day of the process, and asks the justice to set aside or dismiss the proceedings. The defendant or his attorney should distinctly specify the grounds of the objections which he makes to the process, so that the justice and the plaintiff may have an opportunity to discontinue the action or proceedings if the objections are well founded. The defendant should also, for an other reason, be careful to state all the grounds which he intends to urge against the validity of the affidavits, process or proceedings, because, if he makes specific objections which are untenable, he will waive any others which existed, and which were not made a ground of objection. *Colver* v. *Van Valen*, 6 How., 102, 105. This rule is too familiar to require a citation of the numerous authorities. But the justice is not limited in the right to quash proceedings solely upon the motion of the defendant.

Whenever a justice is satisfied that the proceedings in an attachment cause are either erroneous, or are entirely void, he should promptly dismiss them upon his own motion, and especially so, if the defendant does not appear and waive the defect by some act on his part. If the proceedings are void, the justice will be liable for all injuries which result from the attachment, even if the defendant does not appear at all to object. *Davis* v. *Marshall*, 14 Barb., 96; *Vosburgh* v. *Welch*, 11 Johns., 175; *Adkins* v. *Brewer*, 3 Cow., 206. The plaintiff would also be liable in such a case; and there are cases in which the plaintiff would be liable, although the justice might be excused. *Rogers* v. *Mulliner*, 6 Wend., 597; *Hoose* v. *Sherrill*, 16 Wend., 33.

The correct practice for a justice is, to dismiss the attachment action at any time before he renders a judgment, if he becomes satisfied that the papers are so defective that his judgment would be reversed or held void.

Controverting attachments.] There is a material difference between quashing an attachment for a material defect in the plaintiff's affidavits, and that of permitting a defendant to come

in on the return day and show by counter affidavits that he had not done the acts charged, or that he did not intend to do them.

If the affidavits of the plaintiff make a clear case on their face, that will be conclusive in the action, for the defendant is not permitted to show that there was not, in truth, any grounds for an attachment. *Field* v. *McVickar*, 9 Johns., 130; *Mott* v. *Lawrence*, 9 Abb., 197.

The reason for this rule is, that where process has been regularly issued upon legal evidence, the justice has no right to supersede what has been regularly done upon proof that the evidence was false or mistaken. The original affidavits gave the justice jurisdiction to issue the process; and when jurisdiction is once regularly and legally obtained, no act and no evidence of the defendant can deprive him of it. *Schroeppel* v. *Taylor*, 10 Wend., 196. But see the remarks of the court on page 201 of the case last cited, and also the language of the court in *Shannon* v. *Comstock*, 21 Wend., 459, in which it is said that the affidavits are not conclusive, but are liable to be met by the defendant, on proof that there was a plain mistake. This last case was that of a warrant, not an attachment.

Long attachment, against whom issued.] When the defendant is a resident of the county in which the attachment is issued, it must be a long attachment in all cases. And the rule is the same whether the plaintiff is a resident or a non-resident.

So, where the defendant has absconded, or has left the county where he last resided, for the purpose of defrauding his creditors, if an attachment is issued in that county it must be a long one. *Smith* v. *Weed*, 20 Wend., 184; *Johnson* v. *Moss*, Id., 145. So, if a defendant is about to remove his property, or if he actually is removing it from the county in which he last resided, if any attachment is issued in that county, it must be a long one.

When the defendant is a non-resident of the county, a long attachment is never proper. Laws 1831, ch. 300, § 33; Vol. I, 75, § 215; *Webber* v. *Gay*, 24 Wend., 485; *Bowne* v. *Mellor*, 6 Hill, 496.

A non-resident of the state cannot be sued by a long attachment. A short attachment is the proper process, and any other attachment would be void. *Thompson* v. *Sayre*, 1 Denio, 175.

When a long attachment is issued under the provisions of the Revised Statutes, and not under those of the non-imprisonment act, a summons is not proper and ought not to be issued on the return day of the attachment. *Stewart* v. *Brown*, 16 Barb., 367. But if the attachment issues under the provisions of the non-imprisonment act, a summons is proper, and must be issued in all such cases, whether the attachment is long or short, if it appears on the return day that property was attached, and that a copy of the inventory and attachment were not personally served, and the defendant does not appear. Vol. I, 76, § 220; *Rosenfield* v. *Howard*, 15 Barb., 546; *Taylor* v. *Harker*, 1 E. D. Smith, 391. But if the defendant appears on the return day of the attachment, no summons need be issued. *Ib.*; *Conway* v. *Hitchins*, 9 Barb., 378.

And if the attachment and inventory are personally served on the defendant, a summons need not be issued in any case. *Ib.*

General points as to affidavits.] The principal points in relation to affidavits having been discussed, it is deemed convenient to collect the general rules in a condensed form, for the purpose of enabling a person to see, at a glance, what points require attention. This method is exceedingly convenient for assisting one to find readily what he generally needs to use in great haste. Before an affidavit is drawn for the purpose of obtaining an attachment, the following points should be considered; and, in drawing the affidavits, these points should be carefully observed. If this is done, few errors need occur:

1. There must be an affidavit in all cases, whether the attachment is a long or a short one, and whether the plaintiff or the defendant be a resident or non-resident; and mere verbal statements are not sufficient. *Ante*, 128. 2. The affidavits must show some acts or declarations of the defendant as to leaving county, keeping concealed, &c. *Ante*, 140. 3. Should show some acts or declarations of defendant as to disposition of property. *Ante*, 141. 4. Affidavits should not be entitled. *Ante*, 128. 5. Affidavit, where made. *Ante*, 130. 6. Affidavit, when made. *Ante*, 129. 7. How often affidavit may be used. *Ante*, 129. 8. Affidavit must show that plaintiff's demand arose upon contract or judgment, and not for a tort. *Ante*, 130. 9. The demand must be due from the defendant personally. *Ante*, 132. 10. As to defendants jointly liable, and partners, and corporations. *Ante*, 133. 11. Fictitious names cannot be used. *Ante*, 134. 12. Amount claimed must not exceed jurisdiction of justice. *Ante*, 134. 13. Affidavits, by whom made. *Ante*, 135. 14. Subpœna for witness. *Ante*, 135. 15. Facts and circumstances must appear affirmatively. *Ante*, 136. 16. Hearsay not sufficient evidence. *Ante*, 136. 17. Affidavit should show amount of plaintiff's demand, or the balance due over and above all discounts, &c. *Ante*, 136. 18. Facts must not be stated upon belief, except as to *intent* to defraud creditors. *Ante*, 137. 19. Facts must not be stated by way of recital or description, but positively. *Ante*, 138. 20. Satisfactory proof means legal evidence sufficient to make a *prima facie* case. *Ante*, 138. 21. *Facts and circumstances, what they are, and how to state them. Ante*, 139. 22. Affidavits, when sufficient collaterally. *Ante*, 144. 23. Revised Statutes, cases under. *Ante*, 145. 24. Non-imprisonment act, cases under. *Ante*, 146. 25. As to venue, date, signing, jurat, &c., of affidavits. *Ante*, 147, 148. 26. Joinder of cases under Revised Statutes and under non-imprisonment act, and the effect of it.. *Ante*, 149. 27. Defects in original affidavit not amendable, nor supplied by new ones. *Ante*, 150. 28. Quashing attachments. *Ante*, 151. 29. Controverting affidavits by defendant, by affidavits on his part. *Ante*, 151. 30. Long attachments, when proper and when improper, *Ante*, 152.

Manner of drawing affidavits.] Where there is but one person sworn, there will of course be but one affidavit. But there are

sometimes several persons sworn; and it has been a common practice with some justices, and it is recommended in some books, that the most convenient method is to join the statements of several witnesses in a single affidavit. This practice is not by any means the best one. It is true that there is no legal objection to it, but it will be next to impossible for a justice to avoid making mistakes if he adopts that method. Where several different persons are stating different facts and circumstances, there are very few justices who would not sometimes confound the statements, or sometimes omit important facts. The easiest and the simplest mode will be to take the statement of each witness separately, as he gives it, and then reduce it to writing. When it is written, read the affidavit to him, or let him read it himself, and if it is correct as he wishes to swear to the facts, then let him sign and swear to it. In this manner let every affidavit be drawn. There will not be any difficulty then from confounding the statements of one witness with those of an other. Nor can there be a mistake as to what the person intends to swear to, if his statement is made by itself, and he fully knows the contents of the affidavit to which he signs his name and takes his oath. Besides this, there will be less danger of omitting to state all the facts which were to be proved by the witness, if his statements are taken separately, because the attention of the plaintiff and of the justice will be distinctly directed to that subject in this mode of taking the proof.

Applications for attachments.] When a party desires to obtain an attachment, and he is satisfied that he can prove the necessary facts and circumstances to authorize it, the next step will be to apply to a justice to issue the process.

The statute requires that the application shall be in writing. Vol. I, 41, § 26. There has been a diversity in the practice in relation to what the application should contain. In Waterman's Treatise, p. 62, ed. 1849, the application merely states that the plaintiff applies for an attachment against the property of the defendant pursuant to statute. No grounds are stated, and no particular statutes are referred to. The works of other authors refer to the statute with particularity, by stating the article, title, chapter and part of the Revised Statutes, or they refer to the title of the act by the year and chapter when the statute was enacted. 1 Cow. Treat., 524, 3d ed.; Benedict's Treatise, 152, 4th ed.; New York Civil and Criminal Justice, 163, 2d ed.

The Revised Statutes are entirely silent in relation to what the application shall contain. And the non-imprisonment act does not say anything about an application in writing. The reason for this is evident. The Revised Statutes required an application to be made in writing in all cases in which an attachment was required by virtue of its provisions. The non-imprisonment act was enacted soon after; and by the terms of the act itself, it merely *extended* the remedy by attachment *to other cases*, so that the requirements of the Revised Statutes as to a

written application were equally applicable to the *new cases* to which an attachment was extended by the non-imprisonment act. But no change was made in the law as to what the application should contain. In the absence of a statutory requirement upon that subject, the proper mode will be to adopt that form of application which shall be at once the most convenient, and the least likely to lead to mistakes in practice. When the application refers to the provisions of either statute as the ground of application, there will almost invariably be some evidence in the affidavit which relates to the cases provided for by the other statute. And, in some instances, the application has stated the grounds thereof under the provisions of one of these statutes, while the evidence was almost exclusively directed to proving a case under the provisions of the other statute. *Rosenfield* v. *Howard*, 15 Barb., 546. In the case just cited, the affidavit stated the grounds of application under the non-imprisonment act, but the facts stated in the affidavit made a case under the Revised Statutes; and also made some proof for a case under the non-imprisonment act, and the attachment was sustained. But all such questions and difficulties are needless, and a correct mode of practice will avoid them. The true rule is, that the *form* of the application for an attachment shall be *precisely the same in all cases*, whether the attachment is a long or a short one, and whether it is issued under the provisions of the Revised Statutes, or those of the non-imprisonment act. The grounds upon which an attachment is demanded ought *never* to be stated in the application therefor. No statute requires the application to state the grounds, and for that reason the form of application may be the same in all cases. But it must not be supposed, that because the *application* need not state the grounds of applying for an attachment, those grounds need not be stated at all. The statute expressly requires that the *affidavit* shall state the grounds of the application for the attachment. And therefore, the *affidavits*, or some of them, must *always* state the *grounds* therefor. Vol. I, 41, § 26.

To state the grounds in the application, and then to state them in the affidavit, would be a needless repetition. And it would sometimes cause difficulties; because, if the application should state the grounds under one statute, and the affidavits should state them under the other statute, no court could say upon what grounds the plaintiff really wished for an attachment.

It is true, that the grounds stated in the affidavit should control, because the statute declares that the grounds shall be stated in the affidavit, but the courts seem to have overlooked that point in some of the cases; when, if they had treated the statement of the grounds in the application as surplusage, there would have been no difficulties, real or supposed, in the case.

The application may be made by the plaintiff, or by his agent. There are many instances in which a plaintiff may be absent, or for some other cause he cannot make the application in person.

In such cases the application may be made by an agent who is appointed for that purpose, or by any agent whose general duties are such as to include such an authority. And if an application should be made by a person who had no authority at the time of the application, yet, if the plaintiff should adopt his acts and proceed with the action, such subsequent ratification would be sufficient. *Ackerman* v. *Finch*, 15 Wend., 652, 653. The person who appears as attorney for the plaintiff, is of course an agent within the meaning of the statute. When the application is made by an agent, the form of the application is precisely the same as it is when the plaintiff applies in person. The only difference will be that when the application is drawn, the signatures would be written in the following manner: write the name of the plaintiff, and then add the name and character of the agent. For instance, the plaintiff is named Moses Spike, and the name of his agent is Charles Allen. The signature to the application will be "Moses Spike, by Charles Allen, agent." See *Millius* v. *Shafer*, 3 Denio, 60, as to manner of execution, though that was a bond.

Form of application.

To John Frothingham, one of the justices of the peace of Johnstown, in the county of Fulton:

I hereby apply to you for an attachment against the property of John Smith, under and by virtue of the provisions of the several statutes of this state upon that subject. MOSES SPIKE.

Dated November 14th, 1864.

After the application is drawn, the next step will be to draw the affidavits. And in all books of practice a general form is given as a precedent. But no form can be useful further than to serve the purpose of giving a general and correct outline of the *manner* in which the *grounds* of the application are to be stated, and of the facts and circumstances which substantiate those grounds. The grounds of the application may be for some of the cases provided for by the Revised Statutes, or for some of the cases provided for by the non-imprisonment act, or for grounds which will include the cases, or some of them, under both statutes.

The only general directions which are applicable to every case are, that the plaintiff shall state fully all the grounds that exist for an attachment, whether it is under the Revised Statutes, as to the *persons*, *&c.*, or under the non-imprisonment act as to the *disposition of property*, *&c.* And further, that he should also state all the facts and circumstances which will prove a case under either statute, for the reasons already given, *ante*, 149, 150.

General form for affidavit for attachment.

FULTON COUNTY, *ss:* Moses Spike being duly sworn, says, that John Smith is justly indebted to the said Moses Spike, on a demand which arose upon contract (or, if the demand is upon a judgment, say, upon a judgment, and state the amount thereof, and the time, place and person before whom the same was rendered) in the sum of two hundred dollars, as near as this deponent can estimate or ascertain the same, over and

above all discounts which the said John Smith has against the said Moses Spike, and the application for an attachment against the property of the said John Smith, which accompanies this affidavit, is made on the *grounds*, that the said John Smith has departed from the county of Fulton, where he last resided, with intent to defraud his creditors, or with intent to avoid the service of any civil process upon him; or, upon the grounds, that the said John Smith is about to depart from the said county of Fulton, where he last resided, with intent to defraud his creditors, or, to avoid the service of any civil process upon him; or, upon the grounds, that the said John Smith keeps himself concealed within the county of Fulton, where he last resided, with intent to defraud his creditors, or with intent to avoid the service of any civil process upon him; or, upon the grounds that the said John Smith is about to remove his property from the said county of Fulton, with intent to defraud his creditors; or, upon the grounds that the said John Smith has assigned, disposed of or secreted his property with intent to defraud his creditors; or, upon the grounds that the said John Smith is about to assign, dispose of, or secrete his property with intent to defraud his creditors.

And deponent further says: (Here state all the facts and circumstances which will bring the case within any of the cases above stated, and which show any fraudulent acts or intentions on the part of the defendant). And defendant further says, that he believes that the acts so done by the said John Smith were done with the intention of defrauding his creditors.

MOSES SPIKE.

Subscribed and sworn before me this 14th day of November, 1864,
JOHN FROTHINGHAM, *Justice of the Peace.*

The reason for the last allegation in the affidavit as to intent to defraud, &c., will be found, *ante*, 143. The affidavit may state any of the grounds mentioned, or it may state all of them that can be proved by facts and circumstances.

The manner of proceeding upon the return day of the attachment has already been stated, *ante*, 149, 150.

The utmost care is necessary as to stating the *facts and circumstances* in the affidavit. But there need be no difficulty whatever, if the foregoing observations as to attachments, which may be found, *ante*, 153, are observed.

When the affidavit is not made by the plaintiff, the only modification of the form of the affidavit which has been given is, to state that fact thus: "Fulton county, ss: Charles Allen being duly sworn, says that he is the agent of Moses Spike, and that," &c. See remarks, *ante*, 135, 156.

Bond for attachment.] After the application and the affidavits are drawn, the next proceeding will be to draw a bond. The statute provides for that as follows: "The applicant shall execute to the defendant, and deliver to the justice, a bond with sufficient surety, to be approved by such justice, in writing upon such bond, in the penalty of two hundred dollars, conditioned to pay such defendant all damages and costs which he may sustain, by reason of issuing such attachment, if such plaintiff fail to recover judgment thereon; and if such judgment be recovered, that such plaintiff will pay the defendant all moneys which shall

be received by him from any property levied upon by such attachment, over and above the amount of such judgment, and interest and costs thereon." Vol. I, 41, § 27. The non-imprisonment act also requires a bond in the cases provided for in that act, and the language is as follows: "And such plaintiff, or some one in his behalf, shall also execute, in the cases provided for by this act, a bond in the penalty of at least one hundred dollars, with such sureties and upon such condition as is required in section twenty-ninth of said article." Laws 1831, ch. 300, § 35; Vol. I, 75, § 217. It is sometimes said that there is a difference in the phraseology of these statutes in relation to the bond required, and that, in cases under the Revised Statutes, the bond must be executed by the plaintiff or the applicant for the attachment, while the bond may be executed by any proper person in cases under the non-imprisonment act. The literal reading of the statute is, that the *applicant* shall execute, &c. But, the object of the statute ought to be kept in view, which was, that the defendant should be protected by a sufficient bond. It can make no difference to him who executes the bond, so long as the bond is a valid and sufficient one. And the true meaning of the statute is, that the person who applies for an attachment, whether it is the plaintiff in person or some person as his agent, shall furnish a sufficient bond. The only object in requiring a bond will then be accomplished. *Millius* v. *Shafer*, 3 Denio, 60.

This view of the question is strengthened by the non-imprisonment act, which extended the remedy by attachment, and then required a bond to be executed by the plaintiff, or *some one in his behalf*.

The reason for requiring a bond is the same in both cases. And there is no legal rule which requires the construction of the statute to be different. And in many cases a different rule would be impracticable; as for instance, when the plaintiff proves a case under both statutes, which is a very common occurrence, surely two bonds would not be necessary. And which statute is to be preferred if such a construction could be sustained? The penalty of the bond should in all cases be four hundred dollars, because it ought to be in double the amount of any judgment which may be recovered before the justice. And the law now gives a justice jurisdiction in all cases of attachments to the amount of two hundred dollars. Code, § 53, sub. 4.

Bond on attachment.

Know all men by these presents, that we, Thomas S. Curtiss and Hiram Van Arnam, are held and firmly bound unto John Smith in the sum of two hundred dollars, to be paid to the said John Smith, or to his certain attorney, executors, administrators or assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals. Dated the 14th day of November, 1864.

Whereas application has been made by Moses Spike, to John Frothingham, Esq., a justice of the peace of the town of Johnstown, in the county

of Fulton, for an attachment against the property of the said John Smith, in favor of the said Moses Spike, in pursuance of the provisions of the statutes of the state of New York, in such cases made and provided.

Now, therefore, the condition of this obligation is such, that if the said Moses Spike shall pay the said John Smith, all damages and costs which he may sustain by reason of the issuing of said attachment, if the said Moses Spike shall fail to recover judgment thereon; and if such judgment be recovered, and the said Moses Spike shall pay the said John Smith all moneys which shall be received by him from any property levied upon by such attachment, over and above the amount of such judgment and interest and costs thereon, then this obligation to be void, otherwise of full force and virtue.

THOMAS S. CURTISS, [L. S.]
HIRAM VAN ARNAM, [L. S.]

Sealed and delivered in presence of
JOHN FROTHINGHAM.

Approval of bond by justice.

I approve of Thomas S. Curtiss and Hiram Van Arnam as sureties, in the foregoing bond. November 14th, 1864.

JOHN FROTHINGHAM, *Justice.*

If the approval is indorsed on the outside of the bond, say the "within bond," instead of the "foregoing bond." The statute expressly requires that the approval shall be in writing upon such bond, and the justice should be careful to comply with its requisitions.

Must be bond in all cases.] Under some of the older decisions it was held, that a bond was not necessary when a short attachment was issued. *Bates* v. *Relyea*, 23 Wend., 336. But that construction of the statute has been overruled. And it is now conclusively settled, that there must be a bond in every case in which an attachment is issued, whether the attachment is a long or a short one, or whether the attachment issues under the provisions of the Revised Statutes or those of the non-imprisonment act, or whether the defendant is a resident or a non-resident of the county. *Taylor* v. *Heath*, 4 Denio, 592; *Davis* v. *Marshall*, 14 Barb., 96; *Bennett* v. *Brown*, 4 Comst., 254; *S. C.*, 6 E. P. Smith, 99; *S. C.* again, 31 Barb., 158.

Covenant will not do in place of bond.] The statute has required that a *bond* shall be executed and delivered to the justice before an attachment can be issued. It must, therefore, be a bond that is executed. No other agreement will supply its place, so as to satisfy the statute.

A written sealed agreement in the following form was held to be insufficient. "We jointly and severally promise to pay to J. Davis, the sum of one hundred dollars, or pay to him all damages and costs he may sustain by reason of the issuing of an attachment this day applied for by B. H. B., if he fail to recover judgment thereon; and if judgment be recovered, the plaintiff will pay the defendant all moneys which shall be received by him from any property levied on by the said attachment, over and

above the amount of such judgment, and interest and costs thereon." This agreement was signed and sealed by a surety, but the court held it to be no compliance with the statute, requiring a bond, and that the attachment issued under it was entirely void. *Homan* v. *Brinckerhoof*, 1 Denio, 184.

It was held in the same case, that the defendant might appear in the action, and waive the defect so far as to render the judgment valid against him personally, but that it did not in any manner render the agreement sufficient to authorize the attachment to hold the property. And see the same principle, *Watts* v. *Willett*, 2 Hilt., 212.

Deposit of money will not supply the place of a bond.] A deposit of money instead of a bond would not be a compliance with the statute. There must be a bond, and even a written sealed agreement will not supply its place as we have just seen. There is an other reason why a deposit of money would not be proper, and that is, because it would be impossible to deposit an amount which would be certain to cover all the damages and costs which might arise from issuing the attachment, and including the costs thereon, upon an appeal to the county court, the supreme court, and perhaps to he court of appeals. It has been held in cases relating to warrants, that in some cases, a deposit of money would be a sufficient security. But that decision was made under the Revised Laws of 1813, and the reason assigned for the decision was, that that statute merely required security without declaring in what manner it should be given. *Wheelock* v. *Brinckerhoof*, 13 Johns., 481. And, besides that, it was evident in that case, that the amount deposited was equal to any possible amount that the defendant could claim. But the conclusive reason in the case of attachments is, that the statute requires a bond, and therefore no other security in form or substance can supply its place as a substitute.

Bond must describe parties correctly.] The bond should describe the parties to the action correctly, as to the names and number of the parties, and as to the character in which they sue. In one case the bond described the plaintiff as though he were suing in his individual character, when in fact the suit was brought in the name of that person in connection with others as executors of a deceased person. The bond was held defective, and the judgment founded thereon was reversed. *Comfort* v. *Gillespie*, 13 Wend., 404, 405.

Execution of the bond.] The word bond, from the force of the term, imports a sealed instrument. A scrawl with a pen, with the letters L. S., is not a seal, and where a seal is required, these letters will be of no avail whatever. *Warren* v. *Lynch*, 5 Johns., 239; *Van Santwood* v. *Sandford*, 12 Johns., 197. A seal is an impression upon wax or wafer, or some other tenacious substance capable of being impressed. *Warren* v. *Lynch*, 5 Johns., 239; *Van Santwood* v. *Sandford*, 12 Johns., 197. A bond must be signed as well as sealed, but it has been held that the signature need not, of necessity, be at the end of the bond. In one case

the obligor signed his name and affixed his seal in the space between the penal part of the bond and the condition thereof, and it was held that the condition of the bond was included as a part of the instrument as much as though the signature had been at the foot of it. *Reed* v. *Drake*, 7 Wend., 345. The names of the sureties ought to be mentioned in the body of the bond, but if they are not, and the sureties sign and seal the bond, they will be bound. *Ex parte Fulton*, 7 Cow., 484; *Decker* v. *Judson*, 2 E. P. Smith, 439. Where the bond executed upon an application for an attachment professed to be the bond of Jacob Shafer, the creditor who applied, and of two sureties, and was executed thus: "Walter Shafer, agent for Jacob Shafer," and the sureties executed the bond in proper form and manner, it was held that the bond was sufficient, although the principal was not bound. The court said: "The bond, as I think, was sufficient. It was the bond of the agent, Walter Shafer, individually, and an other person, given on behalf of the plaintiff, and, as such, satisfies the statute, although the plaintiff may not have been bound by it." *Millius* v. *Shafer*, 3 Denio, 60. The statute requires that the bond shall be delivered to the justice. See *ante*, 157. The justice should retain the bond in his custody, together with the affidavits accompanying it. See *ante*, 128.

Who to be sureties.] The law has confided to the justice the right to determine the sufficiency of the sureties. And the justice should always be satisfied that the parties offered as sureties are entirely able to respond in damages to the extent of the liability incurred. The object of requiring a bond was to secure the defendant against all damages and costs which might accrue from issuing the attachment, and also to secure the return of any surplus which might remain after the payment of the plaintiff's demand, interest and costs. Without this protection to the defendant's rights, an irresponsible plaintiff might obtain the property of a defendant by an unjust or an illegal judgment, and though the judgment were reversed on an appeal, the defendant would have no security for his damages and costs, nor for the value of his property if that had been sold and the plaintiff had received the avails. And, even if the judgment were to be affirmed, the defendant would not have any security for the return of the surplus after the payment of the plaintiff's judgment and costs. The justice ought in every case to require such sureties as shall leave no reasonable doubt that the bond will be such an indemnity as the law intended. When the plaintiff is a man of undoubted responsibility, and he himself executes the bond, then one other responsible person as his surety will be sufficient. The statute does not require that there shall be more than one surety in addition to the plaintiff, or the applicant, if either of them executes the bond. But, it will always be best to require two names to the bond. If the plaintiff, or the applicant for the attachment executes it, then one responsible surety in

addition will be sufficient; but, if neither the plaintiff nor the applicant executes the bond, then two sureties should be required.

Liabilities of sureties.] The liability of the sureties is more extensive than is generally supposed. By the language of the statute, and the terms of the bond itself, it extends to *all damages* and *costs* which the defendant may sustain by reason of the issuing of the attachment. This language is very broad, for it includes all *damages* which the defendant may sustain by reason of issuing the attachment. If an attachment is issued and the plaintiff fails in the action, the mere return of the defendant's property may not in any manner serve to compensate him for the damages which he has sustained.

The property may be injured, lost or destroyed, and it may be property which was valuable in the defendant's business, and the taking of it may have deprived him of the use of it, or perhaps he may have lost a desirable opportunity to sell it at a profit. *Dunning* v. *Humphrey*, 24 Wend., 31. These illustrations will serve to show in what manner the defendant may suffer damages from the issuing of the attachment.

But it is not merely a liability to damages that the sureties undertake to answer for. The bond also agrees to pay all *costs* which the defendant may sustain. The costs here mentioned are not merely those which may be given in the attachment action before the justice. The sureties are liable for all costs which may be rendered against the plaintiff in the attachment action, or upon any appeal from that judgment. This would include the costs of the county court, the supreme court, and those of the court of appeals, if the supreme court permitted the case to go there. It will not make any difference in the rule, whether the plaintiff or the defendant is the appealing party. If the final judgment is given against the party who was plaintiff in the attachment action, it will be of no consequence whether that final judgment is the result of the reversal or the affirmance of a previous decision. The sureties are liable to answer for the final judgment, if it is against the party for whom they have given the bond, for the purpose of getting the attachment in the justice's court. *Ball* v. *Gardner*, 21 Wend., 270; *Bennett* v. *Brown*, 31 Barb., 158; *S. C.*, 4 Comst., 254; *S. C.*, 6 E. P. Smith, 99.

It may be well to notice here a distinction which exists between the case of an attachment bond, and the security which is given to obtain a short summons or a warrant. In the case of an attachment, the condition of a bond is, to answer for all damages and costs which the defendant may sustain, *by reason of issuing the attachment.* In the case of a short summons or a warrant, the surety merely binds himself to answer for any sum that may be adjudged against the plaintiff *in the suit*, which is commenced by the process issued. An appeal is a *new suit*, if the case is decided solely upon the facts appearing on the justice's return, and therefore the sureties are not liable on the bond for any costs upon any such appeal in actions commenced by summons or

warrant. *Fenno* v. *Dickinson*, 4 Denio, 84. But if the case is one in which a new trial is had in the county court, it is not a new suit.

Penalty of the bond.] The Revised Statutes require that the penalty of the bond shall be two hundred dollars. The jurisdiction of the justice extended to one hundred dollars in attachment suits, and the penalty of the bond was double that sum. In the cases originally provided for by the non-imprisonment act, the jurisdiction was but fifty dollars, and hence the penalty of the bond in the cases under that act need not exceed one hundred dollars, to be double the amount of the judgment in such action. But now the jurisdiction of a justice is two hundred dollars in all attachment actions. Code, § 53, sub. 4; and therefore it is proper to make the penalty of the bond four hundred dollars in all cases.

Condition of the bond.] The statute expressly requires that the bond shall be executed to the defendant.

The bond ought, therefore, in all cases, to be made payable to the defendant, because if it is made payable to any other person, the statute will not be complied with.

The bond will be void if the condition is not such as the statute requires. *Barnard* v. *Viele*, 21 Wend., 88. The bond must also be conditioned to pay the defendant all damages and costs which he may sustain by reason of the issuing of such attachment if such plaintiff fail to recover judgment thereon.

No other condition whatever will supply the place of this one which the statute specifies. As to the extent of this liability, see *ante*, 162.

The bond must also be conditioned, that if the plaintiff recovers judgment, that such plaintiff will pay the defendant all moneys which shall be received by him from any property levied upon by such attachment, over and above the amount of such judgment, and interest and costs thereon.

Bond, when to be executed.] The statute expressly declares that the bond shall be executed before any attachment can issue under the Revised Statutes, or under the non-imprisonment act. Laws 1831, ch. 300, § 35; Vol. I, 75, § 217. The execution of a proper bond is a condition, therefore, which must be complied with before there is any legal authority to issue an attachment.

And if an attachment is issued and served before a bond is executed, the defect cannot be remedied by executing a bond afterwards. *Ackerman* v. *Finch*, 15 Wend., 652.

Amendment of bonds.] There is a very great difference whether there is no bond at all in such cases, or whether there is a bond which is defective in some respects. When there is no bond the proceedings will be entirely void, and so of a bond which entirely omits any of the conditions required by the statute.

But there are defects which are amendable by statute. The statute provides: "Whenever a bond is or shall be required by law to be given by any person, in order to entitle him to any right or privilege conferred by law, or to commence any proceeding, it shall not be necessary for such bond to conform in all

respects to the form thereof prescribed by any statute, but the same shall be deemed sufficient if it conform thereto substantially, and do not vary in any matter, to the prejudice of the rights of the party to whom or for whose benefit such bond shall have been given." 3 R. S., 870, § 35, 5th ed. "Whenever such bond shall be defective in any respect, the court, officer or body who would be authorized to receive the same, or to entertain any proceedings in consequence of such bond if the same had been perfect, may, on the application of all the obligors therein, amend the same in any respect, and such bond shall thereupon be deemed valid from the time of the execution thereof." 3 R. S., 870, § 36, 5th ed.

The application to amend must be made by all the obligors named in the bond. The statute requires this, and so do the adjudged cases in relation to the statute. *Shaw* v. *Lawrence*, 14 How., 94; *Potter* v. *Baker*, 4 Paige, 290. The correct practice would be, to draw up a written request which should specify the particulars in which an amendment is desired, then let the sureties all sign this request, and then present it to the justice. And if the old sureties sign the amended bond, it will then be valid. So if an amendment is made by adding the name of a new surety, he will be bound as much as though he had signed the bond originally. *Decker* v. *Judson*, 2 E. P. Smith, 439. If the bond does not conform strictly to the letter of the statute, but it is a substantial compliance therewith, the bond will be valid.

And if the bond contains the conditions required by statute, and some others which the statute does not require, that will not invalidate the bond when the error does not prejudice the obligee, or when it is more beneficial to him than the statute requires. The amendment of a bond is for the benefit of the defendant in an attachment suit, since the object is to increase the sufficiency of his indemnity. The only safe practice, however, is to execute a proper bond in the first instance. Every question of regularity or of jurisdiction in that respect will thereby be avoided.

Action upon attachment bond.] A few points will be noticed in relation to an action upon such bonds.

In an action upon an attachment bond, where the party suing out the attachment has failed to recover a judgment, the defendant in the attachment action is entitled to recover not only the costs of the defense before the justice, but also damages for the seizure and detention of the property. *Dunning* v. *Humphrey*, 24 Wend., 31. But in such an action, if it appears that the property was merely levied upon but not removed from the possession of the defendant in the attachment suit, and that, on the return of the attachment a judgment of nonsuit was entered because of the failure of the plaintiff to appear, it was held, that the rule of damages in such a case was the actual damages sustained, and nothing more. *Groat* v. *Gillespie*, 25 Wend, 383. Such a case would differ from one in which the attachment proceedings were void for want of an affidavit or a bond, because in

the latter case the taking of the property would be illegal, while in the other case, the taking would have been legal, and the omission to appear might have been by accident, thus determining the action, but not rendering the previous proceedings invalid.

If a suit be commenced before a justice against a non-resident of the county by a long attachment, and the plaintiff fail to appear on the return day thereof, the defendant may either treat the process as void, and recover his damages in an action of trespass, or waive the irregularity and take his remedy on the attachment bond. *Bowne* v. *Mellor*, 6 Hill, 496.

The obligors in a bond executed upon issuing an attachment in a justice's court where the plaintiff has failed to recover judgment, are *prima facie*, liable for the value of the property attached. But where property was seized and removed by virtue of an attachment, and the plaintiff, having been nonsuited on the trial, immediately sued out an other attachment upon which the officer who served the first attachment, seized the same property which was in his possession, on the second attachment, and afterwards sold it on the execution in that suit; in an action on the bond, given on the issuing of the first attachment, it was held, that the sureties and the plaintiff in the attachment suit were entitled to show the appropriation of the property on the process in the second attachment suit, in reduction of damages. *Earl* v. *Spooner*, 3 Denio, 246.

The court, in the case last cited, made a distinction between an action of covenant upon the bond, and an action for a trespass in illegally taking the property upon void process. In an action of covenant upon the bond, the measure of damages is as stated in that action. But in an action of trespass for wrongfully taking the property of the defendant in the attachment action, the subsequent appropriation of it by a sale under an execution in favor of the wrongdoer, will not save the party from answering in damages to the full value of the property. *Otis* v. *Jones*, 21 Wend., 394.

What the attachment must contain.] The statute provides: "Every such attachment shall state the amount of the debt sworn to by the applicant, and shall command any constable of the county in which the justice resides to attach so much of the goods and chattels of the debtor as will be sufficient to satisfy such debt, and safely to keep the same, in order to satisfy any judgment that may be recovered on such attachment, and to make return of his proceedings thereon to the justice who issued the same, at a time therein to be specified, not less than six nor more than twelve days from the date thereof." Vol. I, 41, § 28.

Form of attachment.

FULTON COUNTY, *ss:* The people of the State of New York, to any constable of said county, GREETING: Whereas, Moses Spike has made application to me, John Frothingham, Esq., one of the justices of the peace of said county, for an attachment in his favor against the property of John

Smith, according to the provisions of the statutes of the State of New York in such cases made and provided, for a debt of one hundred dollars, being the amount sworn to by the applicant; which debt arose upon contract (or upon a judgment), and the requisite proof by affidavit, and a legal bond with sufficient sureties, duly approved by me, having been made and executed and delivered to me.

You are, therefore, commanded to attach so much of the goods and chattels of the said John Smith, as will be sufficient to satisfy such debt, and safely to keep the same, in order to satisfy any judgment that may be recovered on this attachment. And do you make return of your proceedings hereon, to me, at my office in the town of Johnstown, in said county, on the 24th day of November, 1864, at one o'clock in the afternoon; and have you then and there this precept. Given under my hand at the town aforesaid, the 14th day of November, 1864.

JOHN FROTHINGHAM, *Justice.*

There is no necessity that the attachment should recite or refer to the statutes under and by virtue of which it is issued. The statute which prescribes what an attachment shall contain does not require that it shall show what statute authorizes it to be issued. And when the statute prescribes that certain things shall be contained in the attachment, the legal presumption is, that all the essential requirements will be mentioned, upon the principle that the express mention of certain things excludes the supposition that any other thing was intended. And again, in the absence of any statutory requirement upon the subject, the same rule is applicable to an attachment which is applied to a summons or a warrant. Neither of those kinds of process ever refers to any statute for the authority by virtue of which it is issued. And the principle of law is precisely the same in relation to attachments, so far as it relates to that question.

When a justice by a clerical mistake omits to insert in the attachment the amount of the plaintiff's debt, he may, after the service of the attachment, and on the return day of the process, amend the attachment by inserting therein the amount of the debt which was sworn to, notwithstanding the objections of the defendant. *Near* v. *Van Alstyne*, 14 Wend., 230.

When an attachment action is tried and a judgment is rendered therein in favor of the defendant, he is entitled to the immediate possession of the attached property. And an appeal by the plaintiff will not make any difference. If the goods are not returned to the defendant, he may, on a proper demand, recover the value of the goods because of their conversion, or he may maintain an action of replevin to recover the goods themselves. *Moore* v. *Somerindyke*, 1 Hilt., 199.

SECTION IV.

SHORT ATTACHMENT.

This attachment must be made returnable in not less than two, nor more than four days from its date. And the only difference in form between a short attachment and a long one, is in the length of time which intervenes between the date and the return

day. The facts and circumstances must be stated in the same manner as in an affidavit for a long attachment.

The remarks which have been made in relation to long attachments are equally applicable to short attachments, except in those particulars which will be hereafter pointed out. There has been one very prevalent mistake in relation to short attachments, which is, that a short attachment has been supposed to be a process which is entirely different in its nature from a long one.

At one time this view was entertained by the supreme court, and it was then held that no affidavit or bond need be furnished to authorize the issuing of this process. *Bates* v. *Relyea*, 23 Wend., 336. This view of the law has been expressly overruled in several cases, and it is now conclusively settled that there must be both an affidavit and a bond before a short attachment can issue in any case whatever. *Taylor* v. *Heath*, 4 Denio, 592; *Bennett* v. *Brown*, 4 Comst., 254; *S. C.*, 6 E. P. Smith, 99; *Davis* v. *Marshall*, 14 Barb., 96. *Ante*, 159, 128.

Nothing is more common than to hear a short attachment spoken of as a process which was intended for a different class of cases than those provided for by a long attachment. It was this error which led to the conclusion that neither an affidavit nor a bond was necessary, though, as we have just seen, that error has been corrected.

Before discussing the provisions of this section of the statute, it will be cited: "Whenever, by the provisions of the thirtieth section of this act, no warrant can issue, and the defendant shall reside out of the county, he shall be proceeded against by summons or attachment, returnable not less than two, nor more than four days from the date thereof, which shall be served at least two days before the time of appearance mentioned therein; and if such defendant be proceeded against otherwise, the justice shall have no jurisdiction of the cause." Laws 1831, ch. 300, § 33, Vol. I, 75, § 215.

The first thing worthy of attention is, that the language of this section differs very materially from that of the 34th section of the same act. The 34th section commences thus: "*In addition to the cases, &c.*, an attachment may be issued." It will be remembered that the Revised Statutes gave an attachment long before the non-imprisonment act was passed, and that section thirty-four of that act merely extended the remedy to a different class of cases. *Ante*, 124. The 33d section, which has been cited, does not profess to give an attachment in any *different class of cases* from those already existing, either by the Revised Statutes or the 34th section of the non-imprisonment act.

The attachment was a remedy which was in familiar use in many cases, and the statute was not changed in that respect by the 33d section. That section does not, in reality, provide for any *class of cases* whatever, so far as it relates to the question *what facts* will authorize the issuing of an *attachment*. The only effect of the 33d section is, to declare that when the defendant

resides out of the county, the return day of the attachment shall be not less than two, nor more than four days from the date of the process. This section does not, therefore, refer to a different class of cases, and give a process in a different case or class of cases; but it merely declares, that in relation to *some specified persons* the process shall differ in *form* from the attachment in general use. This section does not extend the remedy by attachment, to a single class of cases which is not provided for by the other sections of the statute, though it does declare that the time for the return day shall be less than in the case of a resident defendant. And this modification as to attachments was made solely for the convenience of non-resident defendants.

As we have already seen, the courts now invariably hold that both an affidavit and a bond are necessary before a short attachment can be issued. And an important question then arises. What facts shall the affidavit contain to authorize this attachment? If a short attachment is a mere modification of the ordinary attachment, the answer is very simple indeed. It must state the same facts as are required for a long attachment, and in addition to that, that the defendant resides out of the county in which the attachment is sought to be obtained, and also, that no warrant can issue against the defendant. This view of the construction is strengthened by the language of the 33d section. It declares that, where the defendant shall *reside* out of the county, he shall be *proceeded* against by a short summons or attachment. This language relates to the *manner* in which the defendant shall be proceeded against, and not to the *cases* which will authorize proceedings against him. It assumes that an attachment is an existing remedy for all the cases in which that process is proper, if the proper proofs and bond are furnished. But it was also necessary to declare in what form that process should be issued against non-resident defendants, and therefore section thirty-three was enacted.

This view is further strengthened by the concluding clause of this section; for it declares that if a non-resident defendant is *proceeded* against otherwise than by a short summons or a short attachment, the justice shall have no jurisdiction. This provision very clearly has no reference to the *class of cases* which will authorize an attachment, nor to the statement of facts which will be sufficient. It relates solely to the *person* of the defendant, and not to the grounds for the attachment.

The remarks in relation to a short attachment have been more extended than would be deemed necessary in ordinary cases; and this full explanation was deemed important in reference to one decided case, which is opposed to the construction which has been given.

In *Van Kirk* v. *Wilds*, 11 Barb., 520, it was held to be sufficient to state in the affidavit that the cause of action arose upon contract for a specified amount, and that the defendant was a non-resident of the county. This opinion was delivered by a very

learned judge, but he does not cite any authorities, nor does he give any reasons for such a decision, and in my judgment, the court overlooked the entire nature of the process, in considering that it differed from a long attachment in any respect, except as to the form of it.

The thirty-third section does not profess to give any remedy *in addition* to that already existing, as the thirty-fourth section does, nor does it give a short attachment simply because the defendant is a non-resident. This is conclusive that the same proof as to the fraudulent acts of the defendant as to person or property is required precisely as in other cases of attachments. But more than this, there is an express statute which requires it.

The requirements of the Revised Statutes are expressly made applicable to all attachments, whether issued under the thirty-third or the thirty-fourth sections. "All the provisions of said title fourth, not hereby expressly repealed, and not inconsistent with the provisions of this act, are hereby declared to be in full force, and to apply to the provisions of this act, so far as the same relate to the proceedings in courts before justices of the peace." Laws 1831, ch. 300, § 43; Vol. I, 77, § 224.

The courts have held, that by virtue of this section, the provisions of the Revised Statutes which require an affidavit and bond before an attachment can issue under its provisions, are equally applicable to the cases provided for by the non-imprisonment act, and that an affidavit and bond are therefore necessary in all cases before an attachment can be issued. *Taylor* v. *Heath*, 4 Denio, 592; *Bennett* v. *Brown*, 4 Comst., 254; *S. C.*, 6 E. P. Smith, 99; *Davis* v. *Marshall*, 14 Barb., 96; *Van Kirk* v. *Wilds*, 11 Barb., 520. But the provisions of the Revised Statutes which are thus referred to and adopted, require not only that there shall be an affidavit and a bond, but that the *affidavit* shall state the *grounds* upon which the application is made, and that the affidavit shall also state the facts and circumstances which *prove* that there are sufficient grounds to issue the process. It is clear, that under the provisions of the Revised Statutes, there must be proof by affidavit that the defendant is about to leave the county, or that he keeps concealed to avoid the service of any *civil* process, &c., before an attachment can be issued. And under the provisions of the non-imprisonment act, there must be proof by affidavit that the defendant has disposed of his property, &c., before an attachment can be issued. The Revised Statutes and the thirty-fourth section of the non-imprisonment act, state all the grounds which will authorize an attachment in any case whatever. And there is no provision of the statute which makes the mere non-residence of the defendant a ground, or any one of the grounds for an attachment. The only importance of showing his non-residence is, that the form of the attachment may be modified by making it returnable within two or four days, instead of six or twelve as in long attachments. A short summons was intended to take the place of the old non-resident warrant, if the cause of action arose upon

contract, and no warrant could be issued. And the plaintiff can have a short summons on the ground that the defendant is a non-resident. He will thus get a valid judgment if he desires one. But an attachment is not issued against a resident defendant, without showing legal cause, and there is no reason why a short attachment should issue, unless the same cause is shown which would authorize a long attachment.

The affidavits must always show that the defendant is a non-resident of the county, because the non-residence of the defendant is the sole ground which will authorize a short attachment instead of a long one. In the absence of such proof, the defendant would be deemed a resident of the county, and a short attachment an improper process. And when a short attachment is issued, and there is no evidence in the return, nor by the affidavits, that the defendant is a non-resident, the judgment will be reversed. *Taylor* v. *Heath*, 4 Denio, 592; *Allen* v. *Stone*, 9 Barb., 61. It must not be understood from these cases that it will answer to omit to state such non-residence of the defendant in the affidavits, and then to supply proof of that fact on the trial, for that will not be sufficient. The proof of non-residence is a jurisdictional fact, and the justice has no right to issue a short summons until due proof of that fact is made. And no proof is admissible in such cases to supply the defects in the original affidavits. See this point fully discussed, *ante*, 150. It is also necessary to show in the affidavit for a short attachment, that no warrant can be issued against the defendant.

The statute is explicit that a short summons or a short attachment may issue in cases arising upon contract, "whenever, by the provisions of the thirtieth section, no warrant can issue, and the defendant shall *reside* out of the county," &c. It is clearly necessary to show, in an affidavit for a short summons, that the defendant cannot be arrested. *Waters* v. *Whitamore*, 13 Barb., 634. See title Short Summons. And a short attachment is given by the same section, and in the same language, that a short summons is, so that it is impossible to apply a different rule of construction to a short attachment.

I am aware that the construction which I have given to the statutes will require the statement of some facts which are not required in other books, nor by one of the adjudged cases. But the construction which I have given seems to me to be the only correct one, and the error, if any, which will arise from following this practice will certainly be on the safe side, since it clearly requires enough to make a plain case.

Form of affidavit for a short attachment.

FULTON COUNTY, *ss:* Moses Spike being duly sworn, says that John Smith is justly indebted to the said Moses Spike on a demand arising upon contract (or, if the demand is upon a judgment, say, upon a judgment, and state the amount thereof, and the time when, place where, and the person before whom it was rendered), in the sum of one hundred dollars, as near as this deponent can estimate or ascertain the same, over and above all dis-

counts which the said John Smith has against the said Moses Spike, and the application for an attachment against the property of the said John Smith which accompanies this affidavit is made on the *grounds* (state the grounds as in the affidavit for a long attachment, as to concealment of person, or the disposition of property, &c.)

And deponent further says: (Here state the facts and circumstances as in the affidavit for a long attachment, as to leaving the county to avoid the service of civil process, or as to disposing of property, or removing it, &c.) And deponent further says, that the said John Smith resides out of the county of Fulton, and is a non-resident of said county; and also, that the cause of action against the defendant is not for the collection of money by him as a public officer, nor for official misconduct or neglect of duty, nor for damages for misconduct or neglect in any professional employment. And deponent further says, that the acts so done as aforesaid by the said John Smith, were done by him with intent to defraud his creditors.

MOSES SPIKE.

Subscribed and sworn before me, }
this 14th day of Nov., 1864, }
JOHN FROTHINGHAM, *Justice.*

As to the manner of stating the facts in the affidavits, and as to all the general information as to affidavits for attachments, see the remarks as to affidavits for long attachments, which are equally applicable to short attachments, except in such particulars as are otherwise specifically pointed out.

Form of bond for short attachment.] This is precisely the same as in the case of a long attachment, except that the bond should state that the defendant is a non-resident of the county. See form, *ante*, 158.

The same rules are applicable to a short attachment bond, as in the case of a long attachment. See *ante*, 157, 158.

Form of application for a short attachment.] This form is precisely like that in the case of a long attachment. See *ante*, 156.

Form of short attachment.] This form is precisely like that of a long attachment, except that it should state that the defendant is a non-resident of the county, and that it should also fix the return day at a time not less than two, nor more than four days from the date thereof. See *ante*, 165.

Short attachment against whom issued.] This is the only attachment which can in any case be issued if the defendant resides out of the county in which the attachment issues. If the defendant has absconded from the county in which he last resided, or has left it, and has taken his property with him with the intent to defraud his creditors, a short attachment is the only one which can be issued if it is issued in any other county than the one in which the defendant last resided. So, if a non-resident defendant is in the county, and is about to remove his property from such county with intent to defraud his creditors, a short attachment is the only one that can be legally issued. *Bowne* v. *Mellor*, 6 Hill, 496; *Webber* v. *Gay*, 24 Wend., 485. A non-resident of the state should be sued by a short attachment if any attachment is issued. *Thompson* v. *Sayre*, 1 Denio, 175. When the

defendant is a resident of the county, a short attachment is *never* proper, whether the plaintiff is a resident or a non-resident of the county. It differs from a short summons in this respect, because a short summons may in some cases be issued in favor of a non-resident plaintiff, while a short attachment cannot in any case issue against a resident defendant. When both parties are non-residents of the county, a short attachment is the appropriate form of the process, but there must be the same affidavit and bond that there is in any other case of issuing a short attachment.

As to the town in which a non-resident defendant must be sued, see *ante*, 52, title, Actions, where commenced.

When a short attachment has been issued, and the defendant's property has been attached, but no personal service of the attachment and inventory has been made by serving copies on the defendant, a short summons must be issued on the return day of the attachment, unless the defendant appears on that day, when a summons will not be necessary. Vol. I, 76, § 220; *Conway* v. *Hitchins*, 9 Barb., 378.

SECTION V.

SERVICE OF ATTACHMENT.

An attachment is usually executed by a constable, although the justice may depute any other proper person for that purpose. *Ante*, 48. A constable ought not to execute an attachment in his own favor.

When to serve attachment.] An attachment must be served in proper time in order to be a valid service. A long attachment must be executed at least six days before the return day; and a short attachment must be executed at least two days before the return day. As to the computation of time, see *ante*, 45. As to service of process on Sunday, election days, town meeting day and the like, see *ante*, 46, 47.

Where to attach.] An attachment must be executed within the county in which it is returnable. If the defendant's property is taken on an attachment at any place out of such county, the constable will be a trespasser. And this is the rule even in those cases in which the constable is in pursuit of the property at the very time the property is being removed from such county. For, unless he can make a valid levy before it is taken out of the county, he will be too late. If, however, the constable has once made a valid levy, and has taken the property into his possession, he may follow the property into an other county and retake it, if the defendant has unlawfully retaken and removed such property into such other county.

The levy under the attachment gives the constable a lien upon and an interest in the property, which he may enforce any where by way of retaking its possession, or by maintaining an action to recover its possession, or for damages for the unlawful taking from his possession.

What property exempt.] The same property which may be taken upon an execution may be taken upon an attachment. Vol. I, 42, § 29; see Execution, Levy.

How to attach.] The statute, Vol. I, 41, § 29, prescribes the manner of serving the attachment. The constable must attach and take into his custody, and safely keep such part of the goods and chattels of the defendant as shall not be exempt from execution, and as shall be sufficient to satisfy the demand of the plaintiff. The officer ought to take so much property as will be clearly sufficient to satisfy the plaintiff's demand upon a sale of such property. He ought not, however, to take an unreasonable quantity of property and thus injure the defendant. The kind of property which may be taken is specified particularly in the statute just referred to. Books of account, promissory notes and choses in action of every kind are such property as cannot be attached. It must be goods and chattels, such as may be taken on execution. The property need not, however, belong to the defendant alone. For, if he owns the property as tenant in common with an other, or as a partner, his right, title and interest in the property may be taken and sold in the same manner as on an execution. So property which is liable to be sold upon an execution for the purchase-money thereof, may be taken by virtue of an attachment. Vol. I, 41, 42, § 29; and Id., 62, § 148, sub. 7.

The officer must be careful, however, not to take the property of any other person than that of the defendant, or he will be a trespasser. The right to break into buildings is the same as that on an execution or upon a civil warrant, under which titles the law will be fully explained. After the constable has taken the property, his next duty is to make an inventory of the property which he has seized. The statute requires this to be done *immediately*. Vol. I, 42, § 29. The inventory must be in writing. It should show when it was made; enumerate each article, and be signed by the constable.

Form of inventory.

JUSTICE'S COURT.—JOHN FROTHINGHAM, Esq., *Justice*.

John Doe
agt.
Richard Roe.

FULTON COUNTY, *ss:* An inventory of the property which I have taken this 16th day of November, 1864, in the above entitled action, by virtue of the annexed attachment: Two cows; five cords of hard maple wood; twenty-five bushels of corn; three tons of hay.

JAMES PIERSON, *Constable.*

After the inventory is made the constable ought to make an exact copy of it. And he ought also to make an exact copy of the attachment, if that has not been already done. This ought to be done immediately after the taking of the property. And

the copy of the attachment and of the inventory ought then to be both certified by the constable.

They may be in the following forms:

Certificate on attachment.

I hereby certify, that the within is a correct copy of the attachment issued and served in said action. November 16th, 1864.

JAMES PIERSON, *Constable.*

Certificate on inventory.

I hereby certify, that the within is a correct copy of the inventory of the property taken by me on the attachment in said action, a copy of which attachment is herewith served. November 16th, 1864.

JAMES PIERSON, *Constable.*

These certified copies must be served as follows: If the defendant can be found in the county, they must be served upon him personally, by delivering them to him. Vol. I, 76, § 218. If he cannot be found in the county, then such copies must be served by leaving them at the last place of residence of the defendant, if he has such residence in the county. *Watts* v. *Willett*, 2 Hilt., 212; Vol. I, 42, § 29. If the defendant cannot be found in the county, and he has no last place of residence therein, then such copies must be left with the person in whose possession the said goods and chattels were found. Vol. I, 42, § 29. The service of these certified copies constitute a part of the service of the attachment, and they must, therefore, be served at least six days before the return day of a long attachment, and at least two days before the return day of a short attachment. Unless such service of the copies is properly made, the justice will not acquire any jurisdiction over the property attached. When the defendant is a non-resident of the county, and he is merely passing through it, the copies cannot be served by leaving them at the hotel at which he may take a meal or stay over night. Such a stopping would not make the hotel his last place of residence. *Dudley* v. *Staples*, 15 Johns., 196. And a voluntary appearance of the defendant on the return day, will merely confer jurisdiction over the person of the defendant, but not of the property. This was so decided in a case in which the defendant could not be found, but he had a residence in the county, though no copies were left there. The attachment was held void as against the claims of other execution creditors. *Watts* v. *Willett*, 2 Hilt., 212.

When the constable has once taken the defendant's property, the law holds him accountable for its safe keeping, and he will be liable for its loss, unless he uses due diligence in securing it. He may leave it in custody of a third person, and take his receipt for its redelivery in the same manner as upon an execution. *Harvey* v. *Lane*, 12 Wend., 563; and see *People* v. *Reeder*, 11 E. P. Smith, 302. This receipt may be in the same form as that which is given when property is taken upon an execution, except that in this case, the receipt should show that the property was taken upon an *attachment* instead of an execution.

Defendant may retain possession of goods.] After the goods have been attached, the defendant may prevent their removal, by giving a proper bond to the constable. Vol. I, 42, § 30. The bond must be executed to the constable in such a case. It may be executed by any person with one or more sureties, who are to be approved by the constable. The penalty in the bond must be double the sum which is stated in the attachment as the sum which was sworn to by the plaintiff. The condition of the bond must be, that such goods and chattels shall be produced, to satisfy any execution that may be issued upon any judgment which shall be obtained by the plaintiff upon such attachment, within six months after the date of such bond. Vol. I, 42, § 30.

Bond by defendant to prevent removal of goods.

Know all men by these presents, that we, Daniel Stewart and Richard Roe, of the town of Johnstown, in the county of Fulton, are held and firmly bound unto James Pierson, in the sum of dollars (double the sum stated in the attachment to have been sworn to by the plaintiff), to be paid to the said James Pierson, or to his certain attorney, executors, administrators or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals. Dated the 16th day of November, 1864.

The condition of this obligation is such, that if certain goods and chattels, to wit: one double lumber wagon, one horse, &c. (enumerate all the articles attached), which have been seized by the above named James Pierson, as constable, by virtue of an attachment issued by John Frothingham, Esq., in favor of John Doe against the said Richard Roe, shall be produced to satisfy any execution that may be issued upon any judgment which shall be obtained by the plaintiff in the said attachment, within six months after the date hereof, then this obligation to be void, otherwise of full force and virtue.

DANIEL STEWART. [L. S.]
RICHARD ROE. [L. S.]

Sealed and delivered in presence of

JOHN FROTHINGHAM.

The statute leaves the approval of the surety to the constable in this case. The proper mode will be to indorse the approval upon the bond in writing, in this form:

I approve of Daniel Stewart, as surety in the within bond. November 16th, 1864. JAMES PIERSON, *Constable.*

The penalty in this bond, must be in double the sum sworn to by the plaintiff, as stated in the attachment. Vol. I, 42, § 30. The condition of the bond must conform to the statute, or it will be void. And if the condition of the bond is, that the judgment shall be paid, instead of the statutory requirement, that the property shall be produced to satisfy the execution, &c., such bond will be void. *Morange* v. *Edwards*, 1 E. D. Smith, 414. Where the bond is taken in proper form by the constable in such cases, and there is a default on the part of the defendant, because of his non-production of the property, the constable may assign such bond to the plaintiff in the attachment suit, and he may maintain

an action thereon against the surety. *Morange* v. *Edwards*, 1 E. D. Smith, 414.

The giving of the bond to the constable and his approval thereof, does not destroy the lien of the attachment. If the execution is issued immediately upon the rendition of the judgment, the constable will hold the property by virtue of the attachment and execution upon such judgment, in preference to any other executions or attachments, which are issued subsequently to the attachment which he holds, and by virtue of which he took the property. *Van Loan* v. *Kline*, 10 Johns., 129; *Sterling* v. *Welcome*, 20 Wend., 238.

This lien of the attachment may be lost by the neglect and delay of the plaintiff in the attachment suit. An execution ought to be promptly issued upon the judgment and levied upon the attached property. For it is by virtue of a levy upon such execution that the property can be held after the judgment. And if the execution is not issued within a reasonable time, upon such judgment, and the property is removed to an adjoining county where it is levied upon by an execution or taken upon an attachment by other creditors, the lien of the first attachment will be gone. *Sterling* v. *Welcome*, 20 Wend., 238, 240.

The lien of the attachment continues until the plaintiff can regularly obtain a judgment and an execution. But it does not continue until he may *choose* to *levy* upon the property, unless that is done immediately, if the rights of other creditors are, or may be affected by his delay. *Ib.*

The bond which is given when the defendant desires to prevent a removal of the property, must be approved by the *constable.* Vol. I, 41, § 30. It is the duty of the constable to be careful that such surety is entirely responsible. Not that the constable is liable for the responsibility of the surety when he has exercised his best judgment, and has used proper diligence in learning the situation of the surety; but because if he is negligent in these respects, he may be liable for such negligence.

The correct practice is, for the constable to refuse to approve any surety whose responsibility is fairly questionable. And he should require that the surety shall be a man whose credit stands fair in public estimation, If the surety is a man who has abundant property over and above the payment of his own debts, and for the payment of the liability which he assumes; and he is a freeholder or a householder of the county, the constable will be justified in approving him as a surety.

If the constable approves of a surety who is known to be insolvent or irresponsible, or if he accepts of a stranger without knowing his condition, he will be guilty of negligence.

"Whenever any officer is authorized or required by law to take any sureties or bail, or to *approve* any sureties or bail, he shall be authorized to administer an oath to every person who shall be offered as such bail or surety to ascertain his sufficiency." 3 R. S., 866, § 9, 5th ed. A constable ought, in all cases, to swear the

surety, unless he knows that the surety is unquestionably responsible. If the surety swears to facts which show that he is responsible, the constable may approve of him if he is satisfied of his responsibility. Under such circumstances the constable will not be liable, even though the surety should prove to be irresponsible. The constable ought to allow the defendant a reasonable time to procure sureties in such a case.

The statute also provides, that any person other than the defendant may claim the attached property. Vol. I, 42, § 31. Such claim may be made at any time before an execution shall issue upon a judgment in the attachment suit. The claimant must execute a bond in such a case, and the bond differs materially from that which is given by the defendant when he retains the property. The penalty of the bond, in this case, must be in *double* the *value* of the *property attached.* The amount of the plaintiff's demand is not a matter of any consequence in this case. If the plaintiff's demand is but five dollars, and the constable has attached property of the value of one hundred dollars, then the penalty of the bond must be two hundred dollars, which would be double the value of the *property attached.*

The constable's duty is to refuse to deliver the property to such third person, until a bond is tendered to him, in which the penalty is double the value of the property attached and held by him. The constable must judge of the value of the property in the best manner that he can. If he is not a judge of its value, he should call upon some competent and disinterested person or persons, and obtain the assistance which may be derived from their experience and judgment.

No action will lie against a constable for refusing to deliver the property to such third person, unless he can prove clearly and satisfactorily that he has offered to the constable such a bond as is required, and that the constable has refused to receive it. *Kamena* v. *Wanner*, 6 Duer, 698; *S. C.*, 6 Abb., 193. The object of this bond is to protect the real owner of the property. Suppose, for instance, that the plaintiff's claim is five dollars, and that the property attached is worth one hundred dollars, a bond in double the amount of the plaintiff's claim would be ten dollars, while a bond in double the value of the property attached, would be in the penalty of two hundred dollars.

If a third person, who may be an entire stranger, should be permitted to give a bond for ten dollars, and then take the property, the true owner of such property would frequently suffer great loss. In such a case, if the property is delivered to an irresponsible third person, upon his delivering to the constable a bond in the penalty of ten dollars, the property may be removed by him beyond the reach of the true owner, and he thus lose his property, and have no remedy except upon the bond in the penalty of ten dollars, or by an action against the constable for his negligence. The condition of this bond also differs materially from that which is given by the defendant in the action, for the purpose

of retaining possession of the property. The condition of the bond in this case must be, that in any suit which may be brought on such bond within three months from its date, the claimant will establish that he was the owner of the property seized, at the time of such seizure by the constable, and that if he fails to do so, he will pay the value of the goods so claimed, with interest.

In an action upon such a bond, the claimant must establish that he is the *owner* of such property. A sheriff who levies upon the attached goods by virtue of an execution, is not the *owner*, within the meaning of the statute; he has merely a special property in them. *Pierce* v. *Kingsmill*, 25 Barb, 631. The statute uses this word *owner*, in its popular sense, and it means one who has the legal or rightful title, whether he is the possessor or not. Id., 633.

If the plaintiff in the attachment action sues the sureties in such a bond, it is not necessary to show that the justice had jurisdiction to issue the attachment. That will be intended in the absence of proof to the contrary. *Whiley* v. *Sherman*, 3 Denio, 185. But such claimant may allege, and prove if he can, that the justice had no jurisdiction to issue the attachment, and if that fact is established, no action can be maintained against the claimant or his sureties, in such bond. *Homan* v. *Brinckerhoof* 1 Denio, 184.

In one case, *Keyser* v. *Waterbury*, 7 Barb., 650, it was held, that where a constable has taken property upon an attachment issued by a justice, he is bound to release the same on being served with a certificate that an appeal has been duly made from the judgment of the justice, in the same manner as if the property had been seized by him upon an execution. By an appeal duly made, is intended that the appellant has given the undertaking required by section 356 of the Code. Vol. I, 28. But if a levy has been made upon an execution before an appeal was brought, the giving of such undertaking does not require the constable to surrender up the property; the lien of the execution is not discharged, and the only effect of the undertaking is, to stay the further proceedings upon the execution until the decision of the appeal. Code, § 357; Vol. I, 28; *Rathbone* v. *Morris*, 9 Abb., 213; *In the matter of Berry*, 26 Barb., 55; *Smith* v. *Allen*, 2 E. D. Smith, 259.

There ought to be two sureties in a bond of this kind. Vol. I, 42, § 31. The sureties may be sworn in this case in the same manner as in the case where the defendant gives a bond for the purpose of preventing a removal of the property. *Ante*, 176.

The approval of this bond may be made by the constable who attached the property, or by the justice who issued the attachment. The rules as to the approval are the same as in the bond of the defendant. *Ante*, 175. If the approval is made by the justice, he should sign his name to it officially as justice. The form given on page 175, is applicable to this bond. The

only difference in the approval is, that the justice may sign the approval in this case, instead of the constable; or the constable may sign it, and either will be regular. It will be best, however, to let the constable approve the sureties. He must see and know the value of the property when he makes the service of the attachment. It is his duty to take the property and keep it safely, which will include the taking of such bonds. The justice can rarely know anything of the property, unless he goes where it is and examines it. This is not any part of his official duty, although he may do so if he chooses.

Bond by claimant of property attached.

Know all men by these presents, that we, Moses Spike, Daniel Stewart and James Dunn, of the town of Johnstown in the county of Fulton, are held unto John Doe, in the sum of dollars (*double the value of the property attached*), to be paid to the said John Doe, or to his certain attorney, executors, administrators or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals. Dated the 17th day of November, 1864.

Whereas, certain goods and chattels, to wit: one horse, &c. (*enumerate all the articles attached*), were on this 17th day of November, 1864, seized by James Pierson, constable, by virtue of an attachment issued by John Frothingham, Esq., a justice of the peace of Johnstown in the county of Fulton, in favor of the above named John Doe, against Richard Roe. And whereas, the above bounden Moses Spike, claims the said goods and chattels as his property.

Now, therefore, the condition of this obligation is such, that if, in a suit to be brought on this obligation within three months from the date thereof, the said Moses Spike shall establish that he was the owner of the said goods and chattels at the time of the said seizure; and in case of his failure so to do, if the said Moses Spike shall pay the value of the said goods and chattels, with interest, then this obligation to be void, otherwise of full force and virtue.

MOSES SPIKE. [L. S.]
DANIEL STEWART. [L. S.]
JAMES DUNN. [L. S.]

Sealed and delivered in presence of
JOHN FROTHINGHAM.

This bond must be executed to the *plaintiff* in the attachment suit. When the bond is duly executed and approved, the constable should deliver the property to the claimant. Vol. I, 42, § 32. In an action upon such bond, it will be a valid defence if the claimant can establish his ownership of the property at the time of the seizure. But if he fails to do so, or if he allows a judgment to be taken against him without any defense, the sureties will be liable. Vol. I, 42, § 34. The measure of damages is the value of the property, and interest from the date of the bond. *Ib.* If the amount of such recovery by the plaintiff shall exceed the amount of his judgment, the excess must be paid to the defendant in the attachment suit. Vol. I, 43, § 35. The defendant may, either before or after judgment, pay the amount of the

plaintiff's claim, with costs, and he may then maintain an action upon the bond given by such claimant. Vol. I, 43, § 36.

Return to attachment.] The return to an attachment ought to be drawn with great care, for, unless it is legally sufficient, the justice will not acquire any jurisdiction over the property of the defendant; and, in many cases, there will not be any jurisdiction over the person of the defendant.

The statute, Vol. I, 42, § 33, prescribes that the return shall be made at the day mentioned in the attachment for that purpose. It must be in writing, and subscribed by the constable. *Ib.* It ought to state the time when the property was attached, the time when the inventory was made, and the time when the copy of inventory and attachment were served upon the defendant. The return ought also to show the manner in which the copies of the attachment and inventory were served. If the service was made upon the defendant personally, state that fact. If the defendant could not be found in the county, the return should show the taking of the property, and that the defendant could not be found, and that a certified copy of the attachment and of the inventory were left at the last place of residence of the defendant, in the county. If the defendant cannot be found, and he has no last place of residence in the county, then the return should show that such copies were served upon the person in whose possession the property was found. Vol. I, 42, § 29; Id., 76, § 218.* And the return ought to show specifically whether the service of the copies of the attachment and inventory were or were not personally served; for the statute expressly requires this to be stated. Id., 76, § 218. In one case, *Rosenfield* v. *Howard*, 15 Barb., 546, the return showed a taking of the defendant's property; that the defendant could not be found in the county; that he had no residence therein; and that the copies of attachment and inventory were served upon the person in whose possession the property was found.

The court held this sufficient, although the return did not state specifically whether there was a service on the defendant. It was said by the court that, from the facts returned, it was evident that the copies were not served on the defendant, and that such return was sufficient. But, notwithstanding this case, the return ought to state specifically, whether there was or was not a service upon the defendant. It is easily done, and it ought not, therefore, to be omitted. The case cited may be sufficient to sustain a similar return, but experiments of that kind are usually quite unprofitable to the parties to the action. If there are two or more defendants, the return must show what was done in relation to each of the defendants.

And even in a case where the defendants are joint debtors, if the return shows a personal service upon one of the defendants, but it does not state any thing in relation to the other defendants, such return will be defective. And if the defendant, who is personally served with the process, appears in the action, that

* *Williams* v. *Barnaman*, 19 Abb., 70.

will not affect those not served; and if they appeal from a judgment, which is rendered against all the defendants, upon such a return, such judgment will be reversed. *McDoel* v. *Cook*, 2 Comst., 110; *S. C.*, 3 Denio, 317. The forms of several different returns will be found below:

Property attached, and personal service on defendant.

By virtue of the within attachment, I did, on the 15th day of November, 1864, attach and take into my custody, the goods and chattels of the defendant, mentioned in the inventory of which the annexed is a copy; and immediately, on the same day, I made an inventory of the property seized, and served a copy of the within attachment and of the said inventory, duly certified by me, on the defendant personally.

JAMES PIERSON, *Constable.*

Dated November 17th, 1864.

Property taken, defendant not found, copy left at residence.

By virtue of the within attachment, I did, on the 15th day of November, 1864, attach and take into my custody, the goods and chattels of the defendant mentioned in the inventory of which the annexed is a copy; and immediately, on the same day, I made an inventory of the property seized, and because the defendant could not be found in the county of Fulton, I left a copy of the within attachment, and of the said inventory, duly certified by me, at the last place of residence of the said defendant. Dated November 17th, 1864. JAMES PIERSON, *Constable.*

Property taken, defendant not found, and no residence in the county.

By virtue of the within attachment, I did, on the 15th day of November, 1864, attach and take into my custody, the goods and chattels of the defendant, mentioned in the inventory of which the annexed is a copy; and immediately, on the same day, I made an inventory of the property seized, and because the defendant could not be found in the county of Fulton, and because also, the said defendant has no last place of residence in said county of Fulton, I left a copy of the within attachment, and of the said inventory, duly certified by me, with John Smith, in whose possession I found the said goods and chattels. Dated November 17th, 1864.

JAMES PIERSON, *Constable.*

Property attached, personal service, and bond taken.

By virtue of the within attachment, I did, on the 15th day of November, 1864, attach and take into my custody, the goods and chattels of the defendant, mentioned in the inventory, of which the annexed is a copy; and immediately, on the same day, I made an inventory of the property seized, and served a copy of the within attachment, and of the said inventory, duly certified by me, on the defendant personally; but the said goods and chattels were delivered up to Richard Roe, the defendant, upon receiving the bond herewith returned. Dated November 17th, 1864.

JAMES PIERSON, *Constable.*

If the bond was given by a third person who claimed the property, then modify the form of the last return so as to show that fact. The return ought to show that it was the property of the defendant that was taken, although the legal intendment will be, that it was the property of the defendant which was taken, even if that fact is not stated in the return. *Johnson* v. *Moss*, 20 Wend., 145.

It must not be understood that a justice may, in all cases, proceed, upon the return day, to render a judgment upon a return like any of the foregoing forms.

If the defendant's property has been taken, and the copies of the attachment and inventory have been personally served on the defendant, the justice may proceed on the return day of the attachment, whether the attachment was issued under the provisions of the Revised Statutes or those of the non-imprisonment act. *Ante*, 149, 150.

If the attachment was issued under the *Revised Statutes*, and the defendant's property was taken, but no personal service of the copies of the attachment and inventory has been made on him, but copies were left at his last place of residence, then the justice may proceed on the return day. Vol. I, 44, § 44; Id., 76, §§ 219, 220. A summons is not to be issued in such a case. *Stewart* v. *Brown*, 16 Barb. 367; *ante*, 149, 150.

If the attachment was issued under the provisions of the *non-imprisonment act*, Vol. I, 76, §§ 219, 220, and there was no personal service on the defendant of the copies of the attachment and inventory, and the defendant's property was attached, then the justice must issue a summons. This summons should correspond with the attachment. If the attachment was a long one, then issue a long summons. If the attachment was a short one, then issue a short summons. The law has provided two kinds of summons, a long one and a short one, and each of them is intended for a certain class of cases. The law intends that such a summons will be issued as is appropriate to the residence of the parties, to the character of the attachment which it follows, and to the analogies of the practice in ordinary cases of issuing summonses. If the summons which is issued is returned personally served, the justice may proceed on that return with the cause in the same manner as upon the return of a summons personally served. Vol. I, 76, § 220; and Id., 44, § 44.

The return to such summons may be as follows:

Defendant not found.

I certify and return, that I have made diligent search and inquiry for the defendant within named, and that he cannot be found in the county of Fulton.
November 17th, 1864. JAMES PIERSON, *Constable.*

Personal service.

The within summons was personally served on the defendant by me on the 15th day of November, 1864. Dated November 17th, 1864.
JAMES PIERSON, *Constable.*

See also the returns to summons. *Ante*, 74, 75. The constable in making his return, should indorse it upon the original attachment; but if there is not sufficient room for that purpose, it may be made upon a separate paper which must be properly and securely annexed or attached to the original attachment. The return in such case, must refer to the annexed attachment, in-

stead of saying the within attachment, as is done when the return is indorsed upon the original attachment.

The constable should then attach to the attachment and return the original inventory, or a copy of it, duly certified, together with any bond which may have been executed and delivered to him by the defendant for the purpose of retaining the property; or that of any claimant who has given a proper bond and taken the property. These papers are all to be delivered to the justice on the return day of the attachment, if it is not done at an earlier day. If the return is regular on its face, the justice may proceed in the action. And if the return is false, it will protect the justice, or a purchaser under a sale upon an execution issued upon such judgment. *Case* v. *Redfield*, 7 Wend., 398. But if the return is false, and there was not, in fact, a legal service, the defendant may appeal, and assign the falsity of the return as error in fact, and if it is established that the return is false, the judgment will be reversed. *Ante*, 74.

If the defendant's property has been attached, but no personal service of the copies of attachment and inventory have been made on him, he may, notwithstanding, appear on the return day of the attachment, either in person or by attorney; and if he does so, no summons need be issued. Vol. I, 76, § 220; *Conway* v. *Hitchins*, 9 Barb., 378, 381.

CHAPTER VIII.

REPLEVIN, OR REQUISITION OF PERSONAL PROPERTY.

SECTION I.

REPLEVIN PROCESS.

Nature of the action.] This action differs materially from any other one which can be brought in a justice's court. The object of this action is to recover the possession of some particular personal property, which the plaintiff claims has been unlawfully taken from him, or which is wrongfully detained, together with such damages as may be legally awarded to him for such wrongful acts. There are instances in which this action will furnish a more desirable remedy than can be obtained in any other form of action. The instances in which the action will lie, and the general rules of law relating to such actions, have been elsewhere explained. Vol. I, 862–878. The only branch of the subject which will be here discussed, relates entirely to the practice in the action, including some general rules which must be observed in the preliminary proceedings. The statute which confers jurisdiction in this class of cases, has been already given in full. Vol. I, 6, 7, 8; Code, § 53, sub. 10.

Nature of the property.] This action is expressly limited to the recovery of the possession of personal property. There are none, perhaps, who would suppose that an action could be brought in a justice's court, to recover the possession of lands. But there

are many persons who may not be able to determine in every instance, whether the property claimed is personal property.

There are many things which may be considered personal property, or they may be deemed to be a part of some real property, according to the particular circumstances of the case. Trees which are standing and growing upon lands, cannot be transferred by a verbal contract, so as to make them personal property. *Green* v. *Armstrong*, 1 Denio, 550. So of fixtures, they are a part of the real estate to which they are annexed. *Gardner* v. *Finley*, 19 Barb., 317; so of grass growing. *Bank of Lansingburgh* v. *Crary*, 1 Barb., 542. The same rule applies to fruit trees, grape vines and all other things which grow upon the land independently of annual planting or cultivation. But all such articles may be made personal property by severing them from the real estate, as by cutting down the trees, cutting the grass, &c.

And the same articles may be made subject to the same rules as are applied to personal property. If the owner of trees which are growing, should sell them by a valid written contract, the purchaser would obtain the same right to take the trees as though they had been actually severed from the land. *Bank of Lansingburgh* v. *Crary*, 1 Barb., 542; *Smith* v. *Benson*, 1 Hill, 176; *Godard* v. *Gould*, 14 Barb., 662; *Mott* v. *Palmer*, 1 Comst., 564. And in all such cases in which such things as trees, or grass growing, or fixtures are either actually severed from the land, or are conveyed by a written instrument, the purchaser may maintain this action to recover their possession.

There are also various other things which are to be considered personal property, although they would not be articles which could be levied upon by an execution. The law permits an execution to be levied upon personal property, and the articles which are subject to levy are pretty generally understood. But there are many things for which this action can be maintained, although they would not be subject to an execution. The reason for this distinction is found in the Code. By the common law certain articles are deemed to be personal property; and as a general rule, those articles could be levied upon by an execution. But there were other things which were not considered personal property, such as bills of exchange, promissory notes, books of account and the like. These things were said to be choses in action, by way of distinguishing them from personal property. The Code has, however, placed them upon the same footing as personal property, and defines the term personal property, thus: "The words 'personal property,' as used in this act, include money, goods, chattels, things in action, and evidences of debt." Code, § 463, Vol. I, 35.

It is the same act which confers jurisdiction upon justices' courts in this action. Code, § 53, sub. 10, Vol. I, 5. And therefore, this definition is made expressly applicable to this action in these courts. And in this action, a plaintiff may now recover, not merely those things which may be levied upon by virtue of

an execution, but also any other kind of property included within that description. It will include promissory notes, bills of exchange, books of account, and all papers which are evidences of debt. And it was held in one case, *Knehue* v. *Williams*, 1 Duer, 598, that a "warehouse entry" might be recovered. It was held to be as properly a subject of an action as though it had been a certificate of stock or a bill of exchange. Bank bills may be recovered in this action. *Graves* v. *Dudley*, 6 E. P. Smith, 76. The question of identity would be a proper question at the trial.

It has been held that the maker of a note, who had paid it to the holder, who was also the payee thereon, could not recover the note, because it had no value. *Todd* v. *Crookshanks*, 3 Johns., 432. But the reason assigned is scarcely satisfactory.

A note when given, is presumptive evidence of a settlement of all accounts between the maker and the payee. And when the maker pays the note, and he receives it into his possession, it will be evidence of such settlement. It operates as evidence of such settlement, and also as a receipt for the amount paid.

A receipt is personal property, within the statute as to larceny. *People* v. *Loomis*, 4 Denio, 380. And a paid note may possibly be of the value which is represented as the amount of the note, since it is legal evidence of the payment of that amount.

There are other cases in which there can be no doubt that the party paying a note may maintain this action to recover the note paid. A surety who is compelled to pay a note, is entitled to the note to enable him to prosecute the principal. So when one partner takes his individual funds to pay a partnership note, he is entitled to the note as evidence against his copartner, and an action will lie to recover its possession. *Cahoon* v. *Bank of Utica*, 3 Seld., 486.

What title or right plaintiff must have.] A few general rules may be of service:

1. The actual owner of personal property who is entitled to the immediate possession thereof, may maintain this action if such property was wrongfully taken, or is wrongfully withheld.

2. Any person who has a right to the immediate possession of such property, whether he claims such property as owner, or whether he claims some special property therein, may maintain this action. An officer who has a lien upon it by virtue of a levy upon an execution, or a mechanic who has a lien for his labor, are familiar instances of cases of this class.

3. It is sometimes said, that this action may be maintained, whenever trespass or trover will lie, for an unlawful *taking* of the property. There is, however, an exception to this rule. The right to maintain the action, depends upon the question, whether the plaintiff is entitled to the immediate possession of the property claimed. If he is not, this action will not lie. If a constable should take property by virtue of an illegal levy, he could not justify, if he were to be sued in trespass or trover for the unlawful taking or conversion. But if after such illegal levy, and before any action is brought, a new execution is placed in

the hands of the same constable, and he makes a valid levy by virtue of the second execution; no action to recover the possession of the property for the first illegal levy can be maintained, because the second levy is valid, and the plaintiff is not therefore entitled to the immediate possession of such property. *Sharp* v. *Whittenhall*, 3 Hill, 576.

4. Whatever shows that the plaintiff is not the owner, or that he is not entitled to the immediate possession of the property, is a valid defense; and therefore, it will be sufficient to show in this action, that the title or the right to the immediate possession of the property is in an other person. And this rule is equally applicable, whether the defendant claims any right to the property or to its possession under such third person or not. *Rockwell* v. *Saunders*, 19 Barb., 473; *Ingraham* v. *Hammond*, 1 Hill, 353; and see Vol. I, 862 to 878.

Parties to the action.] This subject will be fully discussed in its proper place.

Value of the property.] The value of the property should not exceed one hundred dollars, because that is the extent of the jurisdiction of a justice's court in an action of replevin. The statute requires the plaintiff's affidavit to state the actual value of the property.

Demand before action.] There are two general rules upon this subject, which are all that need be noticed in this place.

1. When the defendant has wrongfully and unlawfully *taken* the property from the plaintiff, no demand is necessary before the action is brought.

2. When the defendant came lawfully into possession of the property, and he has not done any act which amounts to a conversion of it, a demand is generally necessary before an action is brought.

Time of claiming delivery of property.] The time at which the plaintiff may demand that the property shall be taken from the defendant and delivered to himself, is fixed by the statute. It must be done at the time of issuing the summons; and it cannot be done at any time afterwards. Code, § 53, sub. 10.

Proceedings before process issues.] The statute is imperative that there shall be an affidavit and an undertaking *before* any process issues for the taking and delivery of personal property. Code, § 53, sub. 10.

Affidavit, must be in all cases.] An affidavit is indispensable in every case in an action to recover the possession of personal property. The statute requires this affidavit before *any process* issues. Code, § 53, sub. 10. An affidavit and undertaking are necessary to confer jurisdiction upon the justice, to order the *taking* of the *personal property* which the plaintiff claims.

Who to draw the affidavit, &c.] It may sometimes be made a question, who should draw the affidavit and the undertaking required in this action. The statute furnishes a plain answer, thus: "Before any process shall be issued in an action to recover

the possession of personal property, the *plaintiff*, his agent or attorney shall make proof by affidavit, &c." Code, § 53, sub. 10. In strictness of law, therefore, the justice is not bound to act in the cause, until a proper affidavit is drawn and presented to him by the plaintiff, &c. The affidavit must be accompanied by an undertaking such as the law requires. The affidavit which is presented to the justice, need not be sworn to at the time of presenting it. If it is drawn up in blank, it may be sworn to before the justice to whom it is presented. And that is the general practice in those cases in which the plaintiff draws the affidavit himself, or procures it to be done by his agent or attorney. The justice is bound to administer the oath in all cases in which a party desires to make an affidavit in an action before him. A willful refusal to swear the party is an indictable offense. *People* v. *Brooks*, 1 Denio, 457. But although it is the duty of the plaintiff to draw the affidavit and undertaking, it is frequently and perhaps generally the case, that he cannot do it without the assistance of some other person who is more skilled than himself in the law. He may employ an attorney, or he may request the assistance of the justice in drawing such papers. The statute regards it as entirely proper, that the justice should draw these papers if he chooses to do so, on the plaintiff's request. This is evident from the fact, that the law has provided for the payment of fees to the justice for such services.

These papers are required by law, and in all cases in which affidavits, applications and notices are required by law, the justice is allowed five cents a folio for drawing them. A folio is one hundred words, counting every figure as a word. This fee is a part of the justice's costs, and is entered in the judgment against the unsuccessful party. In this action the defendant may require affidavits and undertakings, and the justice may draw those, if he chooses to do so, at the request of the defendant. Either party who requires the justice to draw such papers, is personally liable to the justice for his fees. If the plaintiff fails in the action, the fees for drawing his affidavits, &c., cannot be collected of the defendant, and of course the plaintiff is alone liable for them. And the same rule applies when the defendant fails in the action.

Who to draw copies for service.] There is one question which will naturally and frequently arise in this action. The service of all the papers for commencing the action and taking the property mentioned, must be made by *the delivery of a copy.* The papers which must be thus served, are the summons and notice, and the affidavit. The law makes it the duty of a constable to *serve* process; but it is not his duty to make it, nor to make copies thereof, unless some statute requires him to do so. And in those cases in which he is required to do so, a fee is given to him for the service as in the case of a summons. But in the action of replevin, no fee is given to the constable for making such copies, and he is not bound to do it as a part of his official duty. He may do it at the request of the party, and he is

entitled to such compensation therefor, as the party and himself may agree upon; or in the absence of any agreement, he may recover a reasonable compensation for the labor done.

In attachment cases, the statute gives the constable a fee for making copies of papers. Vol. I, 65, § 152. But in an action of replevin, the duty of drawing the papers devolves upon the plaintiff, though the justice may do it at his request, and a fee is given by law therefor. The plaintiff or the justice must furnish the papers complete before the constable is bound to serve them. There will not usually be any difficulty in relation to this point. But there may questions arise, and it is therefore proper that each party concerned should know his legal rights.

Printed blanks will generally be used in this action, as they will save labor in drawing originals or in making copies. The justice will be entitled to his fees for such printed papers, as much as though they were written.

Who to make affidavits.] The language of the statute is: "Before any process shall be issued in an action to recover the possession of personal property, the plaintiff, or his agent or attorney shall make proof by affidavit, showing, &c." Code, § 53, sub. 10. This language does not necessarily mean that the plaintiff, or his agent or attorney shall swear to the affidavit. It is consistent with this language to say that the true meaning is, that the plaintiff, or his agent or attorney shall *furnish* proof by affidavit. If a full and satisfactory affidavit is made by any person, and it is furnished to the justice by the plaintiff, he clearly makes proof by affidavit. And it is a general rule, that the law does not so much regard who is the witness, as it does the sufficiency of the evidence. Due legal proof of the facts required by the statute ought to be sufficient, let the affidavit be made by whom it will. But if a more strict interpretation is insisted upon, the language of the statute does not declare that the affidavit shall show on its face that it was made by the agent or the attorney of the plaintiff. Still it will be advisable in every case in which an agent or attorney makes the affidavit, to state that fact in it. For in summary proceedings to recover the possession of lands by removing tenants, the language of the statute is quite similar to that used in this statute, and in one case, it was held that the affidavit was defective, because it merely recited or described the name of the agent, instead of alleging directly that he was the agent of the landlord. *Cunningham* v. *Goelet*, 4 Denio, 71.

In an action of this kind in the supreme court, this question would not occur. The language of the statute in relation to those cases is, that the affidavit may be made by the plaintiff, *or by some one in his behalf.* Code, § 207. The difference in the language in reference to the different courts, may have been entirely unintentional, or it may have been intentional; but however that may be, there will not generally be any difficulty in complying literally with the statute. Any person who makes an affidavit for the plaintiff is, for that purpose, his agent, if he acts at the

request of the plaintiff. And again, if the person who acts as agent or attorney for the plaintiff makes an affidavit, in which he shows that he is an agent or attorney, and states such other facts as he knows, it will then be proper for any other person to make an affidavit of any material facts which he knows. The correct practice will be to keep as near to the language of the statute as possible, so as to avoid all unnecessary questions as to regularity or legality in the proceedings.

Affidavits not to be entitled.] The affidavits ought not to be entitled, because at the time when the affidavit is made no action is pending. The statute expressly forbids the issuing of process before the affidavit is made. Code, § 53, sub. 10. Formerly in actions in the supreme court, an affidavit would have been held a nullity if entitled. *Milliken* v. *Selye*, 3 Denio, 54. But since the enactment of the Code, that rule does not prevail in the supreme court. *Pindar* v. *Black*, 4 How., 95; Code, § 176, and § 406.

Probably the same rule would be applied to a justice's court, since it is the intention of the law to confer all necessary powers on justices' courts. Vol. I, 37, § 1. And besides that, the entitling should be treated as a nullity if the affidavit is full and sufficient. As to entitling papers, see *ante*, 129.

Belief as to facts stated.] The general rule in relation to affidavits in this action, is similar to that in relation to affidavits in attachment actions. See *ante*, 137. The statute permits a statement of the plaintiff's best information and belief as to the grounds upon which the defendant claims the property. And the better construction will be, to allow the defendant's claim to be stated on the plaintiff's best knowledge, information and belief, since that is the language of the statute. But all the other facts in the affidavit must be stated directly and positively. If the attorney for the plaintiff makes the affidavit, it will not be sufficient for him to state the facts on the information of the plaintiff and his belief in the truth of such information. *Cutler* v. *Rathbone*, 1 Hill, 204. The attorney should in such cases, state the facts within his own knowledge, and all hearsay evidence will be useless, although he may state the claim of the defendant upon his best knowledge, information and belief, in the same manner that the plaintiff himself might do, because the statute expressly authorizes him to do so.

There are several things, each of which the statute makes indispensable in all such affidavits. These will now be discussed separately.

Description of property.] The statute requires that the property which the plaintiff claims shall be *particularly* described. A mere general description will not be sufficient, where a particular description can be given. And if the property cannot be described by any particular characteristics, because of its general resemblance to similar articles, such as wheat, corn, and the like, then the description can be given as to its quantity, the place

where it is kept, &c. A horse may be described by his color, gait, age, and name, if he is called by one. A promissory note may be described by stating the names of the maker and the payee, the date and amount, and the length of time it has to run before maturity. The principle in relation to the description is, that the affidavit shall give all the information which the plaintiff is reasonably able to furnish. Each party will then know precisely what property is claimed, since the affidavit will show that fact. And the officer will know, from the papers which are placed in his hands, the particular property which he is required to take. And there ought, in all cases, to be such a description of the property, or the place in which it is kept, that the officer may justify himself in the taking of the property described, either from such description of the articles, or of the place in which he may find them.

Ownership, how stated.] When the plaintiff claims the possession of the property because he is the *owner* of it; it will be sufficient to allege that fact distinctly and positively. He need not show in what manner he became the owner. This form of stating the ownership has always been held sufficient in actions in the supreme court, both before and since the enactment of the Code. And there is no reason for a different rule in justices' courts.

Right to immediate possession, how stated.] The plaintiff sometimes claims the possession of personal property, where he has no title to it as owner. He may claim its possession as bailee, or because he has a lien upon it as a mechanic, or because he has levied upon it as an officer. Besides these instances, there are numerous other cases in which a person is entitled to the possession of personal property. To enumerate all such instances would be impossible. But whenever the plaintiff is entitled by law to the immediate possession of the property, as against the defendant, this action will lie. And in a justice's court it is sufficient to allege distinctly and positively that the plaintiff is entitled to the immediate possession of the property. This was the rule in the supreme court before the Code, and the old statute was very similar to that which now applies to justices' courts.

Under the old practice in the supreme court, it was not necessary to state the facts which showed that the plaintiff was entitled to the immediate possession of the property, nor need that now be done in a justice's court. But a different rule is observed in the supreme court since the Code was enacted. In that court the statute now requires that the plaintiff shall state the facts which show his special interest in the property claimed, when he is not alleged to be the owner. Code, § 207, sub. 1; *Depew* v. *Leal*, 2 Abb., 131.

But although it is not necessary in a justice's court, to state the facts which show that the plaintiff has a special interest in the property which entitles him to its possession, yet it is generally an easy matter to do so. If he claims it by virtue of a levy,

it is but little trouble to state such facts as will show his right, and so of all other instances. There are many instances in which a litigation may be avoided by such a statement of the facts. The defendant cannot always know on what grounds the plaintiff claims the possession of the property, unless the affidavit discloses the facts. A careful practitioner will probably prefer to state the grounds of his client's claim fully, as he will thus avoid all question as to the necessity for doing so, and he will at the same time give the defendant full and fair notice of the claim which the plaintiff makes.

Wrongfully withheld, &c.] It is not sufficient for the affidavit to show merely that the property is withheld or detained by the defendant.

The affidavit is required to show that the property is *wrongfully* withheld or detained. It will be sufficient to allege directly and positively, that the property is wrongfully withheld or detained.

Cause of detention, &c.] The law requires the plaintiff to state in his affidavit, the cause which is assigned by the defendant for the withholding or detention of the property. The plaintiff may state that according to his best knowledge, information and belief. He may know what those grounds are, from the declarations of the defendant; he may know from the facts and circumstances of the transactions between himself and the defendant, or he may have heard through some third person what claim the defendant makes. In all cases, it will be sufficient to allege what the supposed cause of withholding or detention is, according to the best knowledge, information and belief of the person making the affidavit. This rule is the same whether the plaintiff or some other person makes the affidavit.

After stating the cause of the detention of the property by the defendant, it would be proper to allege that the claim so made by the defendant is unfounded.

It is not strictly necessary, however, to do this. When the affidavit alleges once that the withholding or detention is wrongful, there is no need of repeating it, after stating the alleged cause of detention. There is no harm, however, in doing so. And there may be those who would prefer to state the alleged cause of detention, and then to state or show that the claim is not valid either in fact or in law. For instance, the defendant may claim to have some lien upon the property as the cause of detention. The plaintiff may show in the affidavit, either that the lien has been discharged, or that in law it never had any existence.

Not taken for any tax, fine, &c.] It must appear *affirmatively*, that the property was not taken for any tax, fine or assessment, pursuant to any statute, and that it was not seized by virtue of an execution or an attachment against the property of the plaintiff, or that, if it was so seized, it was exempt by statute from such seizure. Vol. I, 871, &c. As to the taking of the property for a tax, fine or assessment, pursuant to a statute, it will be

sufficient to allege that the property was not taken for a tax, fine or assessment pursuant to a statute.

And if the property has not been taken on any execution or attachment, it will be enough to allege the fact positively, in the same manner as in the case of a tax, fine or assessment.

But if the property has been taken by virtue of an execution, or upon an attachment against the defendant's property, a different rule may perhaps exist, in case the plaintiff claims that the property is exempt from execution. In one case, *Roberts* v. *Willard*, 1 Code Rep., 100, it was held that it was sufficient for the affidavit to state in direct and positive terms that the property was exempt. In the opinion of the court, notice is taken of the earlier case of *Spalding* v. *Spalding*, 3 How., 297, which requires the facts to be stated so as to show that the property is exempt, but the authority of the older case was questioned. In this conflict of judicial authority, the prudent course undoubtedly will be, to state the facts which show such exemption. A proper precedent for such an affidavit will be given in a subsequent place.

Actual value of property.] It is required that the affidavit shall state the actual value of the property claimed. *Ante*, 186. Code, § 53, sub. 10. That value must not exceed the jurisdiction of the justice, which in actions for recovering the possession of personal property, must not exceed one hundred dollars.

General rules as to affidavits.] There are several general rules which are applicable to affidavits in all cases. See *ante*, 153.

Indorsing direction upon affidavit.] When the plaintiff has furnished the justice with a legal and sufficient affidavit, and with an undertaking such as is required by law, the justice is then required to indorse upon the affidavit "a direction to any constable of the county in which said justice shall reside, requiring said constable to take the property described therein from the defendant, and keep the same to be disposed of according to law." Code, § 53, sub. 10. It will be observed that this direction must be indorsed upon the *affidavit* which describes the property that the plaintiff claims. The original affidavit, with the indorsement thereon, is the one which must be delivered to the constable as his authority to take the property.

The indorsement may be in the following form:

Indorsement on affidavit.

To any constable of the county of Fulton: You are hereby directed and required to take the property described in the within affidavit, from Richard Roe, who is therein named as defendant, and to keep the said property, to be disposed of according to law. Johnstown, November 10th, 1864.

JOHN FROTHINGHAM, *Justice.*

Controverting affidavits.] The defendant cannot controvert the truth of the affidavit of the plaintiff. If the defendant desires to retain the possession of the property until after the trial of the action, he can do so by giving a proper undertaking. Code, § 53, sub. 10. And the trial of such collateral matters upon affida-

vits was not intended by the statute. The rule is the same as to attachment affidavits. *Ante*, 151; and see *Knehue* v. *Williams*, 1 Duer, 598, opinion.

Defective affidavits.] In the supreme court it is a common practice to amend defective affidavits in these actions, if a proper case exists for an exercise of the authority. *Cutler* v. *Rathbone*, 1 Hill, 204; *Stacy* v. *Farnham*, 2 How., 26; *Spalding* v. *Spalding*, 3 How., 301; *Depew* v. *Leal*, 2 Abb., 136. There is no good reason why an amendment is not as proper in a justice's court as in a court of record. And, in such a case, a justice has the same power to permit the amendment of an affidavit as that possessed by one of the higher courts. Vol. I., 37, § 1; and see title, Amendments. In attachment cases, as has been seen, *ante*, 150, there cannot be any amendment of the affidavit. The reason why there is no amendment permitted in those cases is, because the affidavit is a prerequisite to the issuing an attachment in any case. And the absence of any affidavit, or the existence of a defective one will, in either case, fail to confer any jurisdiction upon the justice to issue an attachment.

A summons issues, in most cases, without any proof or security. And a summons is issued in this action to recover personal property. If the plaintiff sues for the recovery of damages, he may take a summons without any affidavit whatever. But if he wishes to obtain the possession of the property claimed, he must furnish an affidavit and undertaking. The action is commenced by the summons, but the property is taken by virtue of the direction upon the affidavit. The defect in the affidavit does not affect the jurisdiction over the person of the defendant; though, if the affidavit should not be amended, there might not be any jurisdiction over the property. The want of an affidavit would prevent the existence of any jurisdiction to commence an action by attachment; and so of a defective affidavit. And there would not be any jurisdiction of the action, either as to the person or over the property, in that case. But, in this action, the summons would confer jurisdiction over the person, and there would therefore be jurisdiction in that respect. And where there is jurisdiction over the person of the defendant in the action, there may generally be amendments made, if they do not infringe upon the rights of the opposite party, and if they are calculated to advance the interests of justice.

Form of affidavit in ordinary cases.

FULTON COUNTY, *ss:* John Doe being duly sworn, says that he is about to commence an action before John Frothingham, a justice of the peace of the town of Johnstown in Fulton county, against Richard Roe, for the recovery of the possession of the personal property hereinafter mentioned and described; that he is the owner of the said property (or that he is entitled to the immediate possession thereof); that he claims the possession of the following described property (here describe the property with as much particularity as is reasonably possible, see *ante*, 189); that the said property was wrongfully taken, and is still wrongfully detained from this deponent

by the said Richard Roe; that the alleged cause of such detention, to the best of deponent's knowledge, information and belief, is (here state the claim which the defendant makes, whether as owner, or as having a lien thereon, or in any other manner, see *ante*, 191); that the said property has not been taken for any tax, fine or assessment pursuant to any statute, nor seized by virtue of an execution, nor upon any attachment issued against the property of this deponent; that the actual value of the said property is one hundred dollars. JOHN DOE.

Subscribed and sworn before me, this 19th day of November, 1864,

JOHN FROTHINGHAM, *Justice.*

Form of affidavit to recover exempt property.

FULTON COUNTY, *ss:* John Doe being duly sworn, says, that he is about to commence an action in a justice's court, before John Frothingham, Esq., a justice of the peace of the town of Johnstown, in Fulton county, against Richard Roe, for the recovery of the possession of the personal property hereinafter mentioned and described; that he is the owner of the following described personal property (here describe it particularly); that the said property was wrongfully taken, and is still wrongfully and unlawfully detained from this deponent by the said Richard Roe; that the alleged cause of such detention, to the best knowledge, information and belief of this deponent, is, that the said Richard Roe is a constable of the county of Fulton; that he took the said property, or claims to have taken it, by virtue of an execution issued by Daniel Cameron, Esq., a justice of the peace of the town of Johnstown, in the county of Fulton, which execution was issued upon a judgment in an action in which one James Denn was plaintiff, and this deponent was defendant; and deponent says that the articles of personal property so seized and taken by the said Richard Roe, on the said execution were, at the time they were so wrongfully taken, and now are exempt by statute, from levy and sale upon execution; and deponent further says, that he was, at the time of such wrongful taking, and that he now is a householder (or that he has a family for which he provides) of the town of Johnstown, in Fulton county; that the said personal property so wrongfully taken and detained, are necessary articles of household furniture (or working tools, or team, &c.); that the entire personal property of this deponent in household furniture, working tools and team, do not in the aggregate exceed two hundred and fifty dollars in value over and above the articles which are absolutely exempted from execution by the provisions of the Revised Statutes; that the execution upon which such property was taken, was not issued upon any judgment rendered for the purchase-money thereof, nor upon any judgment rendered upon any claim accruing to any domestic, for work and labor performed as a domestic in the family of this deponent; that the actual value of the property so taken is one hundred dollars. JOHN DOE.

Subscribed and sworn before me, this 19th day of Nov., 1864,

JOHN FROTHINGHAM, *Justice.*

There are some articles which are absolutely exempt from levy and sale upon execution; and there are other articles which are exempted if they are necessary to a householder, or an inhabitant having a family for which he provides. By looking at the statute, it will be easy to determine the articles which belong to each class. The proper rule in these cases of exempt property is, to state the facts fully and clearly, so that it may appear plainly

and affirmatively on the face of the affidavit that the property is exempt from levy and sale upon an execution. The same rule applies when the property is taken by virtue of an attachment which is issued against the defendant's property. If the property is not liable to an execution, it cannot be taken upon an attachment. And if it is so taken, the party injured may recover the possession of his property in this action. When the affidavit is made by the agent or the attorney of the plaintiff, the form should be modified to meet the circumstances of the case.

Form of affidavit made by agent.

FULTON COUNTY, *ss:* Peter Smith, being duly sworn, says that he is the agent of John Doe; that said John Doe is about to commence an action, &c.

The affidavit should then proceed to state the same facts as in the preceding forms, the only difference being that the affidavit shows that it is made by the agent of the plaintiff. See *ante*, 188. These general forms are sufficient to show in what manner the facts ought to be stated. And any person can, with a little care, state the facts in every instance in such a manner as to answer the requirements of the statute. After the affidavit is drawn and sworn to, the next step will be to indorse it. This has been fully explained, and a precedent given. *Ante*, 192. When the affidavit is completed and it is properly indorsed, it will be necessary to draw up and execute a proper undertaking, before the process can properly be delivered to the constable for service.

Undertaking, must be security in all cases.] In an action to recover the possession of personal property, the plaintiff must furnish an undertaking with one or more sufficient sureties. To this rule there is no exception. An undertaking is an indispensable prerequisite to the authorizing of a seizure and delivery of the property claimed.

Must be in writing.] The statute requires that the undertaking shall be in writing. It is not required that it shall be sealed, nor that it shall be in the form of a bond. A mere verbal agreement would be void for two reasons. The first is, that the statute declares that it shall be in writing; and the second reason is, that any verbal agreement of that nature would be void by the statute of frauds. It is not necessary that such undertakings should be in any particular form, if it states such facts as are required by the statute.

A bond which is drawn in proper form and with the proper conditions, is the best mode of giving security. A bond is a valid undertaking beyond any question; and it is preferred in this case, as in all others in which a form of security has been given.

Who to execute it.] The bond may be executed by the plaintiff with one or more sureties; or it may be executed by one or more sureties without the joinder of the plaintiff. There must, however, be at least one or more sureties in every case. If the plaintiff executes the bond, there must also be at least one

surety in this case, as in all others in which the law requires sureties to be given. It is the duty of the justice to see that the persons who offer themselves as sureties are entirely responsible persons. And the justice should in no case approve of sureties, unless he is entirely satisfied of their solvency and of their responsibility to pay such liabilities as are incurred by their act of becoming a surety. See *ante*, 161.

Penalty of the bond.] The statute requires that the undertaking shall be to the effect that the sureties are bound in double the value of the property as stated in the affidavit for the prosecution of the action.

That property cannot, in any case, exceed one hundred dollars in value, as that is the extent of the jurisdiction of the justice in this action. There should, therefore, always be a bond executed in the penalty of at least two hundred dollars. This bond should, in all cases, be in double the amount of any sum which could be stated in the plaintiff's affidavit as the value of the property claimed.

Condition of the bond.] Great care should be taken that the condition of the bond conforms to the requirements of the statute.

There are three points to be observed. One condition is, that the plaintiff will prosecute the action. The object of this condition is, that the plaintiff shall not commence an action and obtain possession of the property, and then be at liberty to abandon the action. If the action is not prosecuted to a successful termination on the part of the plaintiff; or if by any means the plaintiff fails in the action, the sureties will be liable for a breach of this condition. *Gould* v. *Warner*, 3 Wend., 54. An other condition is, that the property which has been taken from the defendant shall be returned to him, if the court shall adjudge a return of the property. Any failure of the plaintiff to return the property will be a breach of this condition, for which the surety will be liable. An other condition is, that the sureties will pay to the defendant any sum which may be recovered against the plaintiff *for any cause.* This clause of the condition is very broad, and it creates a liability on the part of the surety, which is much more extensive than many persons may at first suppose. The liabilities of sureties will be discussed in a subsequent place.

Approval of sureties in bond.] The statute expressly requires that the justice shall approve of the sufficiency of the sureties. This approval ought to be in writing and *indorsed upon the bond*, it should also be signed by the justice officially, and it must be made by the justice before whom the action is commenced. This approval is not a mere matter which may be observed, or may be disregarded at pleasure. It is required by the statute, and it is therefore indispensable to the regular execution of the bond. *Burns* v. *Robbins*, 1 Code Rep., 62. One of the objects of the statute was, that no sureties should be received in this action on the issuing of process, unless they were men whose reponsibility the justice could conscientiously and officially recognize

as such sureties as the law requires. The qualifications of sureties have been sufficiently discussed elsewhere. *Ante*, 161.

Delivery of bond to justice.] After the bond is executed and approved, it should be delivered to the justice and retained by him. He should file and preserve it among the papers in the cause. And in case of any breach of any of the conditions in such bond, the justice should, on demand of the defendant, deliver the bond to him. It was executed for his especial benefit, and he is therefore entitled to it, for the purpose of prosecuting it for the recovery of such damages as are by law recoverable. The justice should, however, retain the possession of the bond until after the trial of the action, and until there has been some breach of some of its conditions. If the defendant should fail in his defense on the merits of the action, the sureties would not be liable, on either the condition to prosecute the action, or on the condition to return the property, since neither condition would be broken. In such cases and in all other cases, the justice should retain the bond until the defendant is entitled to maintain an action upon it, for a breach of some condition contained in it.

The justice should, however, permit either of the parties to the action to take a copy of it at any time. And the justice would also be compellable to produce it on the trial of any cause in which it is important as a part of the evidence. So, an action to recover the possession of the bond would lie against the justice, after a breach in its conditions. It would then be the property of the defendant, and he would be entitled to the immediate possession thereof.

Amendment of bond.] The general rules as to the amendment of bonds have already been explained. *Ante*, 163. The same rule applies in this action. *Newland* v. *Willetts*, 1 Barb., 20. The amendment which is made is for the benefit of the defendant, and he could not object on the ground that it would be an injury to him. The statute provides that new sureties may be given by the plaintiff on the return day of the summons, provided the first sureties are excepted to and fail to justify. Code, § 53, sub. 10. And if new sureties are joined in the bond, they will be as much liable as though they had originally been sureties. *Decker* v. *Judson*, 2 E. P. Smith, 439. As to the general powers of the justice, see Vol. I, 37, § 1.

Liability of the sureties.] The language of the statute is very plain in relation to the responsibilities which are assumed by a surety. If the plaintiff fails in the action, and he does not pay such costs and damages as are awarded in the action; or if the plaintiff does not return the property to the defendant when a return is adjudged, the surety will be liable for the payment of all such costs and damages. But there is a still greater liability. If the plaintiff should succeed in the action before the justice, and the defendant should appeal to the county court, and from there to the supreme court, if the final judgment is against the plaintiff, the sureties are liable for all the costs of the appeal.

And if the supreme court should permit an appeal to the court of appeals, and the judgment of that court should be against the plaintiff, the sureties will be liable for all the costs on all the appeals. *Tibbles* v. *O'Connor*, 28 Barb., 538. The language of this statute is very different from that in relation to a surety for a short summons or a civil warrant. The surety for such a process, as either of them, is liable for any sum which may be adjudged against the plaintiff *in the suit*. *Ante*, 85, 106. While in this action the surety is liable for any sum which may be recovered against the plaintiff for *any cause.*

Form of Bond.

Know all men by these presents, that we, James Jackson and John Styles, are held and firmly bound unto Richard Roe, in the sum of two hundred dollars, to be paid to the said Richard Roe, or to his certain attorney, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals. Dated the 21st day of November, 1864.

Whereas, application has been made by John Doe, to John Frothingham, Esq., a justice of the peace, of the town of Johnstown, in the county of Fulton, for a summons and notice for the commencement of an action against Richard Roe, for the recovery of the possession of the following described property (here describe it as in the affidavit); and whereas application has also been made by the said John Doe, to the said justice, for process to take the said property from the said Richard Roe; and whereas also, an affidavit in due form of law has been made and presented to the said justice, by the said plaintiff, and the same has been duly indorsed by said justice in pursuance of the statute.

Now, therefore, the condition of this obligation is such, that if the said property is taken from the possession of the said Richard Roe, by virtue of any process to be issued by the said justice in said action, and the said John Doe shall duly and legally prosecute such action; and if the said John Doe shall return said property to the said Richard Roe, in case a return thereof shall be adjudged in due course of law, and if the said John Doe shall pay to the said Richard Roe, such sums as may for any cause be recovered against the said John Doe, then this obligation is to be void, otherwise to be in full force and virtue.

JAMES JACKSON, [L. S.]
JOHN STYLES, [L. S.]

Sealed and delivered in presence of
JOHN FROTHINGHAM.

The approval may be in the following form:

I approve of James Jackson and John Styles, as sureties in the within bond. November 21st, 1864. JOHN FROTHINGHAM, *Justice.*

The same general rules are as applicable to this bond as to any other one. See *ante*, 159 to 165.

Summons, when to be issued.] After a proper affidavit and bond have been duly executed, and the sureties in the bond have been duly approved, and a proper direction has been indorsed on the original affidavit by the justice, the next step will be for the justice to make out and issue the proper summons and notice.

And when these papers are all completed, the necessary copies of such papers as are required to be served upon the defendant should be made. The original affidavit and indorsement, and the summons and notice, together with the proper copies thereof should then be delivered to some constable of the county for service.

Statutory requirements of summons.] The statute prescribes the form of the process which shall be used in commencing this action. And it declares that such process shall be a *summons*. This summons is to be governed by the general rules which relate to a summons, except as to those particulars which are expressly made to govern this process, when issued in an action for the recovery of personal property. See *ante*, 41 to 48. The notice which is spoken of by the statute, is not a separate process; for it is expressly declared that the summons shall *contain* a notice to the defendant, &c. And, therefore, there is really but one process which is a summons, though it differs from the usual summons by containing a notice which is not ordinarily required in that process.

The summons *must be directed to the defendant. Vol.* I, 6, § 53, sub. 10. This is an important alteration of the law relating to a summons, for the ordinary summons is required by statute to be directed to any constable of the county. Vol. I, 39, § 12. This summons must also contain a requirement that the defendant appear before the justice who issued it, at a time and place which must be specified in the summons. The time so specified cannot exceed twelve days from the date of the summons. The statute does not prescribe any time for the least number of days which may intervene between the date and the return day. And in the absence of any express provision of the statute upon the subject, the proper practice will be to apply the ordinary rules as to the time for the return day of a summons. If the parties are residents, then make the time for the return day not less than six nor more than twelve days from the date of the summons. If the defendant is a non-resident, make return day not less than two nor more than four days from the date of the process. The summons must require the defendant to appear at the time and place specified, to answer the complaint of the plaintiff. The summons must also contain a notice to the defendant, that in case he shall fail to appear at the time and place specified in the summons and notice, the plaintiff will have judgment for the possession of the property described in the plaintiff's affidavit, with the costs and disbursements of the action.

Long summons.] The statute has prescribed that the return day shall not extend more than twelve days from the date of the summons. But there is no time expressly prescribed as the shortest time within which it may be returnable. It may be argued that the justice has a discretion as to the time within which he will make the summons returnable, if that time is not more than twelve days from the date thereof. But that construction is not correct, because if that were so, the process might be

issued in the forenoon, and made returnable the same day in the afternoon, or on the next day. Such a construction would deprive the defendant of any opportunity to except to the plaintiff's sureties. This exception may be taken at any time after the service of the summons, &c., and at least *two days* before the *return day* of the summons.

The evident intention of the statute, therefore is, that no summons shall be made returnable in less than two days. And, in the absence of any other rule, the best method of practice will be to make the process conform to the usual rule relating to the return day of a summons.

If the parties are all residents of the county, let the time for the return day be fixed in the same manner that it would in an ordinary long summons.

Short summons.] Many of the remarks which have just been made in relation to a long summons are equally applicable to a short summons.

This action may be brought against a non-resident defendant, as well as against a resident. This would be evident from the general rules of law applicable to such cases. And it is also evident from the provisions of the statute, because one of the cases in which the justice may proceed in the action, although no service of the process has been made on the defendant is, if the defendant has no last place of abode in the county. Code, § 53, sub. 10. This must refer to the case of a non-resident, because if he had been a resident, there must be some last place of abode. This statute extends the remedy by summons to a new class of cases.

The action to recover the possession of personal property which has been wrongfully taken, or which is wrongfully detained, is clearly an action for a tort. And the general rule is, that a warrant must issue in such a case, if the defendant is a non-resident of the county. See *ante* 91, 92. The reason why a warrant was given was for the advantage of the defendant; for if that process were taken, there could not be a long delay between the date and the return day of process. And there is, therefore, the same reason for holding that the summons in this case ought to be a short summons, when it is issued against a non-resident defendant. The same rule ought to apply when the plaintiff is a non-resident. No warrant can issue in this action, because the statute says it shall be a summons, and when no warrant can issue, a short summons is a proper process in favor of a non-resident plaintiff. *Ante*, 77, 92.

The security which is required is ample for the indemnity of the defendant, and convenience and uniformity in the practice both require that a short summons should be the form of process in the case of a non-resident plaintiff.

Must be a summons and not a warrant.] There may be those who will suppose that a summons is not a proper process against a non-resident defendant, if the action is for a tort. And this is

entirely true of ordinary actions. But the reason why that is so, is because the statute has so declared. And the statute, so far as it relates to this particular action, has repealed so much of the old law as conflicts with the present one.

In this action no process but a *summons* can be issued, because the statute has declared that the process shall be a summons. In this action the plaintiff may take the property if he can find it. And the only other object of the action will be to obtain damages for the wrongful taking or detention. If the plaintiff chooses, he may elect to take a warrant against a non-resident defendant. But he must elect which process he will take, for he cannot have a warrant to arrest the defendant in an action to recover the possession of personal property.

Notice in the summons.] This notice is a part of the summons. And, although it is called a summons and notice, there is no occasion to mention the notice, since that is necessarily included in the summons. To mention it, however, can do no harm, and since it is mentioned in the statute, it may be well enough to notice it in those papers in which the process is described, or in the return of a constable as to the papers which he has served on the defendant.

Summons not to describe property.] The statute does not require that the summons shall describe the property which the plaintiff claims. It ought not, therefore, to be described in the summons. It would be mere surplusage to describe the property in the summons. And if the property is properly described in the affidavit, a misdescription of it in the summons will not do any harm. *Finehout* v. *Crain*, 4 Hill, 537.

No direction indorsed on summons.] The summons ought not to be indorsed with any direction as to the taking of the property which the plaintiff claims to recover in the action. That direction must be made on the *affidavit*, and not on the summons.

Form of summons.] The summons in this action, differs in several respects from that of the ordinary summons which is issued by justices of the peace. These peculiarities have been pointed out in the preceding pages. And in the form of summons which is given below, an attempt will be made to make it conform to the requirements of the statute.

Form of summons.

The People of the State of New York, to Richard Roe, defendant: You are hereby summoned and required to appear before John Frothingham, Esq., a justice of the peace of the town of Johnstown, in the county of Fulton, on the 21st day of November, 1864, at one o'clock in the afternoon, at his office in the said town and county, to answer the complaint of John Doe, the plaintiff in this action. And you will also take notice, that in case you fail to appear at the time and place mentioned in this summons, the plaintiff will have judgment for the possession of the property described in the affidavit made in this action, a copy of which is herewith served on you, together with the costs and disbursements of this action. And the said People do further command any constable of the said county of Fulton, to

make due service of this summons, and also to make a proper return thereon as is by law required. Dated November 11th, 1864.

JOHN FROTHINGHAM, *Justice.*

The foregoing summons runs in the name of the people of this state. And the reason for framing it in that manner, is to meet the requirements of the statute, which declares that all *process* shall run in the name of the people. *Ante.* 41.

In justices' courts, a summons has always been considered a process, and all other forms of summons are made to run in the name of the people. It was deemed the safe course, therefore, to follow the ordinary summons in that respect.

SECTION II.

SERVICE OF REPLEVIN PROCESS.

Where to be made.] The service of the summons and notice, and the taking of the property claimed, must all be done within the county in which such process issued. A service of the summons and notice, if made out of such county, will not confer jurisdiction over the person of the defendant. The constable is directed by the statute to serve such copy of affidavit, summons and notice on the defendant personally, if he can be found in said county. Code, § 53, sub. 10. Again, the direction on the affidavit must be to any constable of the county in which the justice resides, and it is evident that the constable has no authority to take the property unless he can find it in such county. He has no more authority to do so, than he would have to make a levy upon an execution out of the county in which it was issued. See also *ante*, 6, 66, 112, 172.

When to be served.] The property which is described in the affidavit must be taken *forthwith.* Code, § 53, sub. 10. It is the duty of the constable, therefore, to take immediate possession of the property if he can find it. And as soon as he has taken the property, he must, *without delay*, serve a *copy* of the *affidavit*, *summons* and *notice* upon the defendant, by delivering them to him personally, if he can be found in the county. The evident object of the statute is, that the constable shall take the property as soon as is reasonably possible, and that he shall then serve the process upon the defendant, as soon as it can be reasonably done after the taking of the property. The words, "*without delay*," do not mean that a constable may consult his convenience as to the time of such service, but that he is to act with diligence and energy in making such service. But the constable must be careful not to take the property after the return day of the summons, as he has no authority to take the property after that time, though if he has taken it in proper time, he may then retain it until disposed of according to law.

How to be served.] The statute has specified with particularity the manner in which the process shall be served. Code, § 53, sub. 10.

The first act which the constable is required to do after receiving the process is, *forthwith* to take the property described in the affidavit. He should be careful not to take any property but that described in the affidavit. And if no particular description is given, though a certain specified amount or quantity of property is mentioned, which the constable is directed to take from a larger mass, he should be careful not to take a larger quantity than that required by his process. A direction to take about 400 tons of iron ore will not authorize the taking of 720 tons. *De Witt* v. *Morris*, 13 Wend., 496. If the property is not particularly described, there ought at least to be some description of it, and of the place where it may be found. And the constable should require the plaintiff to point out in such cases the property which he desires to have taken. And if the property is not particularly described, so that the constable may justify his acts in taking the particular property claimed, he may require the plaintiff to indemnify him for such taking before he is compelled to take it. The statute has conferred full authority upon a constable to execute the requirement or command to take the property. He has the same authority that a sheriff has in similar actions in the supreme court. Code, § 53, sub. 10.

If the property or any part of it is concealed in any building or inclosure, the constable must first publicly demand its delivery. This demand may be made at the door of the house which is most generally used. Or it may be made at any door or window of the building. If any person of proper age and discretion is within the building, or if the defendant is within the building, the demand should be made in a loud and public manner, so that they may have an opportunity of hearing it. If there is no one in sight within the building, and if no person shall open the door, the constable should then knock at the door, ring the door bell, and use such other means as are usually employed to gain a peaceable admission into a dwelling house. If these means all fail of obtaining a peaceable entrance into the building or inclosure, the constable should then break open the building. In doing this, he should do as little damage as possible to the building. After gaining admission into such building, it is the right and the duty of the constable to search thoroughly every part of it. If there are inner rooms which are locked or fastened, and the property cannot be found in the rooms which are open, then the other rooms should be broken open. If the property is such that it may be kept in chests, trunks, bureaus and the like, and it cannot be found elsewhere in the building, the constable should break these open for the purpose of finding the property. If, however, there is any person of suitable age and discretion in the building, it would be proper to request them to open such inner doors as were locked, or to open such chests, trunks, &c., before breaking them open. It must be remembered, however, that this right to break open a dwelling house is a departure from the ordinary rule in relation to the service of civil process.

And it is not permitted in this case unless the property is concealed within such building. Code, § 214; Vol. I, 23.

The term concealed, means that the property is kept close or secret, or that it has been hidden. The true construction of the statute is to be found in the intention and object which was in view in enacting it. Ordinarily an officer would not be justified in breaking into a house to take property upon civil process. And if the law permitted parties to put property within their dwellings for the purpose of placing it beyond the reach of civil process; and if officers could not lawfully take it from such dwellings, the result would be, that every person who wished to evade the law, would put within his dwelling house all property which he wished to place beyond the reach of the law or its officers. The reasonable construction of the statute is, that when the defendant has wrongfully and unlawfully put such property into his dwelling house for the purpose of keeping it from being taken by the owner or by an officer, that is a concealment within the meaning of the statute. So, when the property is of that kind which is usually kept in a dwelling house, if the defendant refuses to deliver it to the constable on a proper demand, that will be within the intent of the statute; and it is a concealment such as will justify the constable in breaking open the building for the purpose of taking it. This construction carries into effect the intention of the law, which is, that no man shall use his dwelling as a castle to protect him in unlawfully keeping the property of an other person. This rule is eminently proper and just. If the defendant has unlawfully taken, or he unlawfully detains the personal property of an other; and he refuses, upon a proper demand, to surrender it, either to the owner or to an officer of the law who has legal process for its recovery; he who thus wantonly disregards the rights of property of other persons, has little reason to complain if the law deals vigorously with one who acts in direct violation of its requirements, in contempt of its process, and in resistance to its officers. Thus much has been said in relation to dwellings, for the reason that it is in relation to those buildings that most questions as to authority to enter would arise. All other buildings, such as stores, shops, offices, barns and the like, and all inclosures may also be broken open after a proper demand, publicly made, as has been already explained.

If it is necessary, the constable may call to his aid the power of the county, to assist him in the execution of his duties. Code, § 214, § 53, sub. 10. It is the duty of every male person of proper age, to aid the constable if he shall demand assistance in the execution of this process, and a refusal to render such assistance is a misdemeanor, punishable by fine and imprisonment. 2 R. S., 441, § 82, 1st ed.; 3 R. S., 740, § 103, 5th ed. If the party who assists an officer is sued for his acts in such a case, it will be a valid defense that he was acting at the request of an officer, in assisting him in the execution of the duties of his office.

If, however, the process is defective on its face, and is not

sufficient to protect the officer, or if he is attempting to take property which is not described in the process, or if he is attempting to take the property from the possession of some person other than the defendant, or his agent; the officer and all who act in his assistance will be trespassers. *Elder* v. *Morrison*, 10 Wend., 128; *King* v. *Orser*, 4 Duer, 431.

It is important to remember that the statute does not authorize the breaking open of a building, unless the property, or a part of it, is concealed in it. The same rule is applicable to this case which governs arrests upon civil process. A dwelling house may be broken open, after a proper demand and refusal, if the officer wishes to arrest a stranger who is not a member of the family in such house. The officer acts at his peril in breaking a dwelling house in that case. If he finds such stranger there, he will be justified; if he does not find him there, the breaking of the house will be a trespass. See Warrant. *Ante*, 115, 116.

The same rule would be applied to the breaking of a dwelling house for the purpose of taking and delivering property in this action. If the property is found in the possession of the defendant or his agent, it is the duty of the constable to take it, notwithstanding any resistance which they or either of them may make. But it is not entirely settled whether he may take the property from the possession of a person who is neither defendant nor his agent. Vol. I, 741. If the constable cannot find all the property specified in the affidavit, he should take such portions of it as he can find. And after he has taken it, it is his duty to take it to some secure place and there keep it, to be disposed of according to law. Code, § 215; Vol. I, 24. Id. 6, 7, § 53, sub. 10.

Serving copies on defendant.] The service of the papers on the defendant must be a personal one, if he can be found in the county. And it must in that case be made by delivering to him a copy of the summons and notice, and a copy of the affidavit. A copy of the *direction* which is indorsed upon the affidavit ought also to be served. The statute does not expressly require this, unless the term "a copy of the affidavit" includes a copy of such direction. The better practice will be to serve a copy of the direction, and the defendant will then have full information of the authority by virtue of which the constable is acting. As we have already seen, *ante*, 187, it is no part of the constable's duty to make such copies. His duty is performed in this case, when he properly *serves* such process as is put into his hands for service.

The constable ought, however, to compare the papers, so as to see that the copies are correct, for he is required to make a return of the manner in which he served the process. And he could not properly return that he had served copies of the papers upon the defendant, unless he knows that his return is true. An immaterial variance, however, would be of no consequence. But a material variance or defect in the copies served would be a very different thing.

In making his return the constable is acting ministerially, and

if his return is false, he is liable to the legal consequences which may follow from it, whether his intention is corrupt or not. *Houghton* v. *Swarthout*, 1 Denio, 589; Vol. I, 746.

Serving copies on defendant's agent.] If the property was found in the possession of an agent of the defendant, and the plaintiff cannot be found in the county, then the service of the copies of summons and notice, and of the affidavit and direction must be made on such agent, if he can be found in the county. But, if the defendant can be found in the county, it would be the duty of the constable to serve the copies upon him instead of such agent. The service is never required to be made upon the agent in whose possession the property is found, if the defendant himself can be found in the county. Code, § 53, sub. 10.

Leaving copies at defendant's residence.] If the property was found and has been taken by the constable, and he cannot find the defendant in the county, and he cannot find within the county the agent in whose possession the property was found, such constable may then serve the copies of the summons and notice, and of the affidavit and direction, by leaving them at the usual place of abode of the defendant, with some person of suitable age and discretion. The law does not provide for the service of such papers by leaving copies at the house of the agent. The service must be personally made upon the defendant, or upon his agent, when the property was found in his possession, if they can be found in the county. Though, as we have seen, the service must be made upon the defendant in all cases, if he can be found in the county. If no personal service can be made, then the copies may be left at the usual place of abode of the defendant, &c.

If the defendant cannot be found in the county, and he has no last place of abode in such county, and there is no agent who can be found to make such service upon, the constable must return such facts. And if the property has been taken, but no service could be made, for the reasons just mentioned, the justice may proceed in the action in the same manner as though there had been a personal service of the papers and process. Code, § 53, sub. 10.

Delivery of property to plaintiff.] After the property has been taken by the constable, the defendant may, at any time after the service of the summons, &c., upon him, and at least two days before the return day thereof, except to the sureties of the plaintiff. Or the defendant may, at any time before the return day of the summons, demand a return of the property taken from him, if he has not excepted to the sureties of the plaintiff. He must, however, give an undertaking such as is prescribed by law, if he desires a return of such property. If the plaintiff's sureties are excepted to, and they justify on the return day of the summons, or if they do not justify, but new sureties are furnished who do justify on such return day, the constable must then deliver the property to the plaintiff. If the defendant does not

except to the plaintiff's sureties, and if, before the return day of the summons, he does furnish an undertaking such as is required by law, then the property must not be delivered to the plaintiff. The constable should always retain the possession of the property until the return day of the summons, when the only claimants of the property are the plaintiff and the defendant. The sureties in the defendant's undertaking need not justify until the return day of the summons.

Return of constable, when to be made.] After the constable has taken the property into his possession, and he has duly served the copies of the summons and notice, and of the affidavit and direction, his next duty is to make a return of his proceedings to the justice who issued the summons. The time for making such return is fixed by statute. It must be done *forthwith* after the taking of the property and the service of the copies of the summons, &c.

What the return should show.] The statute has provided for several different modes of service of the copies of the summons and notice, and of the affidavit and direction. There cannot, therefore, be any one particular form of return. In every instance the return must conform to the particular circumstances of the case, by stating truly and fully just what has been done. Every return ought to show when the property was taken, when the service of the summons, &c., was made, and upon whom such service was made. So it ought to show whether the copies were left at the usual place of abode of the defendant, if he cannot be found, and has a residence in the county, but has no agent upon whom a service can be made.

Again, if the property is taken, and neither the defendant nor his agent can be found in the county, and the defendant has no last place of abode in the county, then the return should show those facts. In short, the principle of making the return is this, it should show distinctly what has been done, that the service, whatever it may have been, is strictly in accordance with the law, and these facts should all be shown affirmatively when that can be done, and negatively as to those things in which it is proper to make a particular service in the absence of some other person or thing. For instance, a service of the papers may be made on the agent in whose possession the property is found, if the defendant cannot be found in the county; and therefore, it is necessary that the return should show that the defendant cannot be found. The return cannot be drawn with too much care in these respects, and this is especially the case when there has not been any service on the defendant, and he does not appear in the action. In that case, if the return does not show a compliance with the statute, the justice will not acquire any jurisdiction over either the person of the defendant or of the property taken. The return of the constable should show the time and manner of the service, and he should sign his name officially thereto.

The statute does not declare whether the return of the con-

stable shall be made upon the summons and notice, or upon the affidavit, or whether it is to be made upon a separate paper. It will therefore be left to the general rules of law to determine the question. The analogies of returns in other cases, would require that the constable should return upon the summons and notice itself, the time and manner of serving that process. And it can hardly be supposed that there was any intention that two returns should be made. The correct practice, therefore, is, to annex the summons and notice to the original affidavit and direction, in some secure and proper manner, and then to indorse the return upon the original summons. When the return is completed in that manner, the constable should deliver the original summons and notice, and the original affidavit and direction to the justice, who will then be able to decide judicially whether he has authority to proceed further in the action.

Several forms of returns will be given hereafter. And the facts will be stated very fully in them, because the practice is not yet settled in relation to returns in this action in justices' courts. And if the same strictness is enforced in this action that has prevailed in relation to returns on attachments in justices' courts, there will be very little danger that the return will be too carefully drawn. Several of the different forms are as follows:

Property taken, and personal service on defendant.

By virtue of the annexed affidavit, and the direction and requirement thereon indorsed, I did, forthwith, on the 22d day of November, 1864, take the property described in said affidavit; and I did also, on the said 22d day of November, 1864, without delay, personally serve upon the said Richard Roe, copies of the within summons and notice, and of said affidavit and direction, by delivering them to him personally. Dated Nov. 22, 1864. JAMES PIERSON, *Constable.*

Property taken, defendant not found, service at residence.

By virtue of the annexed affidavit, and the direction and requirement thereon indorsed, I did, on the 22d day of November, 1864, take the property described in the said affidavit, and after diligent search, the said Richard Roe could not be found in the said county of Fulton; and therefore, I did, without delay, on the 22d day of November, 1864, serve copies of said summons and notice, and of said affidavit and direction, by leaving them at the usual place of abode of said Richard Roe, in the town of Johnstown, in Fulton county, with Mary Roe, his wife, a person of suitable age and discretion. Dated November 22, 1864. Fees, $

JAMES PIERSON, *Constable.*

Property taken, defendant not found, service on agent.

By virtue of the annexed affidavit, and the direction and requirement thereon indorsed, I did, forthwith, on the 22d day of November, 1864, take the property described in said affidavit, and after diligent search, the said Richard Roe could not be found in the said county of Fulton; and therefore, I did, without delay, on the 22d day of November, 1864, serve copies of the within summons and notice, and of said affidavit and direction, upon James Roe, who is the agent of the said Richard Roe, and in whose pos-

session I found the said property, and that such service was made by delivering said copies to the said James Roe personally. Dated November 22, 1864. Fees, $ JAMES PIERSON, *Constable*

Property taken, defendant not found, no residence and no agent.

By virtue of the annexed affidavit, and the direction and requirement thereon indorsed, I did, forthwith, on the 22d day of November, 1864, take the property described in said affidavit, and after diligent search the said Richard Roe could not be found in the said county of Fulton; and the said Richard Roe has no last place of abode in said county; and the said Richard Roe has no agent in said county upon whom such service could be made. JAMES PIERSON, *Constable.*

Dated November 22, 1864. Fees, $

Part of the property found, and part not found.

By virtue of the annexed affidavit, and the direction and requirement thereon indorsed, I did, forthwith, on the 22d day of November, 1864, take the following articles which are described in said affidavit (here describe the articles taken as described in affidavit), and after diligent search, the other articles therein mentioned could not be found in the county of Fulton; and I did, without delay, on the 22d day of November, 1864, serve copies, &c. (here describe the manner of service according to the facts, and as is set out in any of the preceding forms which would be applicable to the particular instance).

This return like the others must be signed by the constable.

Property taken, and claimed by a third person.

By virtue of the annexed affidavit, and the direction and requirement thereon indorsed, I did, forthwith, on the 22d day of November, 1864, take the property described in said affidavit, and I did, without delay, on the 22d day of November, 1864, serve copies of the within summons and notice, and of the said affidavit and direction, on the said Richard Roe, by delivering the same to him personally; and on the 22d day of November, 1864, Moses Spike made claim to said property, and he at the same time served upon me an affidavit in due form of law, stating the grounds of his right and title to the possession thereof; and I did, on the 22d day of November, 1864, notify the plaintiff, John Doe, of the claim so made by said Moses Spike; and I did also, on the same day, demand that the said John Doe should indemnify me against the said claim of said Moses Spike; and after a reasonable time to deliberate thereon, the said John Doe refused to execute the undertaking required by law, and I did, therefore, on the 22d day of November, 1864, return the property so taken to the said Richard Roe. JAMES PIERSON, *Constable.*

Dated November 22, 1864.

If the plaintiff indemnified the constable against the claim of such third person, then the return should state the principal facts as in the foregoing return. But instead of returning that the plaintiff refused to indemnify the constable as in the last form, the return should state as follows:

"And the said John Doe did, on the 22d day of November, 1864, indemnify me against the claim so made by said Moses Spike, by executing and delivering to me the undertaking required by law." This return is then dated and signed in the same manner as in other cases.

No property found.

By virtue of the annexed affidavit and the direction thereon indorsed, I have made diligent search, and the property described in said affidavit cannot be found in said county of Fulton. Dated, November 22, 1864.

JAMES PIERSON, *Constable.*

Proceedings on the part of the defendant.] After the property has been taken by the constable, and the summons and notice and affidavit have been served upon the defendant, it will be necessary for him to act promptly in the proceedings on his part. He has a right to elect whether he will except to the plaintiff's sureties, and waive a return of the property, until after the trial; or he may demand a return of it, and hold the possession thereof until after the action is tried. But this election as to excepting to the plaintiff's sureties cannot be made at any time when the defendant chooses. It must be done at some time after the service of the process upon him, and at least two days before the return day of the summons. If the summons is returnable on Wednesday, the notice of exception must be served as early as the Monday preceding. This notice must be in writing, and a copy of it must be served upon the plaintiff, or upon the constable who took the property. This service must be made upon the plaintiff or constable personally, if either of them can be found; if the plaintiff and the constable can neither of them be found, then leave the copy at the plaintiff's usual place of residence, if he has one in the county, with some suitable person. If the plaintiff cannot be found, and he has no residence in the county, and the constable cannot be found, but he has a residence, then serve the notice by leaving it at such residence with a person of suitable age. There will be an action pending at the time when this notice is served, and the notice therefore should be entitled in the action.

It may be in the following form:

JUSTICE'S COURT—FULTON COUNTY, *ss:*

John Doe
agst.
Richard Roe. } JOHN FROTHINGHAM, *Justice.*

To John Doe, plaintiff, and James Pierson, constable: You will please to take notice that I except to the sufficiency of the sureties named in the bond or undertaking of the plaintiff in this action. RICHARD ROE.

Dated, November 22, 1864.

This notice may be served by any person, even by the defendant himself if he chooses. Before serving a copy of the notice, it will be proper to compare it with the original, because it may become necessary to make proof of the service of the copy. Such proof may be made by the affidavit of the person who made the service. The affidavit should be indorsed upon the original notice, and it may be in the following form:

JUSTICE'S COURT.

John Doe agst. Richard Roe.	John Frothingham, *Justice.*

Fulton County, *ss:* Alexander Stewart being duly sworn, says, that on the 23d day of November, 1864, he served the within notice on John Doe, the plaintiff, by delivering a copy thereof to him personally.

ALEXANDER STEWART.

Subscribed and sworn before me,
this 23d day of Nov., 1864,

John Frothingham, *Justice.*

If the defendant does not serve this notice upon the plaintiff or the constable, at least two days before the return day of the summons, he will waive the right to except to the plaintiff's sureties, and every objection to them will be deemed to have been waived. If, however, such notice is served in due time and in a proper manner, it will be necessary for the plaintiff to see that the sureties justify on the return day of the summons. Or, in case they cannot or do not justify, then new sureties must be substituted who must justify.

The qualifications of sureties are prescribed by statute. Vol. I, 23, § 194; Id., 7, § 53, sub. 10. The manner of justification is also prescribed by statute. Id., 23, § 195.

On the return day of the summons, the justice should swear the sureties, if they have been excepted to. And proof of that fact should be made by affidavit in the manner already shown. The oath to the sureties may be in the following form:

Form of oath to sureties.

You do swear that you will true answers make to such questions as shall be put to you, touching your sufficiency and qualifications as a surety in this action, between John Doe, plaintiff, and Richard Roe, defendant.

The examination ought to be reduced to writing in all cases. And, if the defendant requires it, the justice is bound to take it in writing, and to require the surety to sign it. Code, § 195.

The defendant is entitled to the right of examining the sureties upon all matters that relate to their qualifications. Such, for instance, as his residence within this state; whether he is a freeholder or householder; whether he is worth double the amount of the value of the property taken by the constable, and whether he is worth that sum in property which is exempt from execution. The justice should permit such an examination as is calculated to show that the surety is really responsible and such as the law requires.

If there are several sureties, they are each of them to be examined in the same manner. The notice of exception makes it the duty of the justice to swear and to examine all the sureties, unless the defendant expressly waives it, because when the sureties are once duly excepted to, they will be compelled to justify in every instance, unless the defendant chooses to dispense with

the justification. Code, § 53, sub. 10. If no one surety can justify in the amount required by law, the justice may allow two or more sureties to justify; and if, in the aggregate, the amount of the security is equivalent to double the value of the property, that will be sufficient. Code, § 194, sub. 2. It is important to notice that the sureties must justify by swearing that they are worth the amount for which they justify, exclusive of property exempt from execution. Code, § 194, sub. 2.

The plaintiff may offer as many new sureties as may become necessary, if it is done on the return day of the summons. And whenever any of them, or when all of them, in the aggregate, justify in the proper sum, that will be sufficient. If the plaintiff's sureties, after being sworn, should unexpectedly fail to prove qualified, the justice ought to give the plaintiff a reasonable time to procure new sureties, for the statute expressly requires the new sureties to justify on the return day of the summons. Code, § 53, sub. 10. If the ends of justice should require it, the justice may give the plaintiff the entire return day to procure sureties. But the proper practice would be for the plaintiff to examine into the qualification of the sureties before the return day, and if he finds that they are not qualified, he should procure other sureties who should be present at the time and place mentioned in the summons. Neither party would then be subjected to any unnecessary loss of time.

The justice, however, must decide each question of this kind as it occurs, and according to his views of the justice of the matter, taking into account all the circumstances of the case.

If the plaintiff's sureties fail to justify, and no new sureties justify on the return day of the summons, the justice must order a return of the property to the defendant. And he must also render a judgment against the plaintiff for the defendant's costs and disbursements.

Returning property to defendant.] If the defendant excepts to the sureties of the plaintiff, he cannot demand a return of the property by giving a bond or undertaking. But he may demand such return if he has not excepted to the plaintiff's sureties. This demand must be made at some time *before* the return day, and such a demand will be too late, if not made until the return day. The defendant is not bound to make any demand, nor to serve any notice upon the plaintiff, nor upon the constable for the purpose of obtaining a return of the property.

The only steps which the defendant need take for that purpose is, to provide an undertaking such as the law requires, and to deliver it to the justice *before* the return day of the summons. This undertaking must be filed with the justice. The undertaking must be executed to the plaintiff, and it must be in double the value of the property taken. The conditions must be such as the statute prescribes, and the sureties must justify.

If the undertaking is filed with the justice *before* the return day, the sureties may justify on the *return day.* Code, § 53, sub. 10.

The qualifications of the sureties and the mode of justification is similar to that already described, *ante*, 211. The only difference is, that in this case it is the plaintiff who has the right to examine the defendant's sureties, while in the other case, the defendant examines the plaintiff's sureties. The statute declares, that if the defendant does not require a return of the property before the return day, the property shall be delivered to the plaintiff. Code, § 53, sub. 10. But this must be understood to mean that the plaintiff's sureties have properly justified, or that such justification has been waived, for if such sureties do not justify when excepted to, or new sureties do not justify in their place, the property must be returned to the defendant.

Bond for return of property to defendant.

Know all men by these presents, that we, James Jackson and John Styles, are held and firmly bound unto John Doe, in the sum of two hundred dollars, to be paid to the said John Doe, or to his certain attorney, executors, administrators or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals. Dated the 23d day of November, 1864.

Whereas, in an action which has been commenced by John Doe, before John Frothingham, Esq., a justice of the peace of the town of Johnstown in the county of Fulton, against Richard Roe, for the recovery of the possession of the following described personal property (here describe it as it is described in the plaintiff's affidavit). And whereas, also, James Pierson, a constable of the town of Johnstown in said county, has taken the said property into his possession and keeping, as he was directed and required by said justice to do; and the said James Pierson is still in possession of said property; and whereas the said Richard Roe requires the return of said property to him in pursuance of the statute.

Now, therefore, the condition of this obligation is such, that if the said James Pierson, constable as aforesaid, shall return and deliver the said property to the said Richard Roe, as is by him required, and if the said Richard Roe shall deliver the said personal property to the said John Doe, if such delivery shall be adjudged; and if the said Richard Roe shall pay to the said John Doe, all such sums as may for any cause be recovered by said John Doe against the said Richard Roe, then this obligation to be void, otherwise to be of full force and virtue.

JAMES JACKSON. [L. S.]
JOHN STYLES. [L. S.]

Signed, sealed and delivered in presence of
JOHN FROTHINGHAM, *Justice.*

The foregoing bond need not be approved by the justice, because the statute requires the sureties to justify on the return day of the summons.

New sureties may be substituted and justify on that day, if the original sureties fail to appear or to justify on such return day. The liability of such a surety is one of considerable importance. *Ante*, 211.

Claim of property by a third person.] The statute upon this subject has already been given in full. Vol. I, 24, Code, § 216.

Must be an affidavit.] When the property is claimed by any person other than the defendant or his agent, such third person must make an affidavit, in which he must state his title to the property and his right to its possession.

The affidavit must also state the grounds of such right and title. If such third person claims to own it by a purchase, he should state the facts, such as the time when it was made, the price thereof, and the person of whom purchased.

If such third person does not claim to own such property, but claims a right to the possession, he must state in his affidavit what right he has to the possession, and he must also state the grounds of such right. If he claims the property as bailee thereof, he should state the facts showing what the nature of the bailment was, its terms and the duration of his right of possession under it. This affidavit must be served upon the constable who has the property, by delivering the affidavit to him. A copy of the affidavit should be kept so as to be able to prove the service thereof. The service should be made at some time between the day on which the constable took the property, and the return day of the summons. After receiving this affidavit, the constable should immediately notify the plaintiff of the claim which is made by such third person. He should also demand a bond of indemnity from the plaintiff or his agent, so as to protect him from any claim of such third person. This demand need not be in writing. If the plaintiff refuses to indemnify the constable after such demand, the property should be delivered to the defendant, or the person from whom it was taken.

The constable should allow the plaintiff a reasonable time to procure sureties to the bond of indemnity, if he desires such time. There must be two sureties, and they must both be freeholders and householders of the county, and they must each be worth double the amount of the property as specified in the plaintiff's affidavit. *Graham* v. *Wells*, 18 How., 376. These facts must be stated in an affidavit, and sworn to by the sureties.

If the plaintiff furnishes the proper bond of indemnity, the property must be delivered to him after the return day, unless the defendant shall entitle himself to the possession in the manner already stated. *Ante*, 212.

When a claim is made to the property by a third person, he cannot commence an action against the constable for its possession. His only course is, to make the affidavit mentioned, and to serve it upon the constable. *Edgerton* v. *Russ*, 6 Abb., 189. No claim of property which is made against the constable by any other person than the defendant or his agent, will be valid unless it is made by affidavit as has been explained. The affidavit may be in the following form:

JUSTICE'S COURT—FULTON COUNTY, *ss:*

John Doe *agst.* Richard Roe.	JOHN FROTHINGHAM, *Justice.*

FULTON COUNTY, *ss:* Moses Spike being duly sworn, says, that an action is pending before John Frothingham, Esq., a justice of the peace of the town of Johnstown in the county of Fulton; that John Doe is plaintiff, and Richard Roe is defendant therein; that the action is brought by the plaintiff to recover from the defendant the following property (describe it as in the plaintiff's affidavit); that James Pierson, a constable of said town in the county aforesaid, has taken the said property by virtue of the process which was issued by said justice in said action. And deponent further says, that he is the owner of said property; that on the 15th day of November, 1864, he purchased said property from said Richard Roe the defendant; that this deponent paid the said Richard Roe the sum of one hundred dollars for said property; that this deponent, by the terms of sale and purchase of said property, was to have possession thereof in two days from the time of such sale; that more than two days have elapsed since such sale, and that this deponent is entitled to the immediate possession of said property. MOSES SPIKE.

Subscribed and sworn before me,
this 23d day of Nov., 1864,
JOHN FROTHINGHAM, *Justice.*

Make a copy of this affidavit, and serve the original as has been explained. *Ante*, 214.

After the service of this affidavit upon the constable, and his demand of indemnity, the next step will be to draw a bond of indemnity, if the plaintiff concludes to furnish it. In this case, as in all others, a bond is preferred as the form of the undertaking.

Bond to constable on claim made by third person.

Know all men by these presents, that we, James Jackson and John Styles are held and firmly bound unto James Pierson, Esq., a constable of the town of Johnstown in the county of Fulton, in the sum of two hundred dollars, to be paid to the said constable or his assigns; for which payment well and truly to be made, we bind ourselves, our and each of our heirs, executors and adminstrators, jointly and severally, firmly by these presents. Sealed with our seals. Dated the 23d day of November, 1864.

Whereas, an action is pending in a justice's court, before John Frothingham, Esq., a justice of the peace in the town of Johnstown in the county of Fulton, in which John Doe is plaintiff, and Richard Roe is defendant; and whereas, the said action is brought by the said John Doe, to recover of the said Richard Roe the possession of the following described property, (here describe it as in the plaintiff's affidavit); and whereas, the said justice did in due form of law, issue process for the taking of said property; and whereas, the said constable by virtue of such process or direction indorsed upon the plaintiff's affidavit in said action, did on the 23d day of November, 1864, take the said property; and whereas, Moses Spike claims to own the said property, and has made an affidavit in due form of law, and served the same upon the said constable; and whereas the said John Doe is ready and willing to indemnify the said constable according to law.

Now, therefore, the condition of this obligation is such, that if the said constable shall refuse to deliver the said property to the said Moses Spike, and shall deliver the same to the said John Doe, and if the said John Doe,

his heirs, executors and administrators, shall well and truly indemnify and save harmless the said constable, his heirs, executors and admintrators, of and from all damages, costs and charges, which he, the said constable, his heirs, &c., shall sustain or in any wise be put to, for or by reason of the said claim of the said Moses Spike, his heirs, executors, administrators or assigns, of the property claimed as aforesaid by the said Moses Spike, then this obligation to be void, otherwise to remain in full force and effect.

JAMES JACKSON. [L. S.]
JOHN STYLES. [L. S.]

Sealed and delivered in presence of
JOHN FROTHINGHAM.

This bond need not be approved by the justice, because there must be an affidavit made by the sureties thereto. The affidavit should be indorsed upon the bond, and it may be in the following form:

FULTON COUNTY, *ss:* James Jackson and John Styles, being each severally and duly sworn, does each for himself, depose and say, that he is a surety named in the within bond; that he is worth the sum of two hundred dollars, exclusive of property exempt from execution; and that he is a freeholder and householder of the county of Fulton.

JAMES JACKSON.
JOHN STYLES.

Severally subscribed and sworn to before me, this 23d day of November, 1864,
JOHN FROTHINGHAM, *Justice.*

It will be seen from this form, affidavit and bond, that the sureties must be residents of the county, that they are freeholders and householders thereof, and that they are worth double the value of the property over and above such property as may by law be exempt from execution. Code, §§ 53, sub. 10, 194, 195, 216.

When the property is claimed by a third person, who is neither the defendant nor his agent, it is not necessary for him to give any bond. The statute does not require him to do anything more than to make the affidavit in the manner already explained. *Ante*, 214. If the property is returned to the defendant, such third person may maintain an action of replevin against him for the recovery of the possession of the property, although such action will not lie against the constable. *Ante*, 214. But if the constable has taken the property from the possession of any person other than the defendant or his agent, the true owner may maintain an action against the constable for the recovery of the property. And in that case he is not bound to make any claim of the property by affidavit as has been mentioned. That statute applies to those cases only in which the constable has taken the property from the possession of the defendant or his agent. *King* v. *Orser*, 4 Duer, 431. Vol. I, 873.

CHAPTER IX.

APPEARANCE.

What it is.] An appearance, in a legal sense, means something more than the mere personal presence of the parties before the justice.

To constitute an appearance, the party must do some act or take some step in the action. When the names of the parties are called by the justice, on the return day of process, at the proper time, if either party is present and refuses to answer to his name, or if he merely answers to it by saying "here," and then refuses to put in any pleading, or to take any other step in the action, there will not be any legal appearance by the party who thus neglects or refuses to act. *Fanning* v. *Trowbridge*, 5 Hill, 428, 430; *People* v. *Wilgus*, 5 Denio, 58, 62. The same rule applies to an appearance at any adjourned day. An appearance may be general or special. A general appearance is, when a party appears in the action for all the purposes of the action, and for the purpose of litigating the cause upon the merits, and upon any or all the questions which may arise in the cause. A special appearance is, when the party appears for the sole purpose of making some motion or objection, raising some question, or pleading some special matter which does not relate to the merits of the action, but to some irregularity in the pleadings, some personal privilege, or a want of jurisdiction of person or property, or to something of a similar character.

An appearance will be deemed to be a general one, unless the party states that it is a special appearance; and in that case, he ought to state distinctly the purpose for which he appears. The justice ought to make an entry in his minutes whether the appearance was a general or a special one; and, if special, he should also state the particular grounds or purpose of such appearance. This entry ought also to be made in his docket in entering judgment in the action.

When to appear.] The statute has prescribed the time when the parties shall appear, "Upon the return of a summons personally served, or on the return of an attachment duly served, the justice shall wait one hour after the time specified for the return of such process, unless the parties shall sooner appear." Vol. I, 44, § 44.

Non-appearance of the justice.] The statute relates to the length of time which the justice shall wait for the appearance of the parties. But it is sometimes the case that the justice himself is absent. The statute has not provided for such a case, but the decisions of the supreme court will furnish a guide to the practice upon that point.

It is a general rule that an action is discontinued if the justice does not appear at the place mentioned in the summons or attachment, at the hour appointed, or within one hour after that time. *Stoddard* v. *Holmes*, 1 Cow., 245; *Wiest* v. *Critsinger*, 4 Johns., 117.

Neither party is bound to wait a longer time than that for the appearance of the other, and there is no reason why the justice should be permitted to detain the parties any longer time than that.

When a defendant has appeared at the proper time and place mentioned in the process, and he has there waited one hour for the justice to appear, and he still continues absent, the defendant may then leave. It would be an intolerable injustice to a defendant if he were compelled to wait several hours, and perhaps a whole day, for the return of a justice to attend to his business, or, in default of such waiting, to run the risk of such judgment as the justice might render in his absence.

It is sometimes said that a justice may thus remain absent for several hours, and then proceed and render a valid judgment in the absence of the defendant, if the justice was officially engaged.

The case of *Hunt* v. *Wickwire*, 10 Wend., 102, is generally cited for this proposition, but it does not *decide* any such thing. The facts in that case were briefly these: Foot was justice, Wickwire plaintiff, and Hunt defendant, in an action in a justice's court. The action was commenced by warrant; issue was joined, and the cause adjourned a few days for trial, at one o'clock in the afternoon. Hunt appeared on the day of trial with his witnesses, and waited for the justice's appearance until five o'clock P. M., when he left, the justice not having appeared. After the defendant Hunt had left, the justice appeared, and in the absence of Hunt a judgment was rendered against him, and an execution issued upon which he was arrested. Hunt then sued Foot the justice, and Wickwire the plaintiff, for a false imprisonment, and on the trial of that action, it appeared that the reason why the justice did not appear at the proper time was, that he was engaged as one of the officers of the board in holding a town meeting, and that he attended to the trial of the suit before him as soon as his official duties at the town meeting were discharged. It was also claimed that Hunt agreed with Wickwire that the cause need not be tried until after the town meeting closed. The jury found that there was such an agreement, and they therefore found a verdict for the defendant. Hunt then moved for a new trial, but that was denied, on the ground that the agreement was a conclusive defense to the action. And the court expressly declined to pass upon the question, whether the judgment would be void, or merely erroneous, in case an action was discontinued by such a delay.

It is, however, well settled, that the justice would be protected in such a case, however erroneous the judgment may be. It is not absolutely void. *Ante*, 16, 20. Whenever the justice fails to appear at the time and place mentioned for the return of process, or within one hour thereafter, and the defendant has been present and waited for that length of time and then left, the justice should refuse to proceed in the action. *McCarty* v. *McPherson*, 11 Johns., 407. But if the defendant is still present, although

more than an hour has elapsed, the justice may then proceed to call the cause, and the parties will be bound to appear, even if it is an hour and a half after the proper hour. *Cornell* v. *Bennett*, 11 Barb., 657.

There is an other class of cases in which the justice is not absent from the place mentioned for the return of the process, but he is officially engaged at the time. The proper course for the justice in that case will be, to call the cause at the proper time, and then postpone further proceedings in it until his previous engagements are disposed of. By pursuing such a course there will not be any room for misunderstanding, and neither party will have any advantage over the other. The justice must, however, proceed with the cause at the earliest possible moment, and if he does so, his proceedings will be entirely regular. *Myer* v. *Fisher*, 15 Johns., 504; *Wilcox* v. *Clement*, 4 Denio, 160; *Hunt* v. *Wickwire*, 10 Wend., 103, language of SAVAGE, Ch. J.

If the justice is absent on the return day of process, or upon the adjourned day, the parties may still try the cause if they choose, either by an express agreement, or by proceeding to trial without objection. *Weeks* v. *Lyon*, 18 Barb., 530; *Seymour* v. *Bradfield*, 35 Barb., 49; *Nellis* v. *McCairn*, Id., 115. And such trial may be on any subsequent day. I.b; *Stoddard* v. *Holmes*, 1 Cow., 245. But the agreement to try the cause in that manner will not bind any one but those who are parties to it. And if there are several defendants, and one of them proceeds to trial, the proceedings will be regular as to him, but not as to those defendants who did not agree to the arrangement, and who did not appear at the trial. *Stoddard* v. *Holmes*, 1 Cow., 245.

If the defendant insists upon specified conditions before he will consent to try the cause, the conditions must be complied with, or the defendant is not bound to try it; and if the plaintiff proceeds with the cause in the defendant's absence, and without performing such conditions, any judgment which he may recover will be reversed. *Weeks* v. *Lyon*, 18 Barb., 530.

Non-appearance of plaintiff.] If the plaintiff fails to appear on the return day of process, or at any adjourned day, at the time mentioned for that purpose, or within one hour thereafter, the justice must dismiss the action and render a judgment of nonsuit, with costs. Vol. I, 55, § 110; *Morris* v. *Bleakley*, 1 Hilt., 90. And in one case, *Wilcox* v. *Clement*, 4 Denio, 160, the plaintiff did not appear within such time, but the defendant was present, and insisted that the justice should call the cause and nonsuit the plaintiff. The justice refused to do so, but informed the defendant that he would call the cause within five minutes of such time; the defendant objected to this and left the justice's office. After he left, and within five minutes of the proper time for calling the cause, the plaintiff appeared and proceeded with the cause in the absence of the defendant, and obtained a judgment against him. The supreme court reversed this judgment, and held that a justice had no authority to compel the defendant

to wait five minutes for the appearance of the plaintiff. But, if the plaintiff is near the office, and is seen to be approaching it, for the purpose of appearing in the action, the justice may refuse to call the cause and nonsuit the plaintiff. The defendant will be bound, in such a case, to wait until the plaintiff arrives, if that is within a few minutes. And if the justice informs the defendant that he will call the cause as soon as the plaintiff can reach the office, the defendant will be bound to wait so long or lose his defense if he leaves the court. *Barber* v. *Parker*, 11 Wend., 51. In an other case, *Cornell* v. *Bennett*, 11 Barb., 657, the summons was returnable at one o'clock in the afternoon, but the justice did not appear until half-past three. The defendant was still present in the justice's office, and the justice then called the cause, but the defendant refused to answer. The cause was then tried, and the plaintiff had a judgment. The defendant was called as a witness on the part of the plaintiff on this trial. This judgment was affirmed by the supreme court, on the ground that the defendant had willfully abandoned the suit.

The same rule would be applicable if the plaintiff failed to appear, and the defendant remained until he did appear, and then refused to make any defense.

When the defendant has been arrested upon a warrant, he may be detained in custody twelve hours from the time that he is brought before the justice. Vol. I, 40, § 23, and *ante*, 118. But if the plaintiff does not appear within that time and commence the trial, the defendant is entitled to have the action dismissed, and he himself to be discharged from custody. Vol. I, 40, § 23, and *ante*, 118, 119.

Non-appearance of defendant.] The omission of an appearance by the justice, or by the plaintiff, will generally be a mere question of costs, and the plaintiff may commence an other action. But if a defendant fails to appear in proper season, there may be a final judgment against him, which will be a bar to any further litigation of the same matter, and it may also deprive him of the advantage of a set-off. It is, therefore, of much importance to a defendant to know what his rights are, and what remedy he has in such cases.

There are some general rules which are now well established, and those rules will be stated without giving the cases at length as is sometimes done.

1. If the defendant appears at the return day of the process at the time specified, or within one hour of that time, that is sufficient. Vol. I, 44, § 44.

2. If the defendant appears on the return day of the process, and the justice and the plaintiff are still present in court, the defendant may interpose his answer or defense as a matter of right, even if the plaintiff had previously put in his complaint, and the cause had been adjourned to a subsequent day for trial, and for the purpose of allowing the plaintiff an opportunity of

getting his witnesses. *Pickert* v. *Dexter*, 12 Wend., 150; *Lowther* v. *Crummie*, 8 Cow., 87.

3. If the defendant appears on the return day of the process, but not at the time mentioned, nor within an hour of it, he may still interpose his defense, if the plaintiff is proceeding with the trial on that day, and such trial is then progressing. The plaintiff must be supposed to have been ready for trial, or he would not have proceeded with it, and he has no reason for depriving the defendant of a defense upon the return day. The justice may, however, receive the answer of the defendant, and then adjourn the cause on motion of either party, in the same manner as though the trial had not been commenced. A refusal to receive such defense, or to adjourn the cause in such a case will be a ground for reversing the judgment. *Sweet* v. *Coon*, 15 Johns., 86; *Atwood* v. *Austin*, 16 Johns., 180; *Lowther* v. *Crummie*, 8 Cow., 87; *Pickert* v. *Dexter*, 12 Wend., 150.

Neither party is supposed to be prepared to try a litigated cause on the return day of the process. For, until the pleadings are put in and issue joined, neither party can know what the other will claim, and therefore, neither can be ready with such evidence as he may need.

The plaintiff may, perhaps, be ready to try the cause on the return day if no defense is interposed. But he may be totally unprepared to meet the defense set up if one is interposed. The plaintiff is, therefore, entitled to an adjournment if that is necessary. On the other hand, if the defendant appears at any time on the return day before the cause is adjourned, and before the plaintiff has left the office of the justice, he ought to be allowed to defend. The plaintiff does not lose any rights in such a case, and to deprive a defendant of his defense in such a case, would be gross injustice.

For that reason, the justice ought, in fairness to both parties, to permit an issue to be joined precisely as though both parties had been there in time. And the cause ought then to be adjourned on motion of either party just as is done in ordinary cases.

4. If the defendant fails to appear at all on the return day of the process, but he does appear on the day to which the cause has been adjourned for the convenience of the plaintiff, to enable him to prove his case, the defendant cannot then claim to interpose a defense as a matter of right, and if the justice refuses to permit him to defend the action, such refusal will not be error. *Sammis* v. *Brice*, 4 Denio, 576; *Jenkins* v. *Brown*, 21 Wend., 454; *Snell* v. *Loucks*, 11 Johns., 69. But the defendant will not be remediless, even if the justice should refuse to permit such defense, provided the defendant is able to make a satisfactory excuse for his default, and to show that he has a defense to the action upon the merits; for, in such a case, the county court is authorized to set aside the judgment of the justice and order a new trial. Vol. I, 30; Code, § 366.

5. If the defendant fails to appear on the return day of the process, but he appears on the adjourned day, the justice may, in his discretion, permit a defendant to then interpose a defense. *Sammis* v. *Brice*, 4 Denio, 576; *Jenkins* v. *Brown*, 21 Wend., 454; *Mead* v. *Darragh*, 1 Hilt., 396. And if the defendant by affidavit, or upon being sworn by the justice, shows a satisfactory reason for not appearing on the return day, the justice ought to receive his defense. But the justice may, and he ought, as a matter of justice to the plaintiff, to allow the defense upon such terms as will be just to both parties.

If an adjournment of the cause becomes necessary to the plaintiff in consequence of permitting such defense, the defendant ought to be required to consent to such adjournment, and to pay to the plaintiff such a sum as will pay his witnesses, and the other necessary costs, charges and expenses of the cause down to the time of putting in such defense. A justice should endeavor to so exercise his discretion as to advance the cause of justice, and to secure the full and just rights of both parties.

6. If the defendant did not appear on the return day of the process, nor on the adjourned day, until after a witness has been sworn and examined on the part of the plaintiff, it seems that he will be too late even if the justice is disposed to permit the defense. *Montfort* v. *Hughes*, 3 E. D. Smith, 591, 593; *Mead* v. *Darragh*, 1 Hilt., 396.

7. The defendant will clearly be too late if he does not appear until after judgment has been rendered, whether such appearance is on the return day or on the adjourned day. After judgment is rendered, the justice has no legal power to vacate it and permit a defense. That would be granting a new trial, a power which is not delegated to justices of the peace. *Alburtis* v. *McCready*, 2 E. D. Smith, 39; *Harden* v. *Woodside*, 2 E. D. Smith, 37; *People* v. *Delaware, &c.*, 18 Wend., 558; *Dauchy* v. *Brown*, 41 Barb., 555.

How the parties are to appear.] Any *plaintiff* in a suit before a justice, except persons under twenty-one years of age, may appear and conduct his suit either in person or by attorney. Vol. I, 43, § 37.

Every *defendant* in a suit, except persons under twenty-one years of age, may appear and defend the same in person or by attorney; but where a warrant shall have been served on a defendant and returned, no further proceedings shall be had against him until he shall have personally appeared in court. Vol. I, 43, § 39.

When the defendant has been arrested on a warrant, he must appear personally before the justice; and if he appears by attorney and not in person, any judgment which is rendered against him will be entirely void. *Colvin* v. *Luther*, 9 Cow., 61, and see *ante*, 119. The manner in which infants must appear will be discussed hereafter. Corporations cannot appear personally, and they must, therefore, appear by attorney. It is not

necessary that an attorney who appears for a corporation in a justice's court, should be appointed under the corporate seal. He may be appointed for that purpose as any other agent is appointed by a corporation. *Osborn* v. *Bank of U. S.*, 9 Wheat., 738; *American Ins. Co.* v. *Oakley*, 9 Paige, 497, 501; *Murray* v. *Vanderbilt*, 39 Barb., 141. Any officer of a corporation, such as president, secretary, treasurer or a director, may appear for it without any particular appointment for that purpose. *Ib.; Oakley* v. *Working Men's, &c., Society*, 2 Hilt., 487; *Perkins* v. *Washington Ins. Co.*, 4 Cow., 645; *Bank of Lyons* v. *Demmon*, Hill & Denio, Supp., 398. Such officer may appear in all cases whether the corporation is plaintiff or defendant. All the proof of authority that is necessary, will be for the officer so appearing to swear that he is such officer of the corporation, and the law then declares that he is authorized to appear for such corporation. This is evident from the fact that a process for commencing an action against a corporation may be served upon any such officer. *Ante*, 69 to 73. And the rule may be extended so far as to allow any person to appear for such corporation, if he is the officer or agent upon whom the process was served for commencing the action. *Ante*, 69 to 73.

Idiots, lunatics, and all other persons who are *non compos mentis*, if they are of full age, must sue and be sued in their own names, and they must appear in person. *Lane* v. *Schermerhorn*, 1 Hill, 97; *McKillip* v. *McKillip*, 8 Barb., 552. But if the supreme court has appointed a receiver, or a committee to take charge of the *estate* of a lunatic, habitual drunkard, &c., then there are cases in which the action may be brought in their names instead of that of the lunatic, &c. 3 R. S., 135, § 11, 5th ed.; Laws 1845, ch. 112, § 2; and see "Parties to Action," &c. The committee of a lunatic, or any competent person, may be appointed by the justice to attend to the proceedings in the action, or any proper person may assist such party, if no committee or receiver has been properly appointed. *Faulkner* v. *McClure*, 18 Johns., 134.

A married woman need not, in any case, prosecute or defend an action by guardian or next friend. Code, § 114; Vol. I, 657–667. But if a married woman is sole plaintiff and is an infant, she must have a next friend as much as other infants who are plaintiffs. She may, if of full age, appoint an attorney, in the same manner that any other party may do so, whether she is plaintiff or defendant. If husband and wife are joined as plaintiffs or defendants, he may appear for both, or he may employ an attorney for both.

If the plaintiff does not appear at the return day, or at an adjourned day, the justice must dismiss the action, and if an issue has been joined in the action upon matters of account, and the defendant has interposed a set-off, and the trial has been commenced, and is then adjourned to a future day by consent of parties, if the plaintiff fails to appear on that day the action must

be dismissed. The justice has no authority to take the defendant's evidence of a set-off in such a case, and render a judgment in favor of such defendant. If he does so the judgment will be reversed. *Norris* v. *Bleakley*, 1 Hilt., 90; *S. C.*, 3 Abb., 107.

A warrant was issued by a justice of the peace, and a return was made by the constable, that he had arrested the defendants and had them in custody, the plaintiff did not appear before the justice, nor any one in his behalf. The defendants had given a written request to authorize the entry of a judgment against them, and they had sent this request to the justice. The justice entered a judgment against the defendants upon this request, but the judgment was reversed because the plaintiff was not present, and the action therefore discontinued. *Sprague* v. *Shed*, 9 Johns., 140.

Again, if the trial of an action has commenced, and it is adjourned for a short time for the purpose of permitting a defendant time to procure evidence of a set-off, if the plaintiff does not appear when the trial is resumed, the justice must render a judgment of discontinuance, and if he renders a judgment in favor of the defendant for such set-off, or for the balance between the parties, the judgment will be reversed. *Green* v. *Angel*, 13 Johns., 469.

Appearance by attorney.] The provisions of the statute as to the appearance of parties have been given in full. Vol. I, 43, 44, §§ 37 to 45. All persons of full age, and all corporations may appear by attorney in a justice's court. The office of *attorney*, in a professional sense of the term, is not known in justices' courts. *Bailey* v. *Delaplaine*, 1 Sandf., 11, 13. But, although there are no attorneys at law in these courts in the sense that the term is used in reference to courts of record, there may be attorneys in fact, who are entirely competent, and who are authorized to represent the party who employs them as fully as though he were present in person. *Hughes* v. *Mulvey*, 1 Sandf., 95.

A party may employ an attorney of the supreme court to attend to his cause, or he may employ any other person with a single exception. Vol. I, 44, § 42. The statute declares that the constable who served the original process for commencing the action, or the jury process, or the law partner or clerk of the justice before whom the action is brought, shall not appear and advocate the cause at the trial. Id., 44, § 42. But he may act as attorney for either party at any other stage or proceeding in the cause. *Ib.*

It has been held, *Knight* v. *Odell*, 18 How., 279, that, if an attorney of the supreme court or any other person is deputed by the justice to serve the process by which an action is commenced, the person so deputed will be prohibited from acting as advocate or counsel at the trial in the same manner that a constable is prohibited. To permit such a deputed person to appear and advocate the cause on the trial, is an error for which the judgment will be reversed on an appeal. *Wilkinson* v. *Vorce*, 41 Barb., 370. But such appearance will not deprive the justice of

jurisdiction in such a manner as to render his judgment void. *Ib.* By a legal commencement of the action, the justice acquired jurisdiction of the person of the defendant, and although his subsequent acts may render his judgment erroneous, and therefore reversible on an appeal, it will not be void, and will be sufficient to justify the issuing of an execution upon the judgment, and its collection by a sale of the defendant's property. *Ib.;* and see *ante,* 16.

The person so serving the process is not a constable, but he is subject to the same obligations. Vol. I, 72, § 197. And the court held, in the case just cited, that it included the same disabilities. Any person so deputed, or any constable who served the process, may appear and put in the plaintiff's complaint or the defendant's answer, and join issue in the action; but he cannot legally appear at the trial and act as attorney for the plaintiff, by merely proving his demand when the defendant does not appear.

To appear and act as attorney in thus taking the evidence, is advocating the cause at the trial within the meaning of the statute. *Ford* v. *Smith,* 11 Wend., 73; *Knight* v. *Odell,* 18 How., 279. Any constable or deputed person who violates this statute, will be liable to be indicted for a misdemeanor. 3 R. S., 980, § 54, 5th ed. The party who employs such constable or deputed person to act as counsel at the trial, cannot assign such act as a ground of reversal of the judgment, because the law does not permit any person to take any advantage from his own wrong. *Smith* v. *Goodrich,* 5 Johns., 353.

The general statute, Vol. I, 79, § 13, which forbids a partner or a clerk of a judge to practice before him as attorney, solicitor or counsel, does not apply to a justice's court; and therefore, that statute would not be a ground for reversing a judgment, merely because a partner of such justice acted as counsel for one of the parties in an action tried before him. *Fox* v. *Jackson,* 8 Barb., 355. But there is an express statute which now prohibits any clerk or law partner of a justice from appearing and advocating the cause at the trial. Vol. I, 44, § 42. To permit such person to appear now, would be an error for which the judgment would be reversed.

It is irregular for one attorney to appear for both parties, and where the defendant did not appear, and the attorney for the plaintiff put in an answer for the defendant, without making proof of his authority, a judgment against the defendant was reversed. *Sherwood* v. *Saratoga, &c., R. R. Co.,* 15 Barb., 650. A mere verbal request is a sufficient authority to appear and act as attorney for a party. *Murray* v. *House,* 11 Johns., 464; *Gaul* v. *Groat,* 1 Cow., 113; *Tullock* v. *Cunningham,* 1 Cow., 256; *Pixley* v. *Butts,* 2 Cow., 421. But a mere verbal authority to appear is not sufficient to authorize such attorney to release the interest of a witness. *Murray* v. *House,* 11 Johns., 464. The attorney is a competent witness to prove his authority. *Tullock* v. *Cunningham,*

1 Cow., 256; *Gaul* v. *Groat*, 1 Cow., 113; *Caniff* v. *Myers*, 15 Johns., 246.

The authority to appear may be contained in a letter written to the attorney. In one case, *Bush* v. *Miller*, 13 Barb., 481, the authority of the attorney for the plaintiff to appear was denied. He was sworn and testified that some time previously he had received a letter through the mail, which was dated and post-marked, Fairfax, Vermont; that it purported to come from the plaintiff and to be signed by him, and to have reference to the subject matter of this suit; that since that time he had sent two or three letters in regard to the same business, directed to the plaintiff at Fairfax, Vt., to each of which he had received answers by due course of mail, all from the same individual, dated at the same place, and all in the same handwriting, and that these letters from the plaintiff contained a general authority to take such steps, legal or otherwise, as in the opinion of the witness might be deemed advisable, for the purpose of recovering the carpet or the value of it, and that personally he had no acquaintance with the plaintiff or his handwriting, except as acquired by the correspondence of which he had spoken. It was held that the authority of the attorney was sufficiently proved. The letters were not called for, nor was any objection taken to proving their contents by parol. If the defendant had required the production of the letters, or if he had objected to parol proof of their contents, it would have been necessary for the plaintiff to have produced them, or to account for their non-production. Where the power of attorney is in writing and the attorney is the subscribing witness, he is competent to prove his authority. *Caniff* v. *Myers*, 15 Johns., 246; Code, § 398; Vol. I, 34.

The justice ought always to require proof of authority when the party himself does not appear, and any other person offers to appear as his attorney. When there is an appearance upon but one side, the justice is expressly required by the statute to require proof of authority, if the appearance of such party is by attorney. Vol. I, 44, § 43.

If one party appears in person, and the other appears by attorney, the party who appears in person may admit the authority of the attorney on the opposite side of the case, and in that case it is not necessary to swear such attorney as to his authority. Vol. I, 44, § 43. But, even in that case, it is proper to swear the person who offers to appear as attorney, since the absent party would not be bound by the action of one who assumed to act as his attorney, if he really had no authority for that purpose. *Sherwood* v. *Saratoga, &c., R. R. Co.*, 15 Barb., 650, 652; and see *Armstrong* v. *Craig*, 18 Barb., 387.

In one case, *Ackerman* v. *Finch*, 15 Wend., 652, both parties appeared by attorney, and neither of the attorneys objected to the authority of the other, and this was held to be sufficient. But, in that case, the plaintiff's attorney had sworn out a short summons, and he also had the note upon which the action was

brought. It may be said, therefore, that his authority to appear was proved, and if so, he might waive the swearing of the opposite attorney.

The justice has no right to permit a person to appear as attorney for an other, on the ground that he knows that the attorney has been employed by such party to appear. In one case, *Beaver* v. *Van Every*, 2 Cow., 429, the plaintiff was sick, and had sent for the justice, the day before the suit, and requested him to permit one Heermance to appear as his attorney. The justice accordingly admitted him without proof, but the judgment in favor of the plaintiff was reversed, upon the ground that the justice had no right to decide that question upon his own knowledge. And see *Rosekrans* v. *Van Antwerp*, 4 Johns., 228.

A justice has no right to permit the appearance of an attorney for the plaintiff, on proof which is made in the absence of the defendant, and before the hour for calling the suit. *Fanning* v. *Trowbridge*, 5 Hill, 428. If an attorney swears to his authority to appear at the time of joining issue, he cannot be required to swear to his authority to appear in the subsequent proceedings in the action. And if either party wishes proof of the authority of an attorney to appear for the opposite side, such proof must be required at the time of appearance in the action. *Treadwell* v. *Bruder*, 3 E. D. Smith, 597.

Where, on the joining of the issue in an action before a justice of the peace, a person appeared in behalf of one of the parties without objection and without producing any authority, but on the trial of the cause, such party appeared in person; it was held that such appearance by the party was evidence of the authority of the person who joined issue to appear for him. *Underhill* v. *Taylor*, 2 Barb., 348; and *Andrews* v. *Harrington*, 19 Barb., 343; but see *Fanning* v. *Trowbridge*, 5 Hill, 428.

In an action brought by two overseers of the poor against a defendant to recover a penalty, the attorney for the plaintiffs swore that he was authorized by one of the overseers to answer in the suit. It was proved on the trial that the plaintiffs were such overseers, and the court held that the authority was sufficiently proved. *Andrews* v. *Harrington*, 19 Barb., 343.

The law partner of one who is the official attorney of a municipal corporation, is not entitled upon proof of that fact, to appear as attorney for the corporation in a justice's court. *Wilcox* v. *Clement*, 4 Denio, 160.

The defendant's wife is not as such authorized to appear for him in a suit before a justice, but where she appears and pleads, employs counsel, amends the pleadings and brings the defendant's children as witnesses at the trial, the justice is warranted in inferring authority. *Hughes* v. *Mulvey*, 1 Sandf., 92.

When a father appears as attorney for his son who is a defendant, slight proof of authority is sufficient. In such a case, where it was proved that the defendant said to his father the night before the trial that he must be there, when he was speaking of

the suit; it was held to be enough, although nothing was said about the absence of the defendant at that time, nor that his father was to appear for him. *Gaul* v. *Groat*, 1 Cow., 113.

It is not generally the case, that the attorney is appointed for any other purpose than that of attending to the joining of issue and the trial of the action. But there is occasionally a case in which the attorney has full power to settle and compromise the matters and demands or claims in suit. In such cases, it is better to furnish the person so acting, with a power of attorney, for it will show a clear and specific authority to do the acts done, and the opposite party will have satisfactory evidence that the attorney has proper authority to act in relation to the demands. The statute authorizes such power of attorney, and prescribes what shall be sufficient proof of its execution. Vol. I, 74, §§ 210, 211.

If the power of attorney is properly acknowledged, no other proof of its execution is necessary. If it is not acknowledged, the subscribing witness may prove its execution, and if there is no subscribing witness, it may be proved by any person who can prove the handwriting of the person executing such power of attorney.

When the attorney resides at a distance from the person who appoints him, a power of attorney is sometimes very convenient. And it ought to be properly acknowledged in such a case, as it will save trouble and prevent any question as to the authority of such attorney to appear.

A power of attorney may be limited to the prosecution or defense of a single action, or it may be general and authorizing an appearance to prosecute or defend any or all actions. If it is desired to limit it to a single action, such action must be correctly and particularly described as to the name of the justice before whom it is brought, the names of the plaintiffs, the names of the defendants, and the like. There must be a correct description of the action, or the power of attorney will not be sufficient in those cases in which the particular action is described. But if the power of attorney is general, there cannot be any room for question as to its sufficiency, since it will relate to all actions in a justice's court, in which the person giving the power of attorney may happen to be a party.

General warrant to prosecute, &c.

Know all men by these presents, that I, Moses Spike, of the town of Broadalbin in the county of Fulton, N. Y., do hereby appoint John M. Carroll, Esq., my attorney, for me and in my name, to prosecute any action or actions to be commenced by him, or now depending before any justice of the peace in the State of New York, against any person or persons whomsoever, in my favor, either severally or jointly, with any other person or persons; and in his discretion, to do, execute, suffer and receive all acts, deeds and things which he shall deem necessary for the effectual prosecution thereof to judgment, execution and final collection or discharge, which I might or could do, execute, suffer or receive in my proper

person, and also in his discretion, to settle or compound any such action or actions. Witness my hand and seal, this 25th day of November 1864.

MOSES SPIKE. [L. S.]

Sealed and delivered }
in presence of }
WILLIAM KENNEDY.

General warrant to defend, &c.

Know all men, that I, Moses Spike, of Broadalbin, Fulton county, N. Y., do hereby appoint John M. Carroll, Esq., my attorney, for me and in my name, to defend any action or actions to be commenced or now depending against me, either severally or jointly, with any other person or persons, by or in behalf of any person or persons whomsoever, before any justice of the peace in the State of New York; and in his discretion to do, execute, suffer and receive all acts, deeds and things which he shall deem necessary for the effectual defense thereof, and the collection or discharge of any judgment or judgments which may be therein rendered in my favor, which I might or could do, execute, suffer or receive in proper person, and also in his discretion to settle or compound any such action or actions. Witness my hand and seal, this 25th day of November, 1864.

MOSES SPIKE. [L. S.]

Sealed and delivered }
in presence of }
WILLIAM KENNEDY.

Acknowledgment of power of attorney.

FULTON COUNTY, *ss:* On the 25th day of November, 1864, Moses Spike, to me known to be the individual who executed the within power of attorney, personally appeared before me, and acknowledged that he had made and executed the same. WILLIAM KENNEDY,

Justice of the Peace.

Stamps.] Every power of attorney for the prosecution or defense of an action, requires a revenue stamp of the denomination of fifty cents. See title Stamps and Power of Attorney.

Appearance by next friend or guardian.] Infants under the age of twenty-one years cannot legally appear in an action in person or by attorney, whether they are plaintiffs or defendants. They must appear by some proper adult person. Under the law as it stood before the Code, an infant plaintiff must have appeared by a *next friend*, and an infant defendant by a *guardian*. See the Statutes in full, Vol. I, 43, 44. It is supposed that the Code has abolished this distinction, and that infant parties, whether plaintiff or defendant, must now appear by guardian in all cases. Benedict's Treatise, 170, 4th ed.; New York Civil and Criminal Justice, 185, 186, 2d ed.; Cowen's Treatise, § 925, 4th ed. The mere change of name, as to next friend, by calling it guardian is of no consequence.

But if all the provisions of the Code, §§ 115 and 116, Vol. I, 20, are made applicable to justices' courts, considerable inconvenience must arise from the change. For an infant defendant would have twenty days in which to determine whether to appear at all. And since the longest time which can intervene

between the date and the return day of any process issued by a justice is but twelve days, the two provisions cannot both stand. If the defendant does not appear on the return day of the process, the plaintiff may proceed under the general statute relating to justices' courts and take judgment.

The sections of the Code which are supposed to have made this change in the law as to the time for the appearance of an infant defendant, are sections 115, 116, and 64, sub. 15, of the Code. Those sections when carefully read, will be found to do nothing more than to declare who must be parties to an action. Under the old law, an action must have been brought in the name of the party who had the legal interest, although an other party was, in equity, entitled to the demand. The Code changed this rule, by declaring that all actions must be brought in the name of the *real party in interest*, or the person *beneficially* interested in the demand. Vol. I, 19; Code, §§ 111, 112, 113. This applies to all persons, whether adults, infants, idiots, lunatics, corporations, &c. And it was intended that this rule should be uniform, so as to apply to all the courts in this state. The fifteenth subdivision of section 64 of the Code is very plain, if considered in this light. Because there is a very important distinction between who shall be parties to an action, and the other question, how those persons who are parties shall appear in an action.

The provisions of the Code as to who shall be parties, are applicable to justices' courts, but those provisions of it which relate to the manner of appearance do not apply. The person who appears in the action for an infant plaintiff may be called a guardian or a next friend. A misnomer will be of no consequence so long as a proper and responsible person is joined with such infant. No process can be legally issued in favor of an infant plaintiff until some proper person is appointed as next friend or guardian. The appointment by the justice may be verbal, but the consent of such next friend or guardian must be in writing and filed with the justice, and he will be liable for the costs if the action fails. Vol. I, 43, §§ 38, 41. The same rule applies when an action is commenced in favor of an infant plaintiff without process, and such next friend must be appointed before the cause is tried. Vol. I, 43, § 38. When the defendant is an infant, and the process is served and returned, a guardian must be appointed for him before any further steps are taken in the action. Vol. I, 43, § 40.

Such guardian may be appointed on motion of the defendant, and if he neglects or refuses to ask for such appointment, then the plaintiff may request the justice to appoint a guardian for such defendant. The appointment may be verbal, but the consent of the guardian ought to be in writing, signed by the guardian, and filed with the justice. A guardian for an infant defendant is not liable for the payment of either the costs or the judgment which may be rendered against such infant.

The object of appointing a person to represent either an infant plaintiff or an infant defendant is, that there may be some competent person to guard the rights of such infants, who are supposed to be legally incapable of doing so. And, besides that, it was intended that an infant plaintiff should be represented by some person who is responsible for the costs in case the action is not sustained. The appointment of a next friend or a guardian is something more than a mere formality, and therefore, the appointment or nomination of a fictitious person, as John Doe, is not sufficient. It must be a real person or the judgment will be erroneous. *Bullard* v. *Spoor*, 2 Cow., 430.

If an infant plaintiff appears in person, and not by next friend or guardian, and the defendant joins issue upon the merits, without objection to the manner in which the plaintiff appears, a judgment in favor of such infant cannot be reversed on an appeal by the defendant, because no next friend or guardian was appointed, nor can such infant plaintiff be nonsuited on the trial for such omission. If no objection is made until after issue joined, all such objection is waived. *Schermerhorn* v. *Jenkins*, 7 Johns., 373; *Treadwell* v. *Bruder*, 3 E. D. Smith, 597.

A guardian must in all cases be appointed for an infant defendant, and if the defendant neglects or refuses to apply for that purpose, the plaintiff ought to have one appointed. If it is not done, and a judgment is rendered against such defendant, he may reverse the judgment because of the error. *Mockey* v. *Grey*, 2 Johns., 192; *Alderman* v. *Tirrell*, 8 Johns., 418.

If there are several defendants, and the action is brought against them as joint debtors, it will not be a ground for reversing the judgment, because one of such defendants was an infant and no guardian was appointed for him. *Mason* v. *Denison*, 11 Wend., 612; *S. C.*, 15 Wend., 64.

The appearance by guardian or next friend is for the purpose of having some proper person appearing upon the record, since an infant cannot so appear. But either the infant or the next friend or guardian may employ an attorney or other counsel to conduct the proceedings. *People* v. *N. Y. Com. Pleas*, 11 Wend., 164. And such attorney may, after a proper appearance by next friend or guardian, take all the necessary steps in the action, whether the infant is present or not. When the action is once legally pending, either party may appear by attorney as in any other case, and infants are not exceptions to this rule, for when they have once legally appeared in the action, they may conduct the cause as all other parties may do.

A justice ought, in all cases, to be careful that no person is appointed as a next friend or a guardian for an infant, unless the person so appointed is capable of the position and is responsible for the costs, and for any injury which such infant may sustain by his neglect or willful misconduct. And no person ought to be appointed who has any interest or feelings adverse to such infant.

The mere fact that an action which is brought to recover for a

debt due an infant, is prosecuted by a next friend instead of a guardian, will not render a judgment against him upon the merits void. Such an error in a district court (or a justice's court) can only be corrected by an appeal. So long as the judgment remains unreversed, it is a bar to any other action for the same cause. *Wilkiming* v. *Schmale*, 1 Hilt., 263. But if such infant plaintiff appeals from the judgment, it will not be reversed, it will merely be revoked, and without giving him any costs of the appeal. *Maynard* v. *Downer*, 13 Wend., 575.

The consent which is signed by the person who appears for an infant plaintiff, ought to contain a promise to pay the costs if the action is unsuccessful. Such a promise, however, is not necessary to constitute a liability to costs in such a case, because the statute declares, that if he consents in writing to such appointment, he shall be liable for such costs. Vol. I, 43, § 38. And if such costs are not paid, an action will lie against him by the defendant to recover the amount of his costs So the justice may also recover his costs of such next friend.

Whenever a plaintiff is uncertain whether a defendant is an infant, and such infant does not apply for the appointment of a guardian, it will be the best course for the plaintiff to see that such guardian is appointed. It can do no harm in any case, and if the defendant is an infant it is indispensable to the validity of a judgment against him. If a defendant appears and pleads infancy as a defense to the action, and the jury or the justice find against him on that issue, he cannot reverse the judgment on an appeal by alleging infancy as error in fact, and that no guardian was appointed for him. The decision of that question against him in the court below, is conclusive upon an appeal, and he will be estopped from insisting that he is an infant. *Ingersoll* v. *Wilson*, 3 Johns., 437.

The manner of applying for the appointment of a next friend or a guardian, is by a mere verbal application to the justice. But if the provisions of the Code, § 116, were applicable, it would be necessary to apply by petition. As we have already seen, *ante*, 230, those provisions are not applicable. But a written application is a proper practice in all cases, without reference to the Code. And, for that reason, forms will be given for such applications. When an infant plaintiff applies, the application will not be entitled; but when an infant defendant applies, an action will be pending, and therefore, the application in such case should be properly entitled.

Application by infant plaintiff.

To David Kennedy, Esq., a justice of the peace, &c., of the town of Mayfield in the county of Fulton:

The undersigned, who is an infant of the age of nineteen years, hereby applies to you to issue a summons (or attachment, &c.) in his favor against Richard Roe; and he also applies to you to appoint Richard Hansen as a next friend or guardian for him before the issuing of said summons.

Dated November 28, 1864. SANFORD HANSEN.

Consent of next friend, &c.

FULTON COUNTY, *ss:* I hereby consent to be appointed as a next friend or guardian of Sanford Hansen, who is named as plaintiff in the action mentioned in the annexed application or petition, and I promise to pay all costs which may be recovered against him, or for which he is liable in said action before the said justice. Dated November 28, 1864.

RICHARD HANSEN.

Appointment by justice.

In pursuance of the annexed application and consent, I hereby appoint Richard Hansen as the next friend or guardian of said infant plaintiff, Sanford Hansen, in said action. Dated November 28, 1864.

DAVID KENNEDY, *Justice of the Peace.*

After the application, consent and appointment are completed, the justice will issue the summons. After the service and return of the process, the action will proceed in the ordinary manner. If the defendant is an infant, the first step in the action, after the service and return of the process, is to appoint a guardian for such defendant. This should be done before the plaintiff delivers his complaint in the action. If the defendant himself applies, the application may be in the following form:

Application for guardian.

JUSTICE'S COURT—FULTON COUNTY, *ss:*

John Doe
agst.
Richard Roe.
} DAVID KENNEDY, *Justice.*

To David Kennedy, Esq.:

The undersigned, who is an infant, of the age of twenty years, hereby applies to you for the appointment of James Roe, as a guardian for him in the action above entitled. Dated November 28, 1864.

RICHARD ROE.

Consent to act as guardian.

JUSTICE'S COURT—FULTON COUNTY, *ss:*

John Doe
agst.
Richard Roe.
} DAVID KENNEDY, *Justice.*

I hereby consent to be appointed as guardian for Richard Roe, in pursuance of the annexed application. JAMES ROE.

Dated November 28, 1864.

Appointment of guardian.

JUSTICE'S COURT—FULTON COUNTY, *ss:*

John Doe
agst.
Richard Roe.
} DAVID KENNEDY, *Justice.*

In pursuance of the annexed application and consent, I hereby appoint James Roe as a guardian for the defendant Richard Roe, in said action. Dated November 28, 1864.

DAVID KENNEDY, *Justice of the Peace.*

There is no need of drawing three separate papers, as has been done in the forms preceding. The application may be drawn at the top of a sheet of paper, then the consent may be drawn under it, and below that may be the appointment which is made by the justice, as follows:

Application, consent and appointment of next friend, &c.

To David Kennedy, Esq., a justice of the peace of Mayfield in Fulton county:

The undersigned, an infant of the age of nineteen years, hereby applies to you to issue a summons in his favor against Richard Roe, and he also applies to you to appoint Richard Hansen as a next friend or guardian for him, before the issuing of said summons. Dated November 28, 1864.

SANFORD HANSEN.

I hereby consent to be appointed as a next friend or guardian for Sanford Hansen, who is named as plaintiff in the above application, and I promise to pay all costs which may be recovered against him, or for which he shall be liable in said action. Dated November 28, 1864.

RICHARD HANSEN.

In pursuance of the above application and consent, I hereby appoint Richard Hansen as a next friend or guardian for said infant plaintiff, Sanford Hansen. Dated November 28, 1864.

DAVID KENNEDY, *Justice of the Peace.*

The same brief form may be adopted when a guardian is appointed for an infant defendant, by making the necessary change of names of parties, and by entitling the application in the action. The justice should note in his docket the appointment of a next friend or guardian. He ought also to preserve the application, consent and appointment. They must be filed and kept with the papers in the action, so as to be ready in case an action is brought upon the promise to pay costs, or so as to return copies of them upon an appeal if that should become necessary.

CHAPTER X.

PROCEEDINGS BEFORE PLEADING.

After process has been served upon a defendant, he may either appear in the action or he may refuse to do so. What an appearance is has been already explained. *Ante*, 217. There is one kind of process which may compel the defendant to be present before the justice, and that is a civil warrant. But the mere presence of the party in such a case is not an appearance, and if the defendant does not regularly appear in the action, he will not waive any objection which he might have taken if he had not been personally present. It is a voluntary and regular appearance alone that can be construed into a waiver of legal rights, if such waiver is to result from the act of appearing in the action. When the plaintiff's proceedings are so defective, that the justice has no jurisdiction over the person of the defendant, no objection need be made for the purpose of securing the rights of the defendant. Because if he refuses to appear in the action, and does not in any manner waive such objections, he may at any time

and in all places question the validity of the proceedings or of the consequent judgment if one is rendered in the action.

In relation to the subject matter of the action there can be no danger of waiving rights by an appearance, because it is well settled, that even express consent will not confer jurisdiction in such a case, *ante*, 16; and, as a necessary consequence, there could not be a jurisdiction which is merely implied from a waiver by taking steps in the action when an express agreement could not confer it. But when the justice has jurisdiction of the subject matter of the action, and the only defect in his jurisdiction relates exclusively to the process, either as to its form, or as to the preliminary proceedings to procure it, it is a rule of very extensive influence that the defendant may waive such defects, and thus render the jurisdiction over his person complete. And, in such cases, it is not necessary that the defendant should expressly agree to waive the errors or defects; for, if he voluntarily appears in the action, without any objection on account of such defects or errors, he will be deemed to have voluntarily waived them, and to have consented to consider the proceedings regular.

It is important, therefore, for a defendant before he appears in the action or takes any steps in it, to consider whether there are any irregularities on the part of the plaintiff, of which the defendant may avail himself. If there are such irregularities, it is the duty of the defendant to raise the objection at the earliest moment if he would avail himself of them, upon an appeal from any judgment which may be rendered against him in such action. The proper time to raise and urge all such objections is, on the first appearance of the parties before the justice on the return day of the process, and before any steps have been taken in the action. As soon as the cause is called by the justice, the defendant ought distinctly to state to the justice and to the opposite party, the objections which are relied upon by such defendant. And if the defect is one which is not amendable, the defendant ought, after specifying the particular defects or irregularities, to ask the justice to dismiss the action. If the justice overrules the motion, the defendant may except to such decision, and the question will then be upon the record, so that the legality of the decision can be subsequently reviewed if that becomes proper or important. The nature of the objection which may be urged has been suggested already. *Ante*, 2, 3, 4; see also Short Summons, *ante*, 77 to 80; Attachments, *ante*, 153; Warrants, *ante*, 89 to 92; Replevin, *ante*, 184.

Where there is a mere irregularity in the process, or in the manner of procuring it, a voluntary appearance by the defendant will waive it. *Ante*, 19. If the defendant voluntarily takes any steps in the action, without first objecting to such irregularities, he will waive them. And it will not make any difference to the rule that he was ignorant of them. If the process or the affidavits, or the bonds or securities which were furnished to the justice to authorize the process, are defective, the defendant may readily

know it, for he can call upon the justice to produce them, and the justice is bound to do so before the defendant is legally required to proceed a step in the action.

It is the duty of the justice to permit either party to examine all the process, affidavits, bonds, securities, pleadings or other proceedings in the action, which are filed with him. And he is bound to do so in season to permit either party to examine them in due time to take a legal objection to them if they are defective. A defendant, therefore, has a full opportunity to know of any defects in the plaintiff's process, affidavits, &c., and if he neglects or refuses to examine them or to object to them, it is entirely proper to regard his conduct as an agreement to waive such defects. Again, if the process has been irregularly or illegally served, the defendant has a full opportunity to know it, and he can make a proper objection on that ground, on the return day of such process. If he fails or declines to do so, he will waive the irregularity. There are other objections which may be taken on an adjourned day, but those will be discussed in a subsequent place, since it is not intended to notice any matters here, except such as relate to the return day of the process for commencing the action.

But there are some other important considerations which ought not to be overlooked, although they do not relate to defects in the process. If the justice is a material witness for the defendant, he must raise that question at the return day and in due season. The manner of doing this will be explained in a subsequent chapter. So, again, if the defendant desires to raise a question as to the title to lands, or he intends to rely upon a title to lands as his defense, he must take the proper steps to secure his rights, or he will waive them. This subject will also be discussed fully in a subsequent place.

In actions of replevin, there are some acts which the defendant must perform on the return day, if he would not waive them. See *ante*, 212. So, in other cases, a defendant may have a partial defense, although he cannot entirely defeat the plaintiff's action. And, in such a case, it may be desirable to make an offer of judgment so as to save future costs. See Offer of Judgment.

These general suggestions are sufficient to show a defendant that vigilance is indispensable to a full protection of his rights, and that if he desires to avail himself of any objection to the acts or omissions of the opposite party, such objection must be promptly and distinctly taken at the first available opportunity. The legal maxim is, *Vigilantibus, non dormientibus, jura subveniunt*; or in other words, the laws assist those who are vigilant, not those who sleep over their rights. Broom's Leg. Max., 692, original paging.

CHAPTER XI.

JUSTICE A MATERIAL WITNESS.

General principles.] In the administration of the laws, it is important that there should be purity and impartiality as well as every reasonable facility for the investigation of the questions to be tried. One of the first principles, therefore, is, that no person can act as a judge and a witness in the same action. If such acts were tolerated, it is evident that injustice must result, for it is not to be supposed that a person acting as judge would not attach quite as much importance to his own evidence as to that of any other witness. The statute requires the justice who tries the cause, to administer the oaths to the witnesses who are sworn. Vol. I, 53, § 94. No justice could administer an oath to himself, and thus act as court as well as witness. And it would not make any difference as to his right to be a witness, even if he were sworn by an other justice. If he should be so sworn, and then give evidence, it would be error, and any judgment which he might render would be reversed on appeal. *Perry* v. *Weyman*, 1 Johns., 520. The parties, however, may waive the objection, and if the justice is sworn by an other justice, and he then testifies as a witness without any objection, this will be deemed to be evidence given by consent, and no advantage can be taken of it on an appeal. *Cobb* v. *Curtiss*, 8 Johns., 470. But, where an objection is taken, it will be error for the justice to be thus sworn and give evidence. And, so far is this rule extended, that it will be illegal to swear one of three referees as a witness on a trial before them, if an objection is duly taken to that course. *Morss* v. *Morss*, 11 Barb., 510.

The law, however, has made ample provision for securing the evidence of a justice before whom a cause is pending. If a plaintiff sues before a justice who is a material and necessary witness for him, it is his own fault; and he will be compelled to lose the evidence of such justice if the cause is to be tried before him; although he may discontinue his action, and then commence it before some other justice, if he desires to do so, when he may have the advantage of such evidence.

This is, of course, optional with the plaintiff, and he will, therefore, be governed by his own feelings and judgment in the matter.

But a defendant would not enjoy a similar advantage were it not for the provisions of a statute. To prevent injustice, and to give a defendant an opportunity of securing the evidence of a justice when material and necessary, the statute has provided a mode by which such a result may be attained. The statute will be found in full in Vol. I, 55, § 109.

When to make the application.] Although the statute thus gives a defendant the privilege of procuring the justice as a witness, it does not leave it optional with him whether he will apply at an early day, or postpone it until the day of trial.

The statute is express and explicit that the application, if made at all, must be made *before the joining of issue* in the action. This rule does not require a defendant to make his application before the plaintiff puts in or files his complaint. And, in ordinary cases, the application ought not to be made until the complaint is put in or filed, because the defendant cannot before that time be certain what cause of action will be alleged against him, and, therefore, he cannot know until then whether the justice will be a material and necessary witness for him on the trial of the cause. But the defendant must not put in an answer before making his application, because, under the present system of pleadings in justice's courts, the putting in of an answer is *a joining of issue.* And when that has been done, it will be too late to make the application. The statute does not declare whether an issue of law, or an issue of fact is intended; and there may be an issue of law as well as an issue of fact, even in a justice's court. It is quite probable, however, that an issue of fact alone was intended, for it would be in such a case only that the evidence of the justice would be material. Upon a demurrer to the complaint there would be an issue of law, but no evidence is necessary for the determination of such an issue, because it is a mere question of law upon the record, and upon conceded facts. But since an issue of law is still a legal issue, it would not be prudent to demur to the complaint before making the application for a discontinuance of the action, so that the justice may be a witness for the defendant.

The statute does not require a defendant to wait until the complaint is put in or filed before he can make his application.

The only object in waiting for that event is to be certain that the justice may or will be a material and necessary witness for the defendant; and until the complaint is delivered, the defendant cannot be entirely certain what cause of action he will be required to defend himself against. But, as a general rule, the parties pretty generally know the nature of each other's claims, and they know, too, whether the justice will be a material witness for them on the trial. For this reason a defendant may sometimes prepare his affidavits even before the return day of the process; and there is nothing improper or illegal in this course, if the defendant prefers to adopt it. And besides that, there may be instances when it would be inconvenient if not impossible for the party to attend and make the affidavits on the return day, after the complaint has been put in or filed. A defendant might be sick, or he might be absent from the county, on the return day of the process, and he is not, therefore, to lose the benefit of the statute. It would be proper, although it would not be necessary to set forth, in the affidavits the reason why the usual practice was departed from. But the statute does not require this to be done, and therefore, it may be done or omitted, at the pleasure of the defendant. There is, however, one thing which is indispensable in such a case, and that is that the affidavit shall

state facts which relate to the actual cause of action set out in the complaint; or that the defense which can properly be interposed to it, is such that the justice will be a material witness for the defendant in disproving the facts alleged in the complaint, or in substantiating the matters interposed by way of defense. There is, therefore, some risk attending an application which is founded upon affidavits which were made before knowing what the complaint would be. If the affidavits happen to meet the case it will be well; if they do not, the defendant will have to bear the consequences of the experiment.

Who to make the application.] Where there is but a single defendant there will, of course, be no question as to the person who must make the application. But where there are several defendants it may well happen that some of the defendants need the justice as a witness, while he may may not be a material witness as to the others. And, whenever the judgment may be in favor of the plaintiffs against some of the defendants, while there may be, in the same action, a judgment in favor of the other defendants, there may then be a case in which the justice will be a material witness for a defendant, while he may not be either material or necessary for the other defendants. And since it is the policy of the law, to secure the rights of every defendant, it would be sufficient to prove that the justice is a material and necessary witness for any of the defendants. And on such proof being duly made, the justice ought to render judgment of discontinuance.

How to apply.] After the complaint has been put in, and the defendant ascertains that the justice is a material and necessary witness for him, he ought to state that fact to the justice before interposing any defense by answer or otherwise. But this mere statement is not alone sufficient. The statute requires that the proof furnished to the justice shall be *by affidavit.* And the essential part of every such affidavit is, that it shall contain a statement of such facts and circumstances as the law requires.

The statute requires that the affidavit shall show that the justice before whom the action is pending, is a *material* witness for the defendant, and that the defendant *cannot safely proceed* to the trial *without* the *testimony* of *such justice.* And it will not be sufficient to allege these facts in the affidavit, and then stop at that; because the statute further requires that the affidavit shall *set forth* the *particular facts* and *circumstances* which it is expected can be proved by the justice.

A strict compliance with the requirements of the statute will be necessary, and if it is disregarded, the justice may properly refuse the application.

The statute declares, that the facts and circumstances stated, must be such as to satisfy the justice that he is a material witness for the defendant, without whose testimony the defendant cannot safely proceed to the trial of the action. This language is not to be so construed as to give the justice an arbitrary dis-

cretion whether he will dismiss the action or not. It does not mean that the facts and circumstances must be such that *he* is convinced that he is a material witness.

It was intended that the facts should be such that an intelligent and an honest court or magistrate could decide judicially from the evidence, that he was a material witness, even though he believed that the statement was mistaken, or even false. In such a case, the justice cannot be governed by his own belief, or his own knowledge, if the affidavit is full, clear and precise as to the facts stated. The facts stated, however, must be such that the justice can judicially declare them to be sufficient to require a discontinuance of the action, and when that is done, he has no discretion in the matter; he is bound to dismiss the action. *Hopkins* v. *Cabrey*, 24 Wend. 264, is the leading case upon this subject. In that case, Hopkins sued Cabrey before a justice and claimed to recover money alleged to be in Cabrey's hands as a school district collector, which it was declared the defendant retained in his hands after retaining a sufficient sum to pay a school tax, for which the plaintiff's property had been sold by such defendant. After the complaint was put in, and before answer, the defendant moved for a discontinuance, which was denied on the ground that the affidavit was insufficient. The defendant then made a further affidavit, setting forth the facts which he expected to prove by the justice, which were: "That before the commencement of this suit, the plaintiff sued the defendant before the said justice for the same identical property for which he now claims the surplus money, and that judgment was passed on the same and entered in favor of the defendant against the plaintiff for costs; and also, that the plaintiff acknowledged, in the presence of the justice, that the defendant had tendered to him the overplus of the money before the commencement of the former suit, and that he had no claim for surplus moneys, and that the defendant did not know of any other person by whom he could prove those facts." The justice refused to dismiss the action, and ruled as follows: "I am not satisfied that I am or can be a material witness in behalf of the defendant in this cause, for I know nothing material between the said parties, except what is contained in the record of the former trial between these parties before me, which this defendant can at all times avail himself of upon the trial of this cause; and further, I have no recollection of ever having heard the plaintiff admit that the defendant had tendered him the overplus mentioned in the affidavit."

After this decision, the defendant joined issue, and judgment was rendered against him in favor of the plaintiff. This judgment was reversed by the county court, and the latter judgment affirmed by the supreme court. Among other things, the court said by Cowen, J.: "The justice had no right to interpose his private knowledge or recollection as an answer to the affidavit. Doing so would enable a justice to defeat the application, and at the same time put the point beyond the reach of review, even

on the facts which he may assume to know or to have forgotten. Here, it is true, he states them, but not under his oath as a witness. That the defendant had a right to require. Again, his specification was not satisfactory. He had no right to assume that the docket and other written proceedings would have been proof as full to the purpose as if accompanied with his oath. Oral proof is often necessary to show what was in fact heard and submitted under an issue which has been tried, in order to give it the desired effect upon a subsequent trial of the same matter. His want of recollection might also have been remedied by a recurrence to circumstances in the course of his examination as a witness."

There have been several other cases decided upon the question, since the decision last referred to; and the settled practice is to require a full statement of material facts or circumstances, or to hold the affidavits insufficient.

In *Young* v. *Scott*, 3 Hill, 32, the defendant's affidavit was as follows: "Andrew Scott, being sworn, says that the above named justice is a material witness for this deponent on the trial this cause, and without whose testimony he cannot safely proceed to the trial of said cause; that he expects to prove by said justice on the trial of the matters in difference between said parties, whenever the same shall be tried, that the matters in difference between said parties were submitted to said justice, Walter S. Dailey and Jeremiah Hackney, as arbitrators, selected by the said defendant, and Abram Cutler, who claimed the same demand for which this suit was brought, and submitted to them; and before the award was given in the matter, said Cutler revoked the agreement to submit to such arbitration; and defendant says that all the matters then submitted were afterwards settled with said Cutler by defendant, as defendant supposed at the time, and understood, and expects to prove, and that said Cutler was the owner of all said matters, or the agent of the above plaintiff."

The plaintiff requested the defendant to say in the affidavit that he expected to prove the matters stated in the last clause of the affidavit by the justice, but the defendant refused to do so, saying he would add nothing more. The justice denied the motion to dismiss the case. The plaintiff then declared. The defendant refused to plead, and left the court. The plaintiff had judgment, which the county court reversed; but the latter judgment was reversed in the supreme court, and the judgment of the justice affirmed. The court said, among other things, by BRONSON, J.: "When the affidavit is sufficient, the justice cannot refuse the discontinuance on the ground that he does not recollect the facts which the defendant expects to prove by him," citing *Hopkins* v. *Cabrey*, *ante*, 240; "but he clearly has a right to judge of the sufficiency of the affidavit. He must be 'satisfied,' acting judicially, that the ends of justice require a discontinuance of the action. From the 'facts and circumstances' set forth in this affidavit, I am unable th see that the justice was a material and necessary wit-

ness for the defendant. He expected to prove by the justice that there was a submission and arbitration between himself and one Cutler, in relation to the matter in controversy in the suit, and that Cutler revoked the submission before an award was made. I do not perceive that these facts, if proved, could have any legal influence on the action. And, although it seems that Cutler, as well as the plaintiff, claimed the demand, that would not make his acts evidence against the plaintiff. Indeed, if the plaintiff himself had made, and then revoked the submission, and there had been no award, it would not have affected his right to sue. The only thing of any importance is contained in the last clause of the affidavit, and that, at the most, only amounts to an allegation that the defendant had settled the matter with Cutler, who was either the owner of the demand or the agent of the plaintiff. But the defendant does not state that he expected to prove these facts by the justice; and when his attention was called to this defect, and he was requested to amend the affidavit, he refused to do so. This goes to show that the omission was not a mere clerical error, and I think the justice was right in refusing the discontinuance."

There are other difficulties in the case. So far as it relates to the arbitration, it appears, upon the face of the affidavit, that there are two other witnesses, Dailey and Hackney, who probably knew as much about the matter as the justice, and it is no where stated in the affidavit that the defendant was not able to prove his case by other witnesses as fully as by the justice. In *Hopkins* v. *Cabrey*, the defendant stated in his affidavit that he did not know of any other person by whom he could prove the facts on which he relied. I think the defendant must state enough to show that the justice is a *necessary* as well as a *material* witness. The justice is to be "satisfied that he is a material witness for the defendant, and that, without his testimony, the defendant cannot safely proceed to trial." To the same effect, see also *Murtha* v. *Walters*, 2 Sandf., 517; *Com. of Excise, &c.*, v. *Doherty*, 16 How., 46, in Saratoga county court.

In what actions.] The statute authorizes an application for a discontinuance of the action in every action which is cognizable before a justice of the peace, with a single exception. When the defendant has been arrested on a *civil warrant*, the statute excepts that case from the general rule provided by the statute, and therefore no *discontinuance* of the action can be granted on the ground that the justice is a material witness for the defendant. But the defendant is not remediless, nor need he be deprived of the evidence of the justice in such a case. If the justice is a material witness for the defendant, and he desires to have such justice as a witness, he should make an affidavit in the same manner and form that he would do in the case of a summons or attachment. And if the affidavit makes such a case as would require a discontinuance of the action in an ordinary case, the justice must refuse to hear the case, in which case it is the duty of the constable to take the defendant before the next justice of

the city or town, who is required by statute to take cognizance of the action, and to proceed on the warrant in the same manner as though he had issued it. Vol. I, 40, § 19; and see *ante*, 117, 118.

Form of affidavit.

JUSTICE'S COURT—FULTON COUNTY, *ss:*

Daniel Stewart
agst.
Henry Smith.

Henry Smith, being duly sworn, says that he is the defendant named in the above entitled action; that Peter W. Plantz, Esq., the justice before whom the said action is pending, is a material witness for this deponent in the said action, and that he cannot safely proceed to the trial thereof without the testimony of the said justice. And this deponent further says, that he expects to prove by the said justice, the following facts and circumstances, to wit: That before the commencement of this action, the said plaintiff sued this defendant before the said justice for the same identical property for which he now claims to recover the surplus money, and that judgment was passed in the same, and entered in favor of the defendant against the plaintiff for costs; and also, that the plaintiff acknowledged, in the presence of the said justice, that the defendant had tendered to him the overplus money before the commencement of the former action, and that he had no claim against the defendant for any surplus moneys. And deponent further says that he is unable to prove these said facts by any other person than the said justice.

HENRY SMITH.

Subscribed and sworn before me,
this 30th day of Nov., 1864,

PETER W. PLANTZ, *Justice of the Peace.*

The defendant need not swear positively that he cannot prove the same facts by any other person than the justice. It will be sufficient to state that the defendant cannot prove such facts by any other person, "according to the defendant's best knowledge, information and belief."

If any other person knows the same facts, but he cannot be procured as a witness, then state such facts as will show that.

If the affidavit is made before the return day of the process, it will be proper, and perhaps most prudent, to state the reasons therefor in the affidavit. In doing this, draw the affidavit in full as in the precedent already given, and then add the matter of excuse or explanation, according to the facts of the case, as in the following form:

"And this defendant further says that he is now sick, and confined to his room, and that he is, therefore, unable to appear in person before the said justice; *or*, that one of his children is dangerously ill, and that defendant cannot reasonably or safely leave said child for the purpose of appearing before the said justice, at the hour mentioned in the process issued in this action as the time of appearance; *or*, that the defendant has very urgent business which requires his personal attendance at New York on the day appointed for the return of the process in this action."

Whenever any such excuse is made, it will form a part of the

affidavit, and be signed and sworn to in the usual manner as in the form already given.

When such an affidavit is drawn and presented to the justice, he is bound to swear the defendant to its truth, if he requires the justice to do so. A refusal would be a misdemeanor, for which such justice would be indictable. *People* v. *Brooks*, 1 Denio, 457.

In such a case it is not material whether the affidavit is sufficient for the purpose intended or not; nor is it of any consequence that the justice acted in good faith, and in the belief that he was not bound to administer the oath. *Ib.* The law imposed that duty upon him, and it will not be any legal excuse that he was ignorant of his duty. *Ib.*

Judgment of discontinuance.] If the defendant's affidavit is sufficient, the statute requires the justice to render a judgment of discontinuance, but *without costs against either party.* Vol. I, 55, § 109. Such judgment ought to be entered in the justice's docket in such a manner as to show what disposition was made of the cause, and it may be in the following form:

"On the 30th day of November, 1864, the parties appeared, when the cause was duly called. The plaintiff's complaint was for the recovery of certain surplus moneys claimed to be in the hands of the defendant. The defendant did not put in any answer, but made an affidavit, in accordance with the statute, that I am a material and necessary witness for the defense. Such affidavit being sufficient, and satisfying me that I am a material witness, as stated in the affidavit on file, judgment of discontinuance is hereby rendered in said action, without costs against either party."

Each party is liable to the justice for the costs made by him respectively, but no execution can be issued to enforce their collection. The only remedy is by action in case of a refusal to pay the sum due.

Errors of justice, how corrected.] If the justice erroneously refuses to dismiss an action upon a proper and sufficient affidavit, on the defendant's motion, the error may be corrected by an appeal from any judgment which he may render in favor of the plaintiff. *Hopkins* v. *Cabrey*, 24 Wend., 264. But notwithstanding an erroneous decision of the justice, the defendant may waive the error, if he chooses, and go on to trial. In one case the defendant presented an affidavit of the materiality of the justice as a witness, but the justice stated that "he could give no evidence of any thing except what appeared on his minutes," and he denied the motion to dismiss the action. On the trial of the action the defendant participated, and he accepted the plaintiff's offer to allow the minutes of the justice on a former trial, to be read in evidence from the justice's memorandum thereof. He entered no exception to the denial of the motion, but rather appeared to acquiesce in the decision, and he himself also gave in evidence the minutes of the former trial. *Brown* v. *Brown*, 2 E. D. Smith, 154. The court did not decide this case upon this point, although they evidently considered the conduct nearly equivalent to a

waiver of the error. There ought, however, to be very clear evidence of a waiver of such an objection. And where an *express* exception has been taken to such an erroneous ruling of the justice, nothing less than an *express* waiver ought to deprive the defendant of his remedy on an appeal. *Walrod* v. *Bennett*, 6 Barb., 145; *Penfield* v. *Jacobs*, 21 Barb., 335; *Avery* v. *Slack*, 17 Wend., 85, 87. Whether a judgment would be merely erroneous, or whether it would be entirely void, if entered after an improper refusal to dismiss the action, is not decided in this state. But see *ante*, 15, 16, 20.

CHAPTER XII.

ANSWER OF TITLE TO LAND.

The law does not permit questions of title to real estate to be settled in justices' courts. And the subject, so far as it relates to jurisdiction, has already been sufficiently discussed. *Ante*, 29 to 36. There are, however, in some cases, some important matters of practice to be observed if the defendant would fully secure his rights. It is not enough that title to real estate may be in question, unless it is so presented as to deprive the justice of the right to proceed with the action. And this chapter will be devoted, exclusively, to an explanation of the practice upon this branch of the law.

In what actions title to land may be interposed.] The provisions of the statute have been elsewhere given in full, and it will always be proper to examine the statute carefully before deciding any question of this nature. Vol. I., 8, 9, §§ 55 to 62, inclusive. The statute gives the defendant a right to interpose title to land as a defense in *every action* which can be brought in a *justice's court*, provided the title to land really comes in question in such action. It may come in question when the plaintiff claims that the defendant has committed a trespass upon lands claimed by the plaintiff; and when the defendant insists, as a defense, that he himself is the true owner of the land, and that, therefore, the act done could not, in law, be a trespass. There are numerous other instances in which the title to land may be involved, besides that of an action of trespass to real estate; as for instance, when an action is brought for a taking, a detention or a conversion of personal property, and the title to the personal property, depends upon the ownership of the lands from which such personal property was procured.

When the defense must be pleaded.] This defense, when interposed, is intended to deprive the justice of jurisdiction, either of the entire action, or of some part of it, which is to be determined by the question whether the defense of title relates to the whole cause of action, or merely to a part of it. And for this reason the law requires a defendant to interpose this defense promptly, and at the first opportunity. The answer of title must be put in at the joining of issue; and if this is omitted, the plaintiff cannot insist upon a right to interpose it at any subsequent stage

of the action. There is nothing in the language or the spirit of the statute which favors the idea that an answer of title is proper at any time but that of the joining of issue in the cause. The law allows a defendant to set up title as a defense, either with or without other matters of defense. Vol. I, 8, § 55. At the *time of answering* he is required to give an undertaking for the purposes specified; and if he omits to furnish this he is *precluded* from setting up his title. Vol. I, 9, § 58. This rule is entirely consistent with the general principles of the law, which require parties to act promptly, and to take objections to jurisdiction or otherwise, at the earliest practicable moment. And, in this case, it would also be consistent with justice and the interests of the parties to enforce the rule. The defendant knows, or ought to know, whether his defense is founded upon the title to lands. If it is, he ought to plead it, and thus terminate the action before the justice, without unnecessary delay and expense. If he voluntarily joins issue, without making this defense, he must be prepared to try the issues which he has made, and upon which he intended to rely. The law gives him one fair opportunity to interpose any defense he chooses; and if he voluntarily waives that, he must abide the event, since the law will not assist him nor relieve him from the consequences of his own negligence or intentional omissions. *Quimby* v. *Hart*, 15 Johns., 304. But where an answer of title is interposed in due season, and a proper undertaking given, the defendant will be entitled to amend his answer, if defective, precisely as in any other case; and a refusal, by a justice, to permit such an amendment will be an error for which a judgment in favor of the plaintiff will be reversed on an appeal. *Smith* v. *Mitten*, 13 How., 326.

Who may interpose this defense.] The law declares, in general terms, that the defendant may interpose the defense. And if there were but one defendant, there could be no question as to what persons might set up the defense. But where there are several defendants, and a defense of title to land would be available to some of the defendants, while it would not be available to others, a different question is presented.

Suppose that the plaintiff claims certain lands, and he sues A. and B. for an action of trespass for entering upon it. Now, it may happen that A. is the true owner of the land and entitled to the possession, while B. may not have any title or right of possession. In that case, the title of A. is a perfect defense for him, even though B. has no title, and even though he may be a trespasser as against the plaintiff who might be in the actual possession. See Vol. I, 768, &c. In an action of that character, it is clear that justice would require that A. should be permitted to plead title, notwithstanding the fact that B. could not derive any advantage from that defense, because it would not be just to deprive one man of a full, legal and just defense, merely because some other person is not equally entitled to the advantages of the defense interposed. And if the action were trespass,

it is very clear indeed, that each defendant might set up any separate defense that he has, without any reference to any defense which the other defendants have. So in any other form of action, either defendant is permitted to avail himself of any defense which he has, even though it is limited to himself. And besides this, when there are several separate causes of action, the statute permits a defense of title as to some of them, and retains the action in the justice's court as to others. Vol. I, 9, § 62. It may, therefore, be laid down as a safe, a clear and a just rule, that any defendant may plead title for himself if he chooses, even though the other defendants omit or refuse to do so.

The defense of title to lands is not limited to those cases merely in which the defendant claims to be the owner. For the person sued may not claim any title whatever to the lands, and yet he may have a perfect defense to the action brought by the plaintiff. If the defendant acted as the agent or servant of the true owner of the land, and by his directions in doing the acts alleged as the cause of action, such defense will be as available as though the owner himself had been sued. And whenever the defense of title to land is a legal defense for any person, whether that title be in himself or in a third person, he may avail himself of it by answer. But it must not be inferred from what has been said, that the best possible title in the world, will, in all cases, and under all circumstances, constitute a legal defense. A person may be the actual owner of lands, and yet be liable to an action of trespass in favor of one who does not even claim to own them. The case of landlord and tenant will sufficiently illustrate this; for if a landlord commits a trespass upon lands in the lawful and peaceable psssession of a tenant during the continuance of his term, an action lies, and the ownership of the land will not be any defense whatever. Vol. I, 206 to 211, 768 to 771.

How to plead title.] In ordinary cases, the pleadings may be either written or oral, at the election of the party who puts them in. Vol. I, 10, § 64, sub. 2. But when the title to lands is interposed as a defense, it is required by the statute that the answer shall be in *writing*, and *signed* by the *defendant* pleading it, or by his *attorney*. Vol. I, 8, § 55. An oral answer would not be a compliance with the statute, and an omission to furnish such an answer as the statute requires, would be a waiver of the right to insist upon a discontinuance of the action. For it is only by a compliance with the terms of the statute that the justice can be required to dismiss the action, and he who neglects or refuses to perform the acts specified by the statute, is not in a condition to claim its advantages. *Randall* v. *Crandall*, 6 Hill, 342. If, however, a proper written signed answer is delivered to the justice, in due season, he must then countersign it and deliver it to the plaintiff, or to his attorney, when he appears by attorney, instead of in person. Vol. I, 8, § 55. But, if the answer be ever so legal in form, and put in at the proper time, this alone will not be suf-

ficient to require the justice to dismiss the action. Before a justice is bound to do that, the defendant must also furnish such an undertaking as the statute requires, and the undertaking must be in writing, and have at least one surety, who is to be approved by the justice.

The ordinary condition of the undertaking is, that the defendant will give a written admission of service of any summons and complaint, for the same cause of action, which may be deposited by the plaintiff with such justice, within twenty days after such discontinuance, and that the admission will be given within twenty days after such deposit. Vol. I, 8, § 56.

If the defendant was arrested in the action before the justice, the undertaking must contain a further condition, that the defendant will, at all times, render himself amenable to the process of the court during the pendency of the action, and to any such process as may be issued to enforce the judgment. *Ib.* The various forms applicable in these cases will be given at the end of this chapter.

If the defendant wishes to insist upon a discontinuance of the action, it is indispensable that he should furnish such an undertaking or bond as the statute requires. And if he merely answers orally that he is the owner of the land, or that title will come in question, but he does not furnish the proper bond or undertaking, he will waive any right to set up title on his own part at the trial, even though such answer was received at the joining of issue, without objection on the part of the plaintiff. *Randall* v. *Crandall*, 6 Hill, 342.

When the defendant desires to show title as a defense, he must set forth in his answer such facts as show that title will come in question on the trial, and he must also give a proper undertaking; if he omits both, or either of these requisites, the justice will have jurisdiction, and the defendant will be precluded at the trial from showing title as a defense. *Fredonia, &c., P. R.* v. *Wait,* 27 Barb., 214.

If the defendant answers in writing, as required by the statute, and he also gives the proper undertaking, the justice will be bound to dismiss the action. And if this is done, the plaintiff will then have to commence a new action for the same cause in the supreme court, if he desires to prosecute an action for that cause. And, besides that, he must commence such action in the supreme court within twenty days after the discontinuance of the action by the justice, or the sureties in the defendant's undertaking will be discharged from all liability. The plaintiff need only deposit a summons and complaint with the justice who dismissed the former action, in order to comply with the statute. He need not serve it on the defendant, because the defendant is required to give an admission of the service thereof within twenty days after such summons and complaint have been deposited with the justice. The plaintiff is not bound to give the defendant notice that such summons and complaint have been deposited with the

justice. It is the duty of the defendant to attend to that matter for himself, and to be careful that he gives the admission in due time, which is within *twenty days* after the deposit with the justice. The admission of service must be in writing, and it ought to be indorsed on the summons and complaint, and signed by the defendant, or by his duly authorized attorney.

Under the old practice, before the Code, the condition of the bond was, that the defendant would appear within twenty days after the return of process and put in special bail in the action, if the plaintiff commenced an action for the same cause, in the common pleas, within thirty days after such discontinuance by the justice. 2 R. S., 237, § 60, 1st ed. And under that statute it was held that the delivery of the writ to the sheriff, for service, was a sufficient commencement of an action to comply with the statute, and to render the defendant's sureties liable for a breach of the bond, even though the sheriff did not serve the writ. *Patterson* v. *Parker*, 2 Hill, 598. It was held that it was the duty of the defendant to appear within the time limited and put in special bail, whether the writ was served or not. *Ib. Persons* v. *Parker*, 3 Barb., 249, is to the same effect.

The present practice is entirely different, for the plaintiff's summons and complaint are to be deposited with the justice for the purpose of giving the defendant an opportunity of giving a written admission of service. The summons and complaint must be deposited with the justice within *twenty* days after the *discontinuance*, and the defendant must give the written admission within *twenty* days after the *deposit* of such papers with the justice. When the summons and complaint are deposited with the justice in accordance with the statute, the defendant must be careful to give a written admission of service within *twenty* days after such deposit. And if he omits to do so, and an action is brought by the plaintiff against the sureties upon the undertaking, the court has no power to relieve them. *Davis* v. *Jones*, 4 How., 340; *S. C.*, 3 Code Rep., 63. The plaintiff may, however, waive a literal compliance with the statute. And, therefore, if the defendant omits to give a *written admission* of the service of the summons and complaint within the *twenty* days prescribed for that purpose; yet, if such defendant does, within that time, put in an answer to the action in the supreme court, and the plaintiff accepts it without objection, and without such admission, this will be held to be a waiver of the objection and a substantial compliance with the statute. *Wiggins* v. *Tallmadge*, 7 How., 404.

The answer of title before the justice must be delivered to the plaintiff, but the statute does not declare what shall be done with the undertaking given by the defendant. And in the absence of authority upon the question, the proper course of the justice will be to retain it himself, as a part of the proceedings in the action, at least until a breach of its conditions. He will then be able to produce it for either party, if it is properly demanded. At all events, the justice ought to retain it until the expiration of forty

days from the dismissal of the action by him. For the plaintiff has *twenty* days in which to commence a new action in the *supreme court*, by depositing the summons and complaint with such justice. And the defendant then has *twenty* days in which to give a written admission of service. After a breach of the undertaking, by an omission of the defendant to give a written admission of service of the summons and complaint, there is no legal objection to a delivery of the undertaking to the plaintiff, for the purpose of bringing an action thereon, if he desires to do so. After a breach of the conditions of the undertaking, there is no good reason why the plaintiff should not have the instrument if he requires it, since he then has a subsisting right of action which is given by it, and of which it is the highest evidence.

The remarks already made have related chiefly, if not entirely to a case in which the entire action was discontinued by the justice. But where there are several separate causes of action, the answer of title may not be applicable to more than a portion of them, and in such a case, the justice, on receiving a proper answer and undertaking, is to dismiss so much of the action as is covered by the defense of title. But as to the residue of the action, he is to proceed in the usual manner. And it is especially important for the plaintiff to recollect that, if he commences a new action for the cause of action to which title has been pleaded, he must commence that action in the *supreme court*, for that is expressly required by the statute. The question of costs in the supreme court is provided for by statute. Code, § 61.

Action in supreme court.] In an action in the supreme court by the plaintiff, he will be restricted to the same cause of action for which he sued before the justice. Code, § 60. But the statute relates to the identity of the cause of action in the justice's court, and that sued for in the supreme court, and while the causes of action must be the same, the law does not require that the form of pleading shall be the same. *Wiggins* v. *Tallmadge*, 7 How., 404; *Jewett* v. *Jewett*, 6 How., 185. If the causes of action are identical, that will be sufficient, since the object of the law will be accomplished, which was to require a trial of the cause of action relied on in the court below in the first instance. *Ib.* No reply is necessary in an action in a justice's court, and yet a reply is not only proper but is necessary in an action in the supreme court. *Ib.* As to amendments, see *Houghtaling* v. *Houghtaling*, 5 Barb., 379.

In the action in the supreme court, both parties will be restricted to the same pleadings in substance, as those relied upon in the court below. If either party attempts to interpose a new ground of action or of defense in the action in the supreme court, the remedy is by motion to that court to compel the party to abide by his former pleading. If the plaintiff seeks to set up a new cause of action, the defendant may have such new cause of action struck out on motion. *Tuthill* v. *Clark*, 11 Wend., 642. And so if the defendant seeks to interpose a new or a different defense

from that offered and put in before the justice, the plaintiff may have it struck out on motion. *Ib.* If the defendant, while in the justice's court, interposes no answer but that of title, he will not be permitted to add a general denial in the supreme court. And if he does so, and the denial is not struck out on motion, still, on the trial of the action he will be confined to his answer of title, and if he fails to show title as alleged in the answer, a verdict will be directed for the plaintiff. *Brotherton* v. *Wright*, 15 Wend., 237, 240. It will be seen, therefore, that it is of the utmost importance to the parties, that they form their pleadings correctly in the first instance, for a good defense may be utterly unavailing from the want of due care in presenting it in a proper time and manner.

The rule which requires the parties to rely upon the same cause of action or defense, does not prohibit a defendant from abandoning in the supreme court, a part of the defense interposed before the justice. *Wiggins* v. *Tallmadge*, 7 How., 404. The defense is the same so far as it goes, and the abandonment of a part of the grounds cannot do the plaintiff any harm. *Ib.*

The test in relation to the pleadings is, whether they are the same in substance with those interposed in the court below. If they are, the object of the law is accomplished. *Ib.* And see *People* v. *Albany Com. Pleas*, 19 Wend., 123, in which it was held that if the complaint in the justice's court did not describe the close of the plaintiff with particularity, that might be done in the court above. If, however, he describes a different close or a new cause of action, that will be struck out on motion of the aggrieved party. *Ib.;* and see *Bennett* v. *Rathbun*, 17 Johns., 37.

The action which is commenced in the supreme court is, nevertheless, an action originally commenced in a justice's court. *Cook* v. *Nellis*, 4 E. P. Smith, 126; *Pugsley* v. *Kesselburgh*, 7 How., 402; *Wiggins* v. *Tallmadge*, Id., 404; *Brown* v. *Brown*, 6 How., 320. But now, under the amended Code, an appeal may be taken to the court of appeals without leave given by the supreme court at general term, when the action was commenced in the supreme court, after a discontinuance before a justice. Code, § 11, sub. 3.

Title on plaintiff's own showing.] It is important to bear in mind that the principal object of this statute was to deprive a justice of the power to try questions of title to real estate. And to accomplish this object, provision is made for pleading title, and thus removing the cause from the jurisdiction of the justice. Title may come in question in either of two ways: 1. By the showing of the plaintiff in making out his cause of action; and, 2, by the showing of the defendant by proving his defense. The law did not intend to permit either party thus to introduce the question of title for trial by the justice. And, having provided carefully for the rights of the defendant, by giving him a right to plead title, and on giving proper security to then deprive the justice of jurisdiction, the statute then proceeds to declare the consequences of an omission.

If title is not set up in the answer, and a proper undertaking given, the justice will have jurisdiction of the action, and the *defendant* will be precluded, in *his defense*, from drawing the title in question. Code, § 58. By this is clearly meant that the defendant shall not prove his title as a defense to the plaintiff's action. It does not mean that the defendant shall not raise a question of title upon the plaintiff's evidence. This is evident from the next section, Code, § 59, which expressly declares that the defendant may raise a question of title when it arises from the plaintiff's own showing. And this is the rule in those cases in which there is no pretense of an answer of title interposed. And the statute is *imperative* that, when the plaintiff's evidence shows title, and the defendant disputes the plaintiff's title, the justice *shall dismiss the action*, and render judgment against the plaintiff for costs, How to raise the question of title in such a case has been fully explained, *ante*, 29, 30, 34. There is one case in which it was held that the defendant was bound to plead title, or waive the right to object that title was in question, even on the plaintiff's own showing, if the complaint showed that the title to lands was in question. *Adams* v. *Rivers*, 11 Barb., 390. With great deference to the court which pronounced that judgment, it is submitted that the rule there applied has no foundation in the statute; but, on the contrary, is entirely opposed to the entire scope and spirit of the statute. The statute does not declare that the defendant must plead title in those cases in which the complaint shows that title to land will come in question. It merely requires the defendant to plead title when he himself relies upon his own title as a defense. And, what is entirely conclusive, is, that the next section expressly declares that when title is shown by the plaintiff, the defendant may dispute that title, and that the justice *shall* then dismiss the action. The recent cases expressly hold this view of the subject, and *Adams* v. *Rivers* cannot be regarded as of authority on that question. *Main* v. *Cooper*, 26 Barb., 468; *S. C.*, 11 E. P. Smith, 180.

Answer of title in the defendant.

JUSTICE'S COURT.

John Doe *agst.* Richard Roe.	PETER W. PLANTZ, *Justice*.

The defendant, Richard Roe, answers the complaint in this action, and alleges that the plaintiff ought not to have or maintain his action, because, at the time of the alleged wrongful trespass upon the lands mentioned and described in the complaint, the defendant was then and before that time, and ever since has been the lawful owner in fee of said lands, having a full and lawful right to do and perform all the said acts which are alleged by the plaintiff to be wrongs and trespasses upon his rights. And the defendant further alleges that he claims title to said lands, and is the true owner of the same. Wherefore, he demands judgment that this action be dismissed or discontinued by the said justice.

RICHARD ROE.

Answer of title in a third person.

[Same Title.]

The defendant, Richard Roe, answers the complaint in this action, and alleges that the plaintiff ought not to have or maintain an action against him, because the close mentioned and described in the complaint was, at the time of the alleged wrongful acts, the land, soil, and freehold of one James Denn, and not that of the plaintiff; that the said James Denn, at the time of the said wrongful acts, had full and lawful authority over the said lands as owner, with a legal right to the possession thereof; that this defendant did the alleged wrongful acts by the direction of the said James Denn as he lawfully might; that the said land, soil, and freehold was not the land or freehold of the plaintiff at the time of the alleged wrongful acts, nor was he then entitled to the possession thereof; and the defendant further alleges that the title to said lands was in the said James Denn, as aforesaid, and will come in question on the trial of this action. Wherefore, he demands judgment that this action be dismissed or discontinued by the said justice. RICHARD ROE.

The answer may be signed by the defendant in person or it may be done by attorney. After it is delivered to the justice he is required to countersign it and deliver it to the plaintiff. There is no precise form necessary for this purpose, though the following form may be adopted and indorsed on the complaint:

Countersigning by justice.

The within answer was delivered to me, at the joining of the issue in the within entitled action, on the 30th day of November, 1864, and I hereby countersign the same.

PETER W. PLANTZ, *Justice.*

Another form.

Countersigned this 30th day of November, 1864.

PETER W. PLANTZ, *Justice.*

As countersigning is merely intended to identify the answer, either form will be entirely sufficient for the purpose. Where there are several causes of action, and the defendant does not wish or intend to plead title to more than one of them, he should so modify his answer as to show clearly which cause of action is intended.

In every case the defendant ought to set up a general denial before answering title, if he wishes or intends to put the plaintiff to proof of his title in the action in the supreme court. By merely pleading title as an affirmative defense, without interposing a denial, the plaintiff's title will stand admitted and prevail unless the defendant can show title in himself. *Brotherton* v. *Wright*, 15 Wend., 237; and see also *Tuthill* v. *Clark*, 11 Wend., 642.

The defendant should set up as many defenses as he has besides the answer of title, so that a complete issue may be joined in the action. And where there are other causes of action besides those to which title has been pleaded, the issues may be joined and tried in the same manner as though no question of title had arisen in relation to those causes of action which the justice may have

dismissed on the answer of title. The statute requires an undertaking at the time of answering title. But a bond is clearly an undertaking, and, as in the former precedents a bond has been preferred, so a bond will be given here.

Form of bond on answer of title.

Know all men by these presents, that we, Richard Roe and Daniel Stewart, of the town of Johnstown in the county of Fulton, are held and firmly bound unto John Doe, of the same place, in the sum of two hundred dollars, to be paid to the said John Doe, or to his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we jointly and severally bind ourselves, our and each of our heirs, executors, and administrators, firmly by these presents. Sealed with our seals, and dated the 30th day of November, 1864.

Whereas, in an action before Peter W. Plantz, Esq., one of the justices of the peace of the town of Johnstown, in the county of Fulton wherein the above named John Doe is plaintiff, and the above bounden Richard Roe is defendant, the said Richard Roe has pleaded specially by answer that the title to lands will come in question in the said action.

Now, therefore, the condition of this obligation is such, that if the said plaintiff, John Doe, shall, within twenty days after the discontinuance of this action, deposit with the said justice, Peter W. Plantz, Esq., a summons and complaint in an action in the supreme court, for the same cause of action so discontinued, and relied on before the said justice, and the said defendant, Richard Roe, shall and does, within twenty days after such deposit as aforesaid, give a written admission of the service of said summons and complaint, then this obligation to be void, otherwise to remain in full force and virtue.

RICHARD ROE, [L. S.]
DANIEL STEWART, [L. S.]

Sealed and delivered in presence of
PETER W. PLANTZ.

There is sometimes an other condition necessary to be added to the one already mentioned. If the defendant was arrested in the action before the justice, then add the following condition:

Condition when defendant was arrested.

"And this bond is upon the further condition, that if the said defendant, Richard Roe, shall, and does at all times, render himself amenable to the process of the supreme court during the pendency of the action therein, and to such process as may be issued by that court to enforce the judgment therein," then, &c.

The surety in such a bond or undertaking must be approved by the justice, and may be in the following form:

Form of approval.

I approve of the within bond, and of the sufficiency of Daniel Stewart as the surety therein.

PETER W. PLANTZ, *Justice.*

Nov. 30, 1864.

The law does not require more than one surety, though two or more will do no harm. The liability of the surety is fixed at one hundred dollars. Code, § 56.

CHAPTER XIII.

OFFER OF JUDGMENT.

In what actions.] In every action in which the defendant cannot deny that the plaintiff is entitled to recover some amount, he may make an offer of judgment to the plaintiff for a specified sum with costs up to the time of such offer. Vol. I, 11, § 64, sub. 15. The defendant is thus allowed an opportunity of preventing a protracted or an expensive litigation. And, when a defendant is satisfied that there is a particular sum due to the plaintiff on a demand arising upon contract, or that such plaintiff is entitled to recover some amount of damages in an action for a tort, it will always be prudent to offer judgment for such sum as the plaintiff will probably recover. If such an offer is properly made the plaintiff will be compelled to accept it, or take the risk of paying all subsequent costs of the action, in case he does not recover a judgment for a greater amount than that offered. Code, § 64, sub. 15. And the sum recovered must be larger than that offered, exclusive of costs. *Ib.*

The costs in actions in justices' courts are not large when compared with those in actions in the supreme court, and yet the amount is sometimes such that it is an object to avoid their payment, especially when the action itself is a mere vexatious proceeding on the part of the plaintiff. In actions for a tort, where it is certain that the plaintiff is entitled to recover at least nominal damages, it will always be advisable to make an offer of judgment. And the offer made ought to be such as is quite certain to be equal to any amount that a fair jury or an intelligent and candid justice would be likely to give from the evidence in the particular case. By pursuing this course, a jury or the justice cannot fail to see that the continuance of the litigation is not the fault or the wish of the defendant, and if the offer has been a reasonable and just one, there is little difficulty in the way of a just verdict. In making such an offer, it will always be advisable to make some little sacrifice, by way of offering rather more instead of a little less than could be fairly claimed by the plaintiff, and this is especially the case when it is certain or when it is quite probable that the offer will not be accepted by the plaintiff. In such a case, the offer will be fair towards the plaintiff, and if he rejects it, that will be his own fault or his own folly. While it will be an act of prudence on the part of the defendant, in any event, and especially so, if the justice or the jury should find a verdict for less than the amount offered, since in that case it would not only deprive the plaintiff of costs from the time of the offer, but would also subject him to all the costs of the action from that time. The statute does not make any exceptions, and therefore the offer will be proper in any action which can be tried in a justice's court.

Who may make the offer.] Where there is a single defendant, no question can arise as to the party who may make the offer. But when there are several defendants in the action, and some of them desire to offer judgment, and others do not, a different question is presented. And so, too, where there are several defendants, and one of them offers judgment against all, there may be difficulties to be met and disposed of before a regular judgment can be obtained.

Where the action is for a tort, and there are several defendants, no one of them will be authorized, from the mere relation of defendant, to offer judgment against any one but himself. So there are cases of actions upon contract in which neither defendant can bind any one but himself by the offer of judgment. Such an offer is substantially a judgment by confession, so far as it relates to the power of one person to bind an other. As to the power of partners to confess judgments, see Vol. I, 298, &c.

In courts of record where defaults are allowed, it has been held that, when two partners were sued, and one suffered default, but the other appeared and offered judgment, the offer so made was sufficient to render the plaintiff liable for costs in case he did not recover more than the sum offered. *La Forge* v. *Chilson*, 3 Sandf., 752. But there is no such thing as a default in a justice's court, and when the defendant does not appear, the plaintiff must prove his case just as though he had appeared and put in a general denial. Code, § 64, sub. 8. It is, therefore, necessary that every offer of judgment should be made by some person who is duly and legally authorized by the defendant to make such offer. And when there is no such authority, there cannot be a legal offer of judgment. See Confession of judgment.

At what time.] The statute is explicit as to the time when the offer must be made. It must be *on the return* of the *process*, and *before answering* in the action. Code, § 64, sub. 15. If not made until after issue is joined, by putting in an answer, it will be too late, and an offer after that time will be a nullity.

How to make the offer.] In the first place, the offer must be in *writing;* it must also be for a *specified amount;* and it must expressly *offer to pay the costs* up to the time of making the offer. Code, § 64, sub. 15. The offer cannot properly be made until the complaint is put in or filed; for, until that is done, the defendant cannot be certain what cause of action will be alleged against him, and therefore he could not intelligently make any offer of judgment. But, as soon as the complaint is delivered to the justice, either orally or in writing, the defendant will be in a condition to determine whether to offer judgment. If he elect to make such offer, the plaintiff will then be compelled, before taking any other steps in the action, to elect whether he will accept or reject the offer so made. Code, § 64, sub. 15. If the offer is rejected, the plaintiff need do nothing more than to declare that he will not accept it, or that he rejects it. And if the plaintiff does not make any declaration whatever, but merely

remains silent, this will be deemed a rejection of the offer. If the offer is accepted by the plaintiff, he must give notice of that fact, *in writing*, to the defendant; and the notice must be signed by the plaintiff, or his duly authorized agent or attorney.

When the defendant elects to make an offer of judgment, he should prepare it and deliver it to the justice, and at the same time also inform the plaintiff, or his attorney or agent, of the offer, with permission to examine its contents. But the paper properly belongs to the justice as a part of the papers in the action. If the plaintiff, on examining the offer made, concludes to accept a judgment for the amount offered, he must prepare a written acceptance to that effect, and file it with the justice, and at the same time giving the defendant notice thereof, with a right to examine such acceptance. When the offer and acceptance have both been delivered to the justice, he is required to file them, and to enter judgment accordingly.

If the plaintiff neglects or refuses to give notice of acceptance of the offer, and he proceeds to trial, he will be liable for all subsequent costs, unless he recovers judgment for a greater amount than the sum offered by the defendant, exclusive of costs. Code, § 64, sub. 15.

It is only necessary now to give such practical forms as may be convenient in practice, and this matter will have been sufficiently explained.

Form of offer of judgment.

JUSTICE'S COURT.

John Doe
agt.
Richard Roe. } Before PETER W. PLANTZ, *Justice*.

SIR—Take notice that the defendant, Richard Roe, hereby offers to allow judgment to be taken against him by the plaintiff, for the sum of twenty-five dollars, with costs, pursuant to subdivision fifteen of section sixty-four of the Code of Procedure.

Dated November 30, 1864. RICHARD ROE.

To JOHN DOE, *plaintiff*.

Offer of judgment in replevin.

[Title of Action.]

SIR—Take notice that the defendant, Richard Roe, hereby offers to allow judgment to be taken against him by the plaintiff, for the delivery to the plaintiff of the following described property, claimed in the complaint, to wit: (Here describe the property.) And also to allow the plaintiff to take judgment against the defendant for the sum of five dollars damages, with costs, pursuant to subdivision fifteen of section sixty-four of the Code of Procedure.

Dated November 30, 1864. RICHARD ROE.

To JOHN DOE, *plaintiff*.

Acceptance of offer of judgment.

[Title of Action.]

SIR—Take notice that the plaintiff hereby accepts the offer to allow the plaintiff to take judgment for the sum of twenty-five dollars, with costs, and that the justice will enter up judgment accordingly.

Dated November 30, 1864. JOHN DOE.

To RICHARD ROE, *defendant.*

It will be observed that the statute requires this notice of acceptance of the offer to be *in writing.* And, for this reason, the proper practice will be to make and serve a copy of the notice on the defendant, while the original notice is delivered to the justice, to enable him to enter up the judgment. The justice will file and preserve the summons, complaint, offer of judgment, and the notice of acceptance thereof, and then enter up a judgment in pursuance of the offer and notice so filed by him.

Form of judgment on offer.

[Title of Action.]

November 21st, 1864. I issued a summons in favor of the plaintiff, John Doe, and against the defendant, Richard Doe, returnable on the 30th day of November, 1864, at my office. November 30th, 1864, the summons was returned, personally served, by John P. Albro, constable, on the 21st instant. And, on the 30th day of November, the plaintiff and defendant both duly appeared, and the plaintiff complained in an action for a breach of contract (or for a trespass to real estate). Whereupon the said defendant, before answering said complaint, made and served an offer, in writing, to allow the plaintiff to take judgment against him for the sum of twenty-five dollars, with costs; and the said plaintiff thereupon accepted such offer, and gave notice thereof to the defendant, in writing. Now, therefore, judgment is accordingly rendered in favor of the said plaintiff, and against the said defendant, for the sum of twenty-five dollars damages, and the sum of one dollar costs, making a total judgment for the sum of twenty-six dollars, damages and costs.

Damages,..................................	$25 00
Costs,....................................	1 00
Total,....................................	$26 00

November 30, 1864.

The offer of judgment, or of acceptance, need not be made by the parties in person, but may be done by the duly authorized agent or attorney of either party. But, in such a case, there ought to be some proof made that such attorney or agent had authority to make the offer, or to accept the judgment; such proof need not necessarily be in writing, but may be established by the sworn statement of such attorney or agent that he is so authorized. And, for that purpose, the justice ought to require the attorney or agent to swear to his authority, for the purpose of making or accepting such offer, as well as to his general authority to appear for the party. An oath may be administered to such attorney, and it may be in the following form :

Form of oath to attorney, &c.

You do swear that you will true answers make to all such questions as may be put to you touching your authority to offer a judgment on the part of the defendant, Richard Roe, to John Doe, the plaintiff.

If the oath is administered to the plaintiff's attorney, then vary the form accordingly. If there is a power of attorney in due form, and duly acknowledged, that will be sufficient. And it ought to be filed with the other papers in the action, so as to show authority for rendering the judgment, should that matter ever become important, either to the parties or to the justice himself.

CHAPTER XIV.

PARTIES TO ACTION.

SECTION I.

GENERAL PRINCIPLES.

The importance of a thorough knowledge of the rules of pleading, and of a careful observance of them in practice is not at present generally appreciated. And this remark is peculiarly true of justice's courts, since causes are daily tried there, which involve considerable sums of money, and yet no one would be able to determine the precise nature of the litigation from the pleadings. One result of this neglect is, that the parties are constantly raising questions on the trial as to the admissibility of evidence under the pleadings put in; an other is, that the plaintiff is sometimes precluded from proving all of his claims; or a defendant is not permitted to prove some important portion of his defense because it is not set forth in his answer.

Both parties, therefore, are liable to considerable loss, or, at least, to considerable inconvenience, on account of their negligence in joining issue. It is no answer to these matters to say that the justice may grant amendments at the trial. For, although it is true that the justice has such power, yet there always will be some expense or inconvenience attending such a course. If a material change is made in the pleadings, one or both of the parties will usually need or require an adjournment of the cause to prepare for the trial of such new issues, which will involve both expense and delay. But if the justice should refuse to permit an amendment in those cases in which he has a discretion whether to grant leave or to refuse it, the plaintiff's only remedy would be to discontinue his action, and commence again with proper pleadings; but a defendant cannot pursue such a course, and he may be remediless, solely from his neglect, or his ignorance, of the rule which requires every defense to be set forth in his answer.

It must be evident, therefore, that nothing is better calculated to secure the rights of both parties than a careful observance of the rules of pleadings, even in actions in justice's courts. And it is in this manner only that the object of "joining issue" will be fully attained. The object of every litigation is to determine

some right, or to obtain some remedy. And, therefore, the first thing to be done is to ascertain the subject for decision; the second is to decide it.

The pleadings were intended to inform the court as to the precise points in dispute between the litigants; and they were also intended to inform each of the parties precisely what the other alleges against him.

For this purpose the law requires that each party shall state distinctly and fully the facts which constitute the cause of action, or the ground of defense.

The importance of this method is entirely evident. The plaintiff is required to state in his complaint all the causes of action which he relies upon, and the facts which constitute such causes of action; and the defendant is then able to prepare intelligently for his defense. And, on the other hand, the defendant is also required to state in his answer every ground of defense upon which he relies; and the plaintiff is then able to know what evidence will be necessary on the trial. But these are not all of the advantages of a correct practice, for the court will be able to see what the true points of litigation really are, and will thus be able to determine more readily all questions of the relevancy of evidence when it is offered, and objection is made to its reception.

There are other advantages which are also worth noticing. If an appeal is brought, the record will show a cause of action, or a defense, if it is stated in the pleadings; and, besides that, whenever a question arises as to what was actually decided in the action, the pleadings will be conclusive evidence as to what might have been decided; and also, as to what was actually decided, unless it is shown that some of the causes of action or defense were waived at the trial.

Since the amendment of the Code, which now permits a new trial of the cause in the county court, in some cases, it is of the utmost importance that the pleadings should set out the entire grounds of action or of the defense. And on such new trial the county court has no power to amend an answer by allowing a defendant to set up a new defense which was not interposed in the justice's court. *Savage* v. *Cock*, 17 Abb., 403. The county court is restricted to the trial of the issues joined before the justice. *Ib.* In the case last cited, the only answer in the justice's court was a general denial. The plaintiff recovered a judgment against the defendant for $121.70 damages and costs. Upon an appeal, and a trial in the county court, an amendment was allowed by permitting payment to be pleaded, upon which judgment was rendered in favor of the defendant. Upon an appeal to the supreme court by the plaintiff, this judgment was reversed, and a new trial ordered in the county court upon the original issue of a general denial alone. The effect of the defendant's omission to plead payment before the justice is too obvious to require comment. Changed by Statute, Vol. I., 32, Sub. 4.

There are a few general remarks in relation to putting in the

pleadings, or "joining issue," as it is generally termed, which will be as appropriate in this place as in any other. The object of the pleadings has just been briefly stated, and the next subject relates to the time when they are to be made, the number which is allowed or required, the manner of framing them, and when the cause is at issue. The proper time for putting in the pleadings is at the hour mentioned in the process for the appearance of the parties.

After the parties have appeared in the action, and all objections to process have been disposed of, or waived, the next step in the action is for the plaintiff to put in his complaint, which may be in writing, or it may be oral. If it is written, it will be filed with the justice, and retained by him as a part of the proceedings; if the complaint is oral, the justice is required to take down the substance of it, and enter it in his docket. After the complaint is completed and delivered the defendant must either demur to it or he must put in an answer, if he makes any defense to the action. If the complaint does not state facts sufficient to constitute a cause of action, or if it is not sufficiently explicit for the defendant to understand it, he may demur to it. The manner of demurring will be explained hereafter. If any objection is intended to be made on account of the insufficiency of the complaint, it must be done by demurrer, and before putting in an answer, because if an answer is put in without any objection to the complaint, all defects in it will be waived. If the complaint is deemed sufficient, the next step will be for the defendant to answer it.

The answer may be either written or oral; and if written, it must be filed by the justice, and retained by him; or, if oral, the substance of it must be entered in his docket. The answer may consist of two separate branches. If all the facts stated in the complaint are disputed by the defendant, his answer will contain a denial of all the allegations contained in it, in which case the plaintiff will be required to prove all the allegations in such complaint. But if the defendant admits the truth of a portion of the facts alleged in the complaint, and he denies all the other allegations, the denial may be limited to the disputed facts, and the legal effect of this method of denial will be to admit the material allegations which are not denied, while the denial of the other allegations will put them in issue, and require the plaintiff to prove them. The second branch of an answer relates to such defenses as exist independently of any dispute about the truth of the allegations contained in the complaint. The allegations in the complaint may all of them be true, and yet, there may be a perfect defense to the action. Suppose an action is brought upon a promissory note, and the maker cannot truly deny the making of the note, for a valuable consideration, it does not follow that there is not any defense to the action upon it.

If the note has been paid, that will of course be a complete defense to any such action.

The defendant has a legal right to deny the making of the note if he chooses, and thus require the plaintiff to prove that fact, or he may merely plead payment, which, if proved by the defendant, will defeat the action. It will frequently be advisable for the defendant to omit a denial of the allegations in the complaint, when that can be properly done, and then set up an affirmative defense, as this mode of defense will sometimes give the defendant the right to open and close the case to the jury, which may always be claimed by the party who holds the affirmative of the issue. The right to open and close the case will be fully explained elsewhere.

All defenses which do not consist in a mere denial of a portion, or of all the allegations in the complaint, may be called *affirmative* defenses. The peculiar characteristics of such defenses are, that they will be sufficient to defeat the plaintiff, notwithstanding the truth of the allegations contained in the complaint. Under a general denial of all the allegations in the complaint, the defendant may introduce evidence to controvert such matters as the plaintiff is bound to prove in order to maintain his action, but this is the extent to which the rule extends. Vol. I, 879–884.

In every case in which the defendant relies upon an *affirmative* defense to the action, such defense must be set up in the answer, or no evidence will be legally admissible to prove it. Vol. I, 884–886. As a part of the rule of pleading which requires the facts to be stated, the defendant must state all such facts in his answer as will constitue his defense.

If the facts stated in the answer are not legally sufficient to constitute a defense to the action, the plaintiff may demur to it, or he may demur to it if the answer is not sufficiently explicit for him to understand it. When a demurrer is interposed by either party, the legal sufficiency of the pleading demurred to is directly in issue, and the court must decide upon the validity of the pleading which is demurred to.

A demurrer always raises an issue of law, which must, in all cases, be decided by the justice. If the pleading which is demurred to is defective, the justice must order it to be amended; if it is sufficient the demurrer must be overruled. A demurrer is legally nothing more than an objection to the sufficiency of the pleadings of the opposite party. It may be written or it may be oral, in the same manner that a complaint or answer may. The complaint, answer, and demurrer, are all the pleadings which are allowed in a justice's court.

There is no such thing as a reply to an *affirmative* defense which may be set up in an answer. When an answer sets up an affirmative defense, consisting of new matter, the plaintiff will be considered as denying all such allegations; and, on the trial, the defendant will be required to prove all such allegations in his answer; while the plaintiff will be permitted to controvert them by giving evidence to disprove them, or by introducing evidence of new matter in reply, to avoid their effect, even if the allegations

are true. This may be illustrated thus: Suppose that the plaintiff sues upon a note, and the defendant claims to be allowed a set-off of a demand which he has purchased of a third person. In that case no reply is permitted in the pleadings; but the plaintiff would be allowed to prove in evidence that no such set-off existed, or if it ever did, that the claim had been paid before it was assigned to the defendant. If the plaintiff intends to question the sufficiency of the answer as to an affirmative defense, he must demur to the answer, or the objection will be waived; and this is especially the case when the objection relates merely to the manner of stating the defense, or the mode and form of pleading. No demurrer will lie to a mere denial; but it is applicable to every case in which the pleadings of the opposite party are insufficient.

This brief review of the subject will show that the Code intends that every cause of action, and every ground of defense, shall be explicitly stated in the pleadings. And if the practice is carefully complied with, the result cannot fail to be of advantage to all litigant parties. Some inconveniences may arise from this system, to those persons who are negligent, or to those who are ignorant of their legal rights and of the requirements of the law. But the law does not tolerate negligence, nor does it encourage ignorance, since every man is presumed to know the law, and he is compelled to submit to those inconveniences which may arise from his want of such knowledge.

There are instances in which a justice may permit amendments of pleadings for the furtherance of justice, on such terms as may be just. And, in those cases which a cause of action or a ground of defense has been accidentally omitted, or when in any case there are proper grounds for an amendment, it ought to be liberally allowed; but, at the same time, if there is any expense or inconvenience attending such permission, the expense ought to be borne by him whose neglect or ignorance made the amendment necessary. There are some instances in which the pleadings must be in writing, notwithstanding the general remarks which have been made to the effect that they might be written or oral. When the defendant interposes an answer of title to lands, the answer must be in writing; and in an other place the subject will be fully explained. The pleadings when completed, must always be a complaint and answer, if an issue of fact is intended to be joined for trial by a jury, or by the justice, on evidence to be introduced by the parties. The parties may, however, if they choose, try the cause upon an issue of law, which is joined by a demurrer to the complaint, or to an answer. The legal effect of a demurrer is to admit the truth of the pleading demurred to, and the only question to be decided is, whether the pleading demurred to constitutes a cause of action, or a ground of defense, and this issue the justice must decide.

When the defendant does not appear in the action, the plaintiff must still put in a complaint, and he must also prove a case in

the same manner that he would be required to do if a general denial had been interposed by the defendant. The subject of pleading having been explained in this general manner, the next subject will be to discuss it in relation to those particulars which are important to be known and observed in practice. And, in the first place, it will be necessary to determine who ought to be the parties to the action, because all pleadings relate to disputes between some litigant parties, and the pleadings are merely intended to show the particular facts in dispute.

SECTION II.

WHO TO BE PLAINTIFFS OR DEFENDANTS.

The Code has introduced a plain and simple rule for determining who shall be plaintiffs in an action.

The general rule is, that every action must be prosecuted in the name of the real party in interest. To this general rule there are some exceptions which will be soon noticed. By the expression "*real party in interest,*" is intended that the action shall be brought in the name of the person who has the beneficial and equitable interest in the cause of action; or, who is the actual owner of it. This rule will include all cases in which the cause of action originally accrued in favor of the person who is named as plaintiff; and it will also include all those cases in which the cause of action accrued in favor of one person who has assigned or transferred it to an other, in which case the assignee must sue in his own name.

The general rule is, that every right of action whatever, which arises upon contract, may be assigned, so as to authorize an action in the name of the assignee. Vol. I, 91 to 94.

It will now be proper to show what cases there are in which an action may be brought in the name of a person who is not the real party in interest.

"An executor or administrator, a trustee of an express trust, or a person expressly authorized by statute, may sue without joining with him the person for whose benefit the action is prosecuted. A trustee of an express trust, within the meaning of this section, shall be construed to include a person with whom, or in whose name, a contract is made for the benefit of another." Code, § 113. The cases mentioned in the preceding section, are the only exceptions to the rule which requires that the action shall be brought in the name of the real party in interest. The cases which will now be noticed, are, those which relate to plaintiffs in actions arising upon contracts. And the kinds of contracts are such as are in writing and sealed; those in writing and unsealed; those which are verbal and express; and those which are implied by law.

Judgments rendered by justices of the peace will be considered as contracts for this purpose.

Plaintiffs in actions arising on contract.] Ordinarily there is not much difficulty in determining who ought to be plaintiff in an

action which arises upon contract. In most of the actions which are litigated in a justice's court, the plaintiff and the defendant are the parties to the original contract, which one of the parties alleges the other has broken. In such cases, the party to be named as plaintiff, is the person in whose favor a cause of action has accrued. But such a cause of action which may have accrued in favor of one person against an other, may have been assigned before any action is brought, and in that case, the action must be brought in the name of the assignee of such right of action. Vol. I, 91–94.

Principals, actions by.] There are numerous cases in which contracts are made by agents, and sometimes the contract is made in the name of the principal, and sometimes in the name of the agent. When the contract is made by the agent in his own name, without disclosing that there is a principal, such principal may sue in his own name for a breach of the contract, notwithstanding the contract is a written unsealed one. And parol evidence is admissible to show that he is really the principal, and thus the real party in interest. *Erickson* v. *Compton*, 6 How., 471; *Van Lien* v. *Byrnes*, 1 Hilt., 134.

A right of action cannot be transferred to a plaintiff conditionally, so that it shall be the plaintiff's if he recovers judgment in an action upon it, but it is not to be his if he fails to recover such judgment; thus, one Culver made a negotiable promissory note to one Tanner, which Tanner did not wish to sue in his own name, and he, therefore, on the suggestion of his counsel, transferred the note to one Killmore, who gave his own note to Tanner for the amount due, but with the understanding that this note was not to be paid if he did not succeed in collecting the note against Culver, and in that event, the Culver note was to be returned to Tanner, and Killmore's note was to be given up. Killmore then brought an action against Culver on the note made by him to Tanner, and it was held that the action could not be maintained, as Killmore was not the real party in interest. *Killmore* v. *Culver*, 24 Barb., 656.

But the indorsee and holder of a note may sue the maker upon it, if the note was transferred absolutely and in good faith, notwithstanding that the note is not to be paid for until such note is collected, because a plaintiff who has an absolute right to the money due on a note, and to receive and appropriate it to his own use when recovered, is the real party in interest, although the payee of the note may be interested in the event of the suit, in such wise, that if the note be not collected he will not receive anything as its price, or by reason of his indorsement and sale of it. *Cummings* v. *Morris*, 3 Bosw., 560; *S. C.*, 11 E. P. Smith, 625. In this last case the note was transferred absolutely, and the title to the note passed to the plaintiff. If the note was not collected, the purchase-money would never become due, and therefore, it might happen that the holder and indorser would not receive anything. But the transfer was not conditional, as in *Killmore*

v. *Culver*, *supra*, where, by the terms of the sale, the title was not to pass except in a certain contingency. In the case of *Cummings* v. *Morris*, the title would pass whether anything was paid or not, since the payee could give the note away if he chose, and the condition as to payment did not affect that question. But in *Killmore* v. *Culver*, it was not intended to transfer the title to the note unless it was collected, so that the plaintiff was not the absolute owner or the real party in interest at the time when the suit was commenced, which the law always requires when an action is brought by an assignee. *Garrigue* v. *Loescher*, 3 Bosw., 579, 584.

The owner of a promissory note can maintain an action on it, under the Code, in his own name, against the makers, although not so indorsed that he can sue as indorsee by the rules of the common law. *Houghton* v. *Dodge*, 5 Bosw., 326. And where a promissory note is payable to order, and has been sold and delivered, previous to its becoming due, for a full and valuable consideration, the owner may sue in his own name, without alleging an indorsement of the note to him, since the right to the note will pass by an assignment without indorsement, and the owner will be the real party in interest. *Billings* v. *Jane*, 11 Barb., 620; *Houghton* v. *Dodge*, 5 Bosw., 326; *White* v. *Brown*, 14 How. Pr., 282. The complaint ought to state the facts as they really are in this respect. The fact that a plaintiff has not the actual possession of the note sued on, does not affect his right to recover upon it. It is sufficient that he has the right to the money due upon it, although the instrument has been deposited with a third person, in pursuance of an agreement between the parties. *Selden* v. *Pringle*, 17 Barb., 458.

Where a note, not negotiable, is sued on by a person other than the payee, the possession of the note in court, at the trial, by the plaintiff's counsel, is not *prima facie* evidence, as in case of commercial paper, negotiable in terms, that the note was transferred to the plaintiff before the commencement of the action, and before the maturity of the note. *Barrick* v. *Austin*, 21 Barb., 241. In such cases the plaintiff should allege and prove the facts which show him to be the real party in interest, by sale, assignment or otherwise.

To maintain an action on contract, it must appear that the plaintiff is the only person possessed of any ownership or interest in the demand, so that, on a recovery and subsequent payment, all rights of action in respect to it will be barred as against the defendant. And where the plaintiff sued as the assignee of a demand which originally accrued to two persons as partners, but the assignment which was proved was executed by but one of the partners, and purported to transfer only *his* "right, title and interest" in the claim, and there was no proof that the partnership had been dissolved, or that the claim was ever vested in the partner making the asignment, or that the other partner had ever done any act which would estop him, or would vest his interest in the assets of the firm in his partner, it was held that the plain-

tiff could not maintain his action. *Mills* v. *Pearson*, 2 Hilt., 16. In most of the actions which are brought upon contracts, the action is brought by one of the parties to it, or by some person to whom the right of action has been assigned. But there are some cases in which a person may sue for the recovery of damages for the breach of a contract to which he was not a party, and to whom there has not been any assignment of the right of action. When one person pays money or delivers property to an other, and the latter, in consideration thereof, promises to pay a certain sum of money to some third person, such third person may maintain an action in his own name to recover the sum specified, although no consideration moves from the party who brings the action. *Barker* v. *Bucklin*, 2 Denio, 45; *Hale* v. *Boardman*, 27 Barb., 82; *Earle* v. *Crane*, 6 Duer, 564; *Lawrence* v. *Fox*, 6 E. P. Smith, 268; *Union Ind. Rub. Co.* v. *Tomlinson*, 1 E. D. Smith, 364; *Muller* v. *Maxwell*, 2 Bosw., 355; Vol. I, 107.

Agents, actions by.] The Code, § 113, permits an action to be brought in the name of a person who has made a contract in his own name, or otherwise, for the benefit of an other person. This would include agents who make such contracts, and there are several cases in which it has been decided that the action could be maintained in the name of the agent. Where a lease was executed for a landlord by an agent in his own name, with the additional words, "for the owner," and the other party as tenant, executed the lease in his own name; it was held that the agent might sue in his own name to recover the rent. *Morgan* v. *Reid*, 7 Abb., 215. So the landlord might sue in his own name if he chose. *Ante*, 265; and *Erickson* v. *Compton*, 6 How., 471. Of course, both principal and agent could not sue at the same time, and an action brought by one would determine the right of the other to sue while such action was pending; and a recovery by one would bar an action by the other, and so of a defeat in the action.

A public auctioneer who sells goods for an other, may maintain an action for the price, although he has received his advances and commissions and has no interest in the property or its proceeds. *Minturn* v. *Main*, 3 Seld., 220; *Bogart* v. *O'Regan*, 1 E. D. Smith, 590.

A factor or other mercantile agent who contracts in his own name on behalf of his principal, is *a trustee of an express trust*, within the meaning of section one hundred and thirteen of the Code, and is the proper party to bring an action in his own name upon the contract. *Grinnell* v. *Schmidt*, 2 Sandf., 706.

The agent of a foreign corporation may maintain an action in his own name upon a subscription note payable to the plaintiff, "as executive agent of the company," for stock of the corporation to be issued to the signer. The contract is to be deemed made with the agent, and he the trustee of an express trust, within § 113 of the Code, though he is mentioned in respect to his representative character, and not as promisee individually,

and nothing appears to show that he has any interest apart from his principal, or that there was any motive for interposing him as the formal contracting party between the promisor and the party equitably entitled to the benefit of his contract. *Considerant* v. *Brisbane*, 8 E. P. Smith, 389; overruling *S. C.*, 2 Bosw., 471.

Assignee, action by.] Before the enactment of the Code, there were but few causes of action, except negotiable paper, which could be assigned so as to authorize an action in the name of the assignee for the recovery of the demand. But, by § 111 of the Code, it is declared that every assigned cause of action must be sued in the name of the assignee.

All causes of action arising upon contract may be assigned; and the effect of the Code is, to require every action to be brought in the name of the person who is the beneficial owner of the right of action. Vol. I, 91 to 99. When several persons are interested in a claim or demand they must all join in an assignment of it, or the transfer will not carry any other interest than that of the person who executes the assignment; and if the whole interest is not assigned, the person to whom a portion of the claim is assigned cannot maintain an action in his own name alone on the demand. *Mills* v. *Pearson.*, 2 Hilt., 16, and see *ante*, 265.

A joint demand which belongs to several persons cannot be split up by them and assigned to several different persons, so as to authorize an action to be brought by each assignee for his interest in the demand, because the law will not tolerate that a defendant shall be subjected to the costs of several different actions in such a case. *Coster* v. *N. Y. and Erie R. R. Co.*, 6 Duer, 43, 44.

If the whole interest in the demand is transferred, it is not important whether it is the legal title that passes, so long as the equitable title and the whole interest passes, for in that case the assignee will be the real party in interest. *Hastings* v. *McKinley*, 1 E. D. Smith, 273.

A promissory note, which is guaranteed, may be assigned so as to authorize an action in the name of the assignee against the guarantor. *Small* v. *Sloan*, 1 Bosw., 352.

An assignee named in an assignment for the benefit of creditors, may sue in his own name for demands which were due to the assignor, without joining the persons for whose benefit the assignment was made. *Mellen* v. *Hamilton Fire Ins. Co.* 5 Duer, 101.

Claims for unliquidated damages for a breach of a contract may be assigned and the assignee may sue in his own name; as where a landlord agreed in a lease to allow the tenant certain privileges in the use of Croton water, &c., and he afterwards deprives the tenant of the use thereof. *Munson* v. *Riley*, 2 E. D. Smith, 130. So, where there is a contract to employ and pay a laborer, and the contractor refuses to perform his agreement. *Monahan* v. *Story*, 2 E. D. Smith, 393. So, of a contract to deliver a quantity of merchandise of a certain quality, which is not done. *Dana* v.

Fiedler, 1 E. D. Smith, 464. So, where a landlord let land on shares, and he agreed with the tenant to keep certain fences in repair, which was not done; the tenant assigned his interests in the crops, which were damaged by cattle in consequence of the non-repair of the fences, it was held that the landlord was liable to an action by the assignee in his own name. *Parmelee* v. *Dann*, 23 Barb., 461.

A contract to pay a certain person, or his wife, annually, a given sum during the life of the longest liver of them, gives a right of action to the survivor, which is assignable after the death of one of the parties, and the assignee may sue in his own name. *Prindle* v. *Caruthers*, 1 E. P. Smith, 425.

Where money is loaned, and it is claimed by the lender that the loan was procured by fraudulent representations, the claim is one arising upon contract, and it may be assigned, and the assignee sue in his own name. *French* v. *White*, 5 Duer, 254; *Byxbie* v. *Wood*, 10 E. P. Smith, 607; *Brady* v. *Bissell*, 1 Abb., 76.

Where a note, though valid in its inception and collectible by the payee, is transferred by the latter as a security for a usurious loan, such transfer is illegal and void, and in an action by the transferree against the maker such usury, on being alleged and proved, is a defense to the action. *Fish* v. *De Wolf*, 4 Bosw., 573, and see *Dewitt* v. *Brisbane*, 2 E. P. Smith, 508, as to a transfer of a bond and mortgage under similar circumstances.

In an action upon a negotiable promissory note, payable to bearer or indorsed in blank by the payee, possession of the note by the plaintiff is *prima facie* evidence that he is the owner of it for a good consideration. *James* v. *Chalmers*, 2 Seld., 209; *S. C.*, 5 Sandf., 52. So the production of a check, which is drawn payable to "bearer," upon the trial, is sufficient *prima facie* evidence of title to enable the plaintiff to recover upon it. *Townsend* v. *Billinge*, 1 Hilt., 353.

When a note, negotiable by delivery merely, is transferred by the payee to the plaintiff, and a guaranty of payment indorsed thereon, expressed as being for value received, the possession of the note by the holder is *prima facie* evidence that he owns it, notwithstanding it appears by the date of the guaranty that he did not receive the note until after it became due. *Smith* v. *Schanck*, 18 Barb. 344. But, if the note is not negotiable, the plaintiff must prove his title to it. *Ante*, 266; *Barrick* v. *Austin*, 21 Barb., 241.

Every right of action arising upon contract may be assigned by writing under seal, or without a seal. And so may such rights of action be assigned by a verbal agreement, and a delivery of the thing assigned, if it is in writing. A judgment may be assigned by a verbal assignment, and so may a bond and mortgage, or a chattel mortgage. But it is always advisable to reduce such agreement to writing, since the evidence may be better preserved, and it will always be available. There need not be any consideration for the assignment, nor need there be any

expressed in the assignment if it is reduced to writing. *Richardson* v. *Mead*, 27 Barb., 178; *Burtnett* v. *Gwynne*, 2 Abb., 79. The assignee takes the claim subject to all equities. Code, § 112.

Executors and administrators, actions by.] An executor or administrator is expressly authorized to sue in his own name, without joining with him the person for whose benefit he sues. Code, § 113. Actions may be brought by executors or administrators in a justice's court, though they cannot be sued as such in that court. Code, § 54, sub. 5. An executor can maintain an action either in his own name, or as executor, upon a note given to him as executor, for a debt due to the testator at the time of his decease. *Merritt* v. *Seaman*, 2 Seld., 168; *Bright* v. *Currie*, 5 Sand., 433; *Eagle* v. *Fox*, 8 Abb. 40. A sole acting executor can maintain an action respecting the property of the testator, without joining with him an executor who has refused to qualify as such. *Moore* v. *Willett*, 2 Hilt., 522; 3 R. S., 201, § 2, 5th ed.; Laws 1838, ch. 149.

The *next of kin* cannot maintain an action or prosecute a claim for a distributive share of the *personal property* of the deceased, *in their character of next of kin*; letters of administration must be taken out, and the action brought in the name of the *administrator*. *Woodin* v. *Bagley*, 13 Wend., 453; *Beecher* v. *Crouse*, 19 Wend., 306. But where the owner of the premises in fee, having demised the same for a term of years, dies intestate before the expiration of the lease, one of his heirs-at-law can sue alone to recover his aliquot part of subsequently accruing rent. *Jones* v. *Felch*, 3 Bosw., 63; 3 R. S., 169, 170, §§ 6, 7, 5th ed.

Where the payee of a promissory note was in possession of it about eight days before her death, it was held that an action could not be maintained upon such note by a third person, after the payee's death, without showing a title thereto, derived from the personal representatives of such payee. *Edwards* v. *Campbell*, 23 Barb., 423. There were circumstances in this case which showed that the payee intended that the note should be canceled, so that the presumption that she had sold it, was rebutted.

Where a promissory note was shown to have been in possession of the payee, and owned by him, within four or five days previous to his death, and there was no evidence of a transfer of it by him in his lifetime, but, about two weeks after his death, his widow was in possession of it, claiming it as her own, and she subsequently negotiated it to the plaintiff, and it appeared that the payee died intestate and indebted, and that no letters of administration had been issued, it was held that it was to be inferred from these circumstances that the note belonged to the payee at the time of his death, and that his widow, not being his legal represensative, nor the owner of the note, had no right to transfer it to the plaintiff. *Lounsbury* v. *Depew*, 28 Barb., 44.

A chose in action (an account) owned by an individual at the time of his death, belongs to his personal representatives, after his decease; and his widow has no authority to assign it, in the

absence of any proof that she is executrix or administratrix of her husband. *Heidenheimer* v. *Wilson*, 31 Barb, 636.

Trustees of an express trust, actions by.] By the Code, § 113, a trustee of an express trust may sue in his own name without joining the name of the person for whose benefit the action is brought. There are not a great many classes of cases of this nature which can be prosecuted in a justice's court. But in all cases in which the action may be tried by a justice of the peace the rule applies as much as to any other court. An assignee named in an assignment which is made for the benefit of creditors is a trustee of an express trust, *Mellen* v. *Hamilton Fire Ins. Co.*, 5 Duer, 101; and so are agents, or factors, or auctioneers in those cases in which they are authorized to sue in their own names. Executors and administrators are also trustees of an express trust.

A consignee or indorsee of a bill of lading has not the right to sue upon the special contract, unless he is the shipper or owner of the goods, for the reason that, otherwise, no express contract is made with him. *Dows* v. *Cobb*, 12 Barb., 310.

A mere ordinary merchandise broker, not acting under a *del credere* commission, cannot maintain an action in his own name to recover the price of goods sold by him for the owner. But, if the broker has advanced upon the goods sold, or has guaranteed the sale, he may sue in his own name. *White* v. *Chouteau*, 10 Barb., 202. In both of these cases the facts out of which the actions arose occurred before the enactment of the Code. And there was no notice taken in either of the cases of the provisions of the Code, § 113.

And if they were decided upon the ground that the broker had no interest in the subject of the contract, and he could not, therefore, maintain an action in his own name, they have been overruled in that respect. See *ante* 267, Agents, and see *Morgan* v. *Reid*, 7 Abb., 215; *Grinnell* v. *Schmidt*, 2 Sandf., 706; *Considerant* v. *Brisbane*, 8 E. P. Smith, 389; *Bogart* v. *O'Regan*, 1 E. D. Smith, 590.

And under the provisions of the Code, § 113, the test is *not* whether the agent has an interest in the subject matter of the contract in action but whether he has made a contract in his own name for the benefit of an other person, for if he has, he is a trustee of an express trust within the express terms of § 113 of the Code.

The committee of the person and estate of a lunatic are trustees of an express trust. *Person* v. *Warren*, 14 Barb., 488. The committee of the person and estate of a habitual drunkard may bring actions on promissory notes which he received as such committee, and he may sue *in his own name*, without describing himself as committee. *Davis* v. *Carpenter*, 12 How. Pr., 287.

A receiver of the property of an individual, or of an insolvent corporation, is a trustee of an express trust, and he may bring actions in his own name to recover the property so vested in

him, or to recover any debts or demands which belong to the estate of which he is receiver.

Persons authorized by statute to sue in their own names.] There are numerous cases in which some statute authorizes an action to be brought in the name of some person or officer, for the benefit of some other person, or of some corporation, town, &c. And, in such cases, the statute, and § 113 of the Code, will authorize an action to be brought in the name of such person or persons.

"Actions may be brought by the supervisors of a county; by the loan officers and commissioners of loans of a county; by county superintendents of the poor; by supervisors of towns; by overseers of the poor of the several towns; by the school commissioners; and commissioners of highways of the several towns; by trustees of school districts; and by trustees of gospel and school lots; upon any contract lawfully made with them or their predecessors, in their official character; to enforce any liability, or any duty enjoined by law, to such officers or the body which they represent; to recover any penalties or forfeitures given to such officers or the bodies whom they represent; and to recover damages for any injuries done to the property or rights of such officers, or of the bodies represented by them." 3 R. S. 774, § 105, 5th ed.

"Such actions may be brought by such officers in the name of their respective offices, notwithstanding the contract or obligation on which the same is founded may have been made with or to any predecessors of such officers, in their individual names, or otherwise, and notwithstanding any right of action may have accrued previous to the time when the officers commencing such suit entered upon the execution of the duties of their office." 3 R. S., 774, § 106, 5th ed.

"But in cases where, by special provision of law, actions are directed to be brought by or against any public bodies, in the name of such body, the same shall be brought or defended in such name, by the persons representing such body, then in office." 3 R. S., 774, § 107, 5th ed.

When an action is brought by an officer under the provisions of this statute, he should sue in *his own name*, with the *addition* of *his title as officer*, as, "E. O. Smith, Supervisor of the town of Galway." He cannot properly sue thus, "The Supervisor of the town of Galway," because that would be omitting his own name, and the action could not be maintained in that form. *Supervisor of Galway* v. *Stimson*, 4 Hill, 136. And the same rule applies to actions by commissioners of highways. *Gould* v. *Glass*, 19 Barb., 179. It is important to observe this rule in all cases, since a disregard of it is certain to be attended with defeat and a bill of costs. Corporations ought to bring actions in the corporate name. Const., art. 8, § 3.

Any joint stock company, or association, consisting of seven or more shareholders or associates, may sue or be sued in the name of the president or treasurer, for the time being, of such joint stock company or association. 3 R. S., 777, § 122, 5th ed.; Laws

1849, ch. 258, § 1; 3 R. S., 778, § 127, 5th ed.; Laws 1851, ch. 455, Vol. I, 291, 292. Where a promissory note is the property of a company or association, composed of not less than seven persons, having a treasurer, an action may be brought thereon, in the name of such treasurer. *Tibbetts* v. *Blood.* 21 Barb., 650. The association mentioned in the case just cited was one known as "Sons of Temperance." The case was decided under the Laws of 1851, ch. 455. See also *Austin* v. *Searing*, 2 E. P. Smith, 112; *Nash* v. *Russell*, 5 Barb., 556; *Wells* v. *Gates*, 18 Barb., 554; and *N. Y. Marbled Iron Works* v. *Smith*, 4 Duer, 362.

Lunatics, &c., actions by.] "Receivers and committees of lunatics and habitual drunkards, appointed by any order or decree of the supreme court, may sue in their own names for any debt, claim or demand transferred to them, or to the possession and control of which they are entitled as such receiver or committee." 3 R. S., 135, § 11, 5th ed.; Laws 1845, ch. 112, § 2; *Person* v. *Warren*, 14 Barb., 488. The committee of the person and estate of a habitual drunkard may bring actions on promissory notes he received, as such committee, in his own name, without describing himself as committee. *Davis* v. *Carpenter*, 12 How. Pr., 287.

When no receiver or committee has been appointed in the manner prescribed by the statute, the action must be brought in the name of the lunatic. *Lane* v. *Schermerhorn*, 1 Hill, 97; *Petrie* v. *Shoemaker*, 24 Wend., 85. And, in all cases, the action must be brought in the name of the lunatic, unless the case is within the provisions of the statute which has been cited. *McKillip* v. *McKillip*, 8 Barb., 552.

A defendant *non compos mentis*, but of full age, and not an *idiot* from nativity, may appear by attorney; and the court, on motion, will appoint an attorney for him. *Faulkner* v. *McClure*, 18 Johns., 134. The same rule is equally applicable to a plaintiff. But, in all such cases, the party ought to appear in court, in person, so that an appearance may be entered as a personal one; because, if a person is of unsound mind, he cannot properly select an attorney to act for him, even if it were conceded that he has legal capacity for that purpose. And, in all such cases, the justice will be careful to see that some competent person is intrusted with the cause, so that the rights of the party will be safe.

Infants, actions by.] Actions by infants must always be brought in their names, even when they have a general guardian. *Porter* v. *Bleiler*, 17 Barb., 149, But a next friend must also always be appointed by the justice, and joined with the infant in the action. Vol. I, 43, § 38. The same rule as to being the real party in interest, applies to infants equally with adults. As to the manner of appearing in the action, *Ante*, 229, &c.; Appearance by infants, &c.

Married women, actions by.] "When a married woman is a party, her husband must be joined with her, except that: 1. When the action concerns her separate property, she may sue alone; 2. When the action is between herself and her husband, she may

sue or be sued alone. And in no case need she prosecute or defend by a guardian or next friend." Code, § 114.

Since the enactment of the Code, there has been a material change in the law in relation to the rights of married women. Some of the more important provisions have already been given in full. Vol. I, 657–661.

The provisions of the statute which have been referred to, will require a married woman to sue alone in nearly all cases. When the property belongs to the wife alone, she must sue alone, and if her husband is joined with her, the action cannot be maintained. *Ackley* v. *Tarbox*, 29 Barb., 512; *Smart* v. *Comstock*, 24 Barb., 411; *Brownson* v. *Gifford*, 8 How. Pr., 389.

As a married woman may appear in the same manner as though she were a single woman, she may, therefore, appear by attorney, or by agent, or in person if she is of full age. But if such married woman is an infant, it will be necessary to appoint a next friend for her in the same manner as a next friend is appointed for other infant plaintiffs.

Before the enactment of the statutes in relation to the rights of married women, Vol. I, 657–661, the husband was entitled to the earnings of his wife, and whatever she earned became his in his right of husband. *Freeman* v. *Orser*, 5 Duer, 476. But it has been held, under those statutes, that where a husband does nothing for the support of his wife, and she having a separate property, employs herself in trading therewith, with his knowledge and assent, he neither assisting nor interfering therewith, such property does not become, in equity, liable for his debts. It remains with its proceeds and profits, her sole and separate property. *Burger* v. *White*, 2 Bosw., 92. And then came the statutes of 1860 and 1862, which have been quoted, Vol. I, 657–661, which give the wife the entire right to the pay for her services, or to any profits which she may make by trading or carrying on business for herself.

The practical effect of this change in the law is, to make the wife a sole plaintiff in nearly all cases. The only instances in which they can properly be joined as plaintiffs, will be in those cases in which they are jointly interested in the right of action. *Schoonmaker* v. *Elmendorf*, 10 Johns., 49; *Smith* v. *Ransom*, 21 Wend., 202. Prior to 1860 and 1862, the earnings of a married woman belonged exclusively to her husband, and for her earnings before that time he must now sue alone. For all her earnings since that time she must sue alone, because the husband cannot be legally joined with her in the action.

Joinder of plaintiffs.] "All persons having an interest in the subject of the action, and in obtaining the relief demanded, may be joined as plaintiffs, except as otherwise provided in this title." Code, § 117.

"Of the parties to the action, those who are united in interest must be joined as plaintiffs or defendants; but if the consent of any one who should have been joined as plaintiff cannot be

obtained, he may be made a defendant, the reason thereof being stated in the complaint; and when the question is one of a common or general interest of many persons, or when the parties are very numerous and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of the whole." Code, § 119. These sections of the Code are applicable to justices' courts. Code, § 64, sub. 15. The joinder of plaintiffs who are united in interest is not optional, but compulsory; and therefore, a dormant partner must be joined as a plaintiff in an action by partners. *Secor* v. *Kellor*, 4 Duer, 416. So, where a claim is assigned, the action must be brought in the names of all the parties who are interested in the demand. *Lewando* v. *Dunham*, 1 Hilt., 114. And a single demand or claim cannot be split up into several, so as to authorize several different actions in a court of law, and in the name of each party interested. *Coster* v. *N. Y. and Erie R. R. Co.*, 6 Duer, 43, 44.

A court of equity will protect the rights of a party to whom a portion of a demand has been assigned, but it will require all the parties interested to be joined in the action, either as plaintiffs or defendants. *Field* v. *Mayor of New York*, 2 Seld., 179; *Cook* v. *Gen. Mut. Ins. Co.*, 8 How. Pr., 514.

Where the owner of premises in fee, having demised the same for a term of years, dies intestate before the expiration of the lease, one of his heirs-at-law can sue alone to recover his aliquot part of subsequently accruing rent, or the heirs-at-law may all join as plaintiffs. *Jones* v. *Felch*, 3 Bosw., 63; and see *Porter* v. *Bleiler*, 17 Barb., 149.

But if several tenants in common, of land, join in a lease of it, they must all join as plaintiffs in an action to recover the rent, as they are jointly interested. Code, §§ 117, 119. When two firms have one common member, and one firm performs work and labor for the other, no action at law will lie in favor of the creditor firm against the other, nor in favor of the partners therein who have no interest in the debtor firm; nor will it lie although the common partner assigns his interest in the claim to his copartners. *Englis* v. *Furniss*, 4 E. D. Smith, 587. But where two firms, of which A. was a partner, stated an account of their mutual dealings, and the partners in the creditor firm, with the exception of A., who declined to be a plaintiff and was made a defendant, brought their action against the members of the debtor firm, it was held that, upon proof of these facts, the plaintiffs were entitled to judgment for the balance thus ascertained. *Cole* v. *Reynolds*, 4 E. P. Smith, 74. Where one or more of the partners of a firm dies, an action to recover a debt due to the partnership firm must be brought in the name of the surviving partner. *Bernard* v. *Wilcox*, 2 Johns. Cas., 374; *Murray* v. *Mumford*, 6 Cow., 441; *Holmes* v. *D'Camp*, 1 Johns., 34.

Misjoinder and nonjoinder of plaintiffs in actions on contracts.] The Code has determined who are the proper parties to actions, and in courts of record it has provided how an objection is to be

made for a defect of parties. Code, §§ 140 to 177, inclusive. The parties to an action must be the same in a justice's court as in a court of record. Code, § 64, sub. 15. But §§ 140 to 177 inclusive, do not apply to justices' courts, except so far as § 140 operates to abolish all the old forms of pleadings in all courts. The principles of pleadings are not changed, either in courts of record or in justices' courts, except so far as the Code has made an express alteration in the rules. The change in the rules of pleadings in justices' courts are contained in the Code, § 64. These rules relate to the proper parties to an action, and to the manner of stating the cause of action or defense; but there is nothing provided in relation to the manner in which a defect of parties is to be objected to, or how or when that question is to be determined. The former practice must prevail, therefore, in these courts until some change is made in the law in that respect.

Misjoinder of plaintiffs. When the cause of action arises upon contract, and there is a misjoinder of plaintiffs in the action, by adding too many parties as plaintiffs, the defendant may raise the objection in several ways:

1. He may answer in abatement such misjoinder of parties.

2. If the defect appears on the face of the complaint, he may demur, since it will be evident that there is not a cause of action in favor of all the plaintiffs. Code, § 64, sub. 6.

3. It is a ground of nonsuit at the trial, and the defendant is not bound to set up the defense in his answer, nor to demur to the complaint. He may raise the question for the first time at the trial by way of motion for a nonsuit, if the pleadings and the evidence show that too many persons are named as plaintiffs.

4. If the defendant answers in abatement that there is a misjoinder of plaintiffs, and he proves that fact on the trial; or if the defect appears on the face of the complaint, and the objection is made in the court below and is overruled; or if the defect does not appear from the complaint, nor by the answer, yet, if it is proved on the trial that there is a misjoinder of plaintiffs, and the objection is made a ground of motion for nonsuit, which is overruled, then in either of these cases, the question may be made a ground of appeal.

Non-joinder of plaintiffs.] If the action arises upon contract, and all the parties are not joined as plaintiffs, the defendant may raise the objection in several ways:

1. He may set up the objection in his answer by way of abatement of the action. *Wooster* v. *Chamberlain*, 28 Barb., 602.

2. By demurrer, if the defect appears on the face of the complaint, since it will be evident that there is not a cause of action in favor of the parties who sue. Code, § 64, sub. 6.

3. It will be a ground of nonsuit at the trial. *Dob* v. *Halsey*, 16 Johns., 34; *Armine* v. *Spencer*, 4 Wend., 406, 409. The objection may be made by way of motion for nonsuit, notwithstanding the defect appeared on the face of the complaint, because the rules of the Code, §§ 140 to 177, do not appply to a justice's court, which is governed by the former law in this respect. The

advantages of the old rule for these courts will be evident when it is remembered that it is doubtful whether justice's courts have the same power of adding or striking out parties, or of rendering judgment for one or more plaintiffs, which is possessed by courts of record. *Gates* v. *Ward*, 17 Barb., 424; *Webster* v. *Hopkins*, 11 How. Pr., 140.

4. If the objection is properly taken in the court below, and it is overruled, it is ground for an appeal. *Dob* v. *Halsey*, 16 Johns., 34; *Armine* v. *Spencer*, 4 Wend., 406, 409.

In actions upon contracts, the plaintiff is supposed to know who is interested with him in the cause of action, and, therefore, if he chooses either negligently or intentionally to commence an action in which there are too many or too few plaintiffs, he has no cause for complaint if the action fails at any stage of it. See *Burges* v. *Abbott*, 1 Hill, 478.

Defendants in actions on contract.] The general rule is, that an action which is brought for the breach of a contract must be brought against the parties who made the contract as principals, and who have been guilty of a breach of it. When the contract is made by the defendant in person, there will not be any doubt as to the proper party. But there are many instances in which contracts are made by agents, and when the agent pursues his authority, the principal will be bound, and he alone is the proper party to be sued. Vol. I, 246 to 250. As a general rule, an agent is not liable on a contract when he keeps within the limits of his authority, and when he discloses the name of his principal at the time of making the contract. *Morrison* v. *Currie*, 4 Duer, 79; Vol. I, 254 to 258.

In case of the death of all the parties who made the contract, and who would have to be made defendants if they had lived, no action can be maintained in a justice's court, because executors and administrators cannot be sued as such in this court. Code, § 54, sub. 5. But, if there are several parties to the contract or liability, and any of them are living, they may be sued as survivors. And the executor or administrator of the deceased party cannot be joined, as we have just seen that a justice has no jurisdiction of an executor, &c., as such. But an action against one of the obligors of a bond conditioned for the faithful execution of his duties as an administrator, is an action against the defendant personally, and may be prosecuted in a justice's court. *O'Neil* v. *Martin*, 1 E. D. Smith, 404.

Who to be defendants under §§ 119, 120, *of the Code.*] By § 119, any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the questions involved therein. Section 120 requires that those persons who are united in interest as defendants, shall be joined as such in an action. And § 120 provides, "Persons severally liable upon the same obligation or instrument, including the parties to bills of exchange and promissory notes, may all, or

any of them, be included in the same action at the option of the plaintiff." These provisions of the Code are very plain and simple, and they are also imperative in their requirements. The effect of a violation of these rules will be noticed presently, when treating of the joinder of defendants.

The enactment of § 120 of the Code, is not intended to change the rights of the parties to such instruments as are mentioned, nor does it operate so as to make the liabilities of the several parties different from what they were as among the parties themselves. The engagement of successive parties to a promissory note is not joint, nor does the statute authorizing a joint action against all make it so. That act applies only to the remedy of the party prosecuting, and has no effect upon the promises of the prior parties to each other, or to their rights and responsibilities as between each other. *Kelsey* v. *Bradbury*, 21 Barb., 531.

An action brought by a subsequent indorser against prior indorsers, to recover the amount he has been compelled to pay in a suit brought upon the note, is an action for money paid for the use of the defendants, and not an action on the note within the meaning of § 120 of the Code, and the prior indorsers cannot be joined as defendants in such an action. *Barker* v. *Cassidy*, 16 Barb., 177; Vol. I, 432, 463.

Partners, actions against.] As a general rule, partners must all be joined as defendants, in an action against them upon a contract which relates to the business of the firm. Where one person enters into a contract with two others by name, without knowing or having at the time any reason to suspect that they have a partner in the business to which such contract relates; in a suit upon such contract, the two with whom it is made may alone be sued, and it is not necessary to make their partner, if they had one, a party defendant. *Hurlbut* v. *Post*, 1 Bosw., 28; *N. Y. Dry Dock Co.* v. *Treadwell*, 19 Wend., 525.

But this rule does not prevent the plaintiff from joining such dormant partner as a defendant, if he chooses to make him such. And again, when the defendants were partners, and as such contracted to receive and sell, on commission, a quantity of lumber to be forwarded to them by the plaintiff, and before the lumber was all sold, one of the partners retired from the firm, but the business was continued by the other partner on his own account; it was held that the retiring partner was jointly liable with the other one to the plaintiff for the proceeds of the lumber received by the partner continuing the business. *Briggs* v. *Vose*, 1 E. P. Smith, 471. The liability of the retiring partner was clear, since it was for the performance of a contract which he made, and which he was bound to see performed.

The general rule is, that a dissolution of a partnership terminates the liability of either of the partners as to new contracts, but it does not affect existing liabilites. As to the rights of a person who is a member of two firms, see *Ante*, 275,

When one of several parties dies, an action must be brought

against the survivors alone. The executor or administrator of the deceased partner could not be sued in a justice's court. Code, § 53, sub. 5. And besides that, an action could not be maintained against the executor, &c., at all, unless the surviving partner was insolvent. *Tracy* v. *Suydam*, 30 Barb., 110; *Voorhis* v. *Baxter*, 18 Barb., 592; *Morehouse* v. *Ballou*, 16 Barb., 289; *Yorks* v. *Peck*, 14 Barb., 644; *Higgins* v. *Rockwell*, 2 Duer, 650; *Voorhis* v. *Child*, *&c.*, 3 E. P. Smith, 354.

Joint stock companies, actions against.] Any joint stock company or association which consists of seven or more shareholders or associates, and who have a president or treasurer, for the time being, may be sued in the name of the president or treasurer, and such action will be as effectual against all the shareholders or associates, as though they were all named as defendants. 3 R. S., 777, 778, §§ 122, 127, 5th ed.; Laws 1849, ch. 258, § 1; Laws 1851, ch. 455; and see *Tibbetts* v. *Blood*, 21 Barb., 650; and *Austin* v. *Searing*, 2 E. P. Smith, 112; Vol. I, 291, 292.

Corporations, actions against.] Actions against corporations must be brought against them in their corporate name. Const., art. 8, § 3; *Wilde* v. *N. Y. and Harlem R. R. Co.*, 1 Hilt., 302. The manner of commencing actions against them has already been explained. *Ante*, 69–73.

Infants, actions against.] Most of the contracts which an infant may make are voidable at his election, but they are not absolutely void, for they may be ratified when he arrives at adult age. *Goodsell* v. *Myers*, 3 Wend., 479; *Bigelow* v. *Grannis*, 2 Hill, 120; *Taft* v. *Sergeant*, 18 Barb., 320. Infancy is a personal defense and no one can interpose it but the defendant himself. *Van Bramer* v. *Cooper*, 2 Johns., 279; *Hartness* v. *Thompson*, 5 Johns., 160. If no such defense is made by the infant, and a guardian is legally appointed for him, a judgment against him will be valid.

An infant is liable for necessaries furnished to him, or for money to purchase necessaries, if the money is so applied. *Randall* v. *Sweet*, 1 Denio, 460; *Smith* v. *Oliphant*, 2 Sandf., 306. When a contract has been made by several persons, and one of them is an infant, he must nevertheless be joined as a defendant in an action. *Slocum* v. *Hooker*, 13 Barb., 536. If the infant defendant pleads infancy and establishes the defense, the action may be discontinued as to him, and judgment may be rendered against the other defendants, if a cause of action is proved against all the defendants, but for the defense of infancy interposed by such defendant. *Slocum* v. *Hooker*, 13 Barb., 536; *Butler* v. *Morris*, 1 Bosw., 329; *Bank of Attica* v. *Wolf*, 18 How. Pr., 102.

The correct practice is, to make the infant party a defendant, and if he does not plead infancy, but has a guardian appointed, then proceed in the action as though he were an adult; but if the infant pleads infancy, and establishes it on the trial, then the action must be dismissed as to him, and proceed against the other parties in the same manner as though there never had been such

a party to the contract as the infant. As to infancy in general see Vol. I, 888 to 896.

Married women, actions against.] "An action may be maintained against the husband and wife jointly, for any debt of the wife contracted before marriage, but the execution on any judgment in such action shall issue against, and such judgment shall bind the separate estate and property of the wife only, and not that of her husband." Vol I, 659; Laws 1853, ch. 576, § 1.

"Any husband who may hereafter acquire the separate property of his wife, or any portion thereof, by any ante-nuptial contract or otherwise, shall be liable for the debts of his wife contracted before marriage, to the extent only of the property so acquired, as if this act had not been passed." Vol. I, 659; Laws, 1853, ch. 576, § 2.

The sections just cited relate exclusively to such an indebtedness of the wife as may exist at the time of her marriage. And the effect of the change in the law is, to relieve the husband from his common law liability of paying such debts as his wife might owe at the time of her marriage. The law justly provides, however, that he shall be liable to the extent of the property which he may have received from her. This act is not to be so construed as to affect the vested rights of creditors which existed at the time of its passage, for, if it did, it would be unconstitutional and void. *Berley* v. *Rampacher*, 5 Duer, 183. But, there has been a still greater innovation made, for by the laws of 1860 and 1862, the wife is permitted to take and retain her own earnings, and to engage in trade, and to retain the profits. See sections one and two. The husband is not liable for her debts so contracted by the wife in trading. And in all cases relating to her separate property, or to her trade or business, she may be sued alone as though she were a single female. Vol. I, 659, 661.

Generally, the husband alone is liable for necessaries furnished to the wife during coverture; and in an action therefor, she ought not to be joined as a defendant when the proofs will warrant a recovery against either. *Main* v. *Stephens*, 4 E. D. Smith, 86.

The wife's separate property, and her earnings, and the profits which she may make by trade are not liable to the husband's control, nor for his debts, unless such debts were contracted for the support of the wife or her children, and by the wife as agent for her husband. Vol. I, 659 to 661.

Principal and surety, actions against.] The contract of a principal debtor, and that of his surety, are entirely different agreements. The principal promises to pay absolutely, but the surety promises to pay in case the principal debtor does not. *Draper* v. *Snow*, 6 E. P. Smith, 331; *Church* v. *Brown*, 29 Barb., 486; *De Ridder* v. *Schermerhorn*, 10 Barb., 638. The obligation of a lessee, for the payment of the rent reserved in the lease, and the obligation of a third person, who, by a separate instrument executed at the same time with the lease, guarantees the payment

of the rent by the lessee, are separate and not joint, and will not support a joint action by the lessor, against the lessee and the guarantor. *Tibbits* v. *Percy*, 24 Barb., 39. And if the agreement of the lessee and that of the surety are on the same paper, but are agreements, one as lessee and principal debtor, and the other as surety, they cannot be joined as defendants in an action to recover the rent. *Phalen* v. *Dingee*, 4 E. D. Smith, 379. So where there is a principal debtor, as the maker of a note, and a guarantor, they cannot be joined as defendants. *Brewster* v. *Silence*, 4 Seld., 207, 215; *Allen* v. *Fosgate*, 11 How. Pr., 218. So on a sale of goods, wares and merchandise, which is guaranteed by a third person, the principal debtor and the guarantor cannot be joined in the same action. *LeRoy* v. *Shaw*, 2 Duer, 626.

Persons who are *severally* liable on the same instrument, may be sued together. Code, § 120. But the cases cited show that the persons so sued must all of them be principal debtors, or at least, must all be liable in the same capacity of principal, or surety, &c.

Where the parties are severally, or jointly and severally liable, the plaintiff may include them all, or any of them separately, in the same action, provided they are all parties to the same obligation or instrument, and are all liable in the same right. Any or all of the parties to a bill of exchange or promissory note, may be joined as defendants. But this rule does not include a guarantor, as we have just seen.

Joint debtors, actions against.] When the liability of two or more persons is *joint*, and not joint and several, they must, in general, be joined as defendants. But it is not always possible to serve process on all the parties in actions in justices' courts, since some of them may be non-residents of the county, or there may be some other reason why process cannot be served upon all of them. The statute has, therefore, provided, "If process shall have issued against two or more persons jointly indebted, and shall have been personally served upon either of the defendants, the defendant who may have been served with process shall answer to the plaintiff; and the judgment in such case, if rendered in favor of the plaintiff, shall be against all the defendants, in the same manner as if all had been served with process; but execution shall issue only in the manner hereinafter mentioned. Vol. I, 56, § 113. This statute requires that all the parties shall be named in the process, and the whole proceedings are, in form, against all the parties, although there may be but a part of them served with process. As to process against joint debtors, see *ante*, 60, 61, 77, 78.

Counties, towns, and public officers, actions against.] Actions against counties must be brought against the board of supervisors. 3 R. S., 774, § 108, 5th ed. The board of supervisors must be named as defendant; the individual supervisors should not be named. *Hill* v. *Board of Supervisors, &c.*, 2 Kern., 52. Actions against a town must be brought against the town by name, and the process may be a summons, as in case of an action against a

corporation. 3 R. S., 774, § 108, 5th ed. Actions against the several town and county officers must be brought against them individually, specifying in the process, pleadings and proceedings, their name of office; and such actions may be commenced in the same manner as against individuals. 3 R. S., 794, § 109, 5th ed. See manner of describing names of office, *ante* 64, 65.

Change of parties, &c.] When an officer of a town, or of a school district is sued, and there is a change of officers by the expiration of the term of office of one person, and the election of an other to supply his place, such change will not affect a pending action.

A suit against the trustees of a school district to recover teacher's wages does not abate, and is not discontinued by the expiration of the defendant's term of office and the choice of other persons to succeed them. *Colegrove* v. *Breed*, 2 Denio, 125. The same rule is applicable to overseers of the poor. *Manchester* v. *Herrington*, 6 Seld., 164. A substitution of the new officers may be made by consent of the parties. *Colegrove* v. *Breed*, 2 Denio, 125. Or the court may order a substitution. Code, § 121. This section is applicable to justices' courts. Code, §§ 8 and 64, sub. 15.

Misjoinder of defendants.] In actions upon contracts, the misjoinder of defendants may be made a ground of objection in several ways:

1. By way of answer in abatement of the action.

2. By motion for a nonsuit at the trial. *Manahan* v. *Gibbons*, 19 Johns., 109; *Tibbits* v. *Percy*, 24 Barb., 39, 42; *Barker* v. *Cassidy*, 16 Barb., 177; *Phalen* v. *Dingee*, 4 E. D. Smith, 379.

3. If the defect appears on the face of the complaint by way of demurrer.

4. If the objection is properly taken below and overruled, it is a ground of appeal. *Phalen* v. *Dingee*, 4 E. D. Smith, 379; *Tibbits* v. *Percy*, 24 Barb., 39, 42; *Barker* v. *Cassidy*, 16 Barb., 177; *Manahan* v. *Gibbons*, 19 Johns., 109.

Nonjoinder of defendants.] In actions upon contract, the nonjoinder of a co-defendant must be objected to:

1. By way of answer in abatement; for unless the defect appears on the face of the complaint, the objection must be taken by way of answer in abatement, or it is waived. *Williams* v. *Allen*, 7 Cow., 316; *Gay* v. *Cary*, 9 Cow., 44.

2. If the defect appears on the face of the complaint, and also that the co-defendant is still living and within the jurisdiction of the court, a demurrer may be interposed. *Burgess* v. *Abbott*, 6 Hill, 135; *State of Indiana* v. *Woram*, 6 Hill, 33.

3. It is not a ground of nonsuit at the trial. *Gay* v. *Cary*, 9 Cow., 44; *Williams* v. *Allen*, 7 Cow., 316.

The defendant knows, or ought to know, who should be joined with him as co-defendants; and if he does not plead their nonjoinder in abatement, he has no ground of complaint. If all the defendants are liable severally, or jointly and severally, the defendant sued has no ground of objection, since the plaintiff

has a right to sue all or a portion of those liable. And it is only in case of a joint liability, not a joint and several liability, that affords ground of an answer in abatement.

Plaintiffs in actions for wrongs.] The general rule is, that the action must be brought by the person who is injured by the wrongful or unlawful acts. The cases which determine what injuries are actionable are very numerous; and the cases are extremely diversified, since they relate to injuries to real estate, to personal property, and to the rights of persons.

Action by assignee.] There is a numerous class of cases in which it is held that a cause of action for a tort or wrong is assignable. And in those cases in which such an assignment may be made, the action must be brought in the name of the assignee. The instances in which such an assignment may or may not be made, have been discussed in its appropriate place. Vol. I, 94 to 97.

Actions by executors or administrators.] In case of the death of a person in whose favor a cause of action exists, the action may generally be brought by his executor or administrator. 3 R. S., 746, § 1, 5th ed. If one of several persons interested dies, the action should be brought in the name of the survivor.

Husband and wife.] If an injury is done to property which belongs to husband and wife jointly, an action may be brought in their joint names.

If the property injured belongs to the husband alone, the action must be brought in his name alone. So, if the injury is done to the separate property of the wife, the action must now be brought in her name alone. Vol I, 657 to 661.

Partners, actions by.] A cause of action which exists in favor of a firm for a wrong, must be brought in the name of all the partners.

Corporations, actions by.] Corporations must sue in their corporate name for any wrongful act which gives them a right of action.

Joint stock companies or associations.] Actions in favor of joint stock companies or associations, which consist of seven or more shareholders or associates, may sue in the name of their president or treasurer, for the time being. Vol. I, 292.

Town and county officers.] Actions may be brought by town and county officers, in their own names, with the addition of their name of office, for any injury to the property or right of such officers, or of the bodies represented by them. Vol. I, 260, 267.

Infants, actions by.] An action by an infant for a wrong must be brought in his name in the same manner as in an action upon contract. See *ante*, 273.

Lunatics, actions by.] Actions for *wrongs* to the property of lunatics must be brought in their own names, notwithstanding they may have a committee. *Lane* v. *Schermerhorn*, 1 Hill, 97; *Petrie* v. *Shoemaker*, 24 Wend., 85; *McKillip* v. *McKillip*, 8 Barb., 552.

In actions on *contract*, there are cases in which the action may be brought in the name of the committee of such lunatic. See *ante*, 273.

Actions by the committee are limited strictly to the cases mentioned in the statute, viz., on contracts. *McKillip* v. *McKillip*, 8 Barb., 552.

Tenants in common, and joint tenants.] In actions brought by tenants in common, or by joint tenants, for injuries to their real or personal property, the action ought to be brought by all the parties in interest. Code, §§ 117, 119; *Rice* v. *Hollenbeck*, 19 Barb., 664, and cases cited.

Penalties, actions for.] Whenever any statute gives a penalty to any person, or class of persons, the action may be brought in the name of the person to whom such penalty is given. Actions brought for the recovery of a penalty for a violation of the excise law ought to be brought in the name of the "Board of commissioners, &c.," and not in the name of the individual commissioners. *Pomroy* v. *Sperry*, 16 How. Pr., 211; *Board of Com. of Excise of Saratoga Co.* v. *Doherty*, 16 How. Pr., 46.

The correct practice is, to bring the action precisely as the statute authorizes it. If an action is given to individuals, then they must sue, or if it is given to a board by name as in the case cited, then sue in the name of such board. As to action for penalties see Vol. I, 754 to 762.

Misjoinder of plaintiffs in actions for torts.] If too many persons are joined as plaintiffs in an action for a wrong, the law provides that the objection may be taken as follows:

1. By answer in abatement. *Walrod* v. *Bennett*, 6 Barb., 144.
2. By motion for a nonsuit at the trial. *Ackley* v. *Tarbox*, 29 Barb., 512; *Gould* v. *Glass*, 19 Barb., 179.
3. By demurrer, if the defect appears on the face of the complaint.
4. By way of appeal, if the objection was properly taken in the court below, and overruled. *Ackley* v. *Tarbox*, 29 Barb., 512; *Gould* v. *Glass*, 19 Barb., 179.

Nonjoinder of plaintiffs in actions for torts.] The nonjoinder of proper parties as plaintiffs in actions for torts may be objected to:

1. By answer in abatement.
2. By motion for nonsuit at the trial. *Rice* v. *Hollenbeck*, 19 Barb., 664.
3. By way of appeal, if the objection was properly taken in the court below, and overruled. *Rice* v. *Hollenbeck*, 19 Barb., 664. But see *Tripp* v. *Riley*, 15 Barb., 334, which holds that the nonjoinder must be set up in the answer by way of abatement, or it is waived.

It does not appear from the report of the last case, that a motion for a nonsuit was made in the court below.

Defendants in actions for torts.] The general rule is, that the person committing the injury, either by himself or his agent, is

to be made defendant, the principal being in all cases liable for the fraudulent or tortious acts of his agent or servant, if committed while in the course of his employ, but not for injuries willfully committed. *Harlow* v. *Humiston*, 6 Cow., 189; *McCahill* v. *Kipp*, 2 E. D. Smith, 413; *Wolfe* v. *Mersereau*, 4 Duer, 473; *Wright* v. *Wilcox*, 19 Wend., 343; *Hibbard* v. *N. Y. and E. R. R.*, 1 E. P. Smith, 455; Vol. I, 249, 276.

Infants, lunatics.] All natural persons are liable for their torts, and this rule includes infants. *Conklin* v. *Thompson*, 29 Barb., 218; *Fish* v. *Ferris*, 5 Duer, 49; *Campbell* v. *Stakes*, 2 Wend. 137. So lunatics are liable in a civil action for any tort which they may commit, although they may not be punishable criminally, since the guilty intent would be wanting to constitute a crime, while the intent is not material in making out a cause of action for a tort; but the intent might be material as to the amount of damages. *Krom* v. *Schoonmaker*, 3 Barb., 649.

Married women.] A married woman is liable to be sued for her wrongful and unlawful acts, but her husband must be joined with her as a defendant, whether the tort was committed before or during marriage. *Marsh* v. *Potter*, 30 Barb., 506; *Matthews* v. *Fiestel*, 2 E. D. Smith, 90.

Prior authority, or subsequent ratification of tort.] An action lies against any person who was a party to a tort, or a conversion of property, or who assisted in it or directed it to be done, or who subsequently assented to and ratified it, whether the assent was given before or after the wrong was done. But an infant, a married woman or a lunatic would not be made liable by a subsequent ratification of the act. And in all cases, the ratification must be made with full knowledge of the facts. *Fox* v. *Jackson*, 8 Barb., 355; *Pratt* v. *Potter*, 21 Barb., 589.

Executors and administrators.] If the person who committed the wrongful act dies, and the cause of action survives, that will not authorize an action against his executor or administrator in a justice's court, because a justice has no jurisdiction over such an action. Code, § 54, sub. 5.

Corporations.] Corporations are liable for negligence, when an injury results to an other in consequence. *The Rector, &c.*, v. *Buckhart*, 3 Hill, 193; *Townsend* v. *Susquehanna T. R.*, 6 Johns., 90. So, they are liable for a wrongful conversion of personal property. *Beach* v. *Fulton Bank*, 7 Cow., 485. Or for the wrongful acts of their officers or agents or servants when they are engaged in the ordinary course of the business of the corporation. *Richmond Turnp. Co.* v. *Vanderbilt*, 1 Hill, 480; *Vanderbilt* v. *Richmond Turnp. Co.*, 2 Comst., 479; *Mayor of New York* v. *Baily*, 2 Denio, 433. But a corporation is not liable for a willful trespass committed by an agent or servant. *Ib.* An action lies against a corporation for malfeasance in building a dam across a stream. *Mayor of New York* v. *Baily*, 2 Denio, 433; Vol. I, 249, 276.

Penalties.] In actions for penalties, those persons must be named as defendants who are liable to be sued therefor. Where a statute imposes a penalty or forfeiture for an act injurious to the rights of an other, which is given to the party aggrieved, it is in the nature of a satisfaction for the wrong done, and though the words of the statute render *every man* offending liable, only one penalty can be recovered, and all who join in the act may be sued together. *Palmer* v. *Conly*, 4 Denio, 374; *S. C.*, 2 Comst., 182. And this rule applies to actions for penalties for a violation of the excise law. *Hall* v. *McKechnie*, 22 Barb., 244; *Ingersoll* v. *Skinner*, 1 Denio, 540; see Vol. I, 754–762.

Cannot be both plaintiff and defendant.] No one can be both plaintiff and defendant in an action. A trustee of a religious society cannot be sued by his co-trustees, as a trespasser, in respect to the property of the society, until he has been divested of his character and authority as trustee. His possession is the possession of his co-trustees, and his right is equal to that of the others. *Trustees of Meth. Ep. Church* v. *Stewart*, 27 Barb., 553.

Joinder of defendants.] In an action for a tort unconnected with contract, where the wrong is done by several individuals, the plaintiff has an election to sue them all jointly, or to sue one or more of them separately. *Livingston* v. *Bishop*, 1 Johns., 290; *Rose* v. *Oliver*, 2 Johns., 365; *Marsh* v. *Berry*, 7 Cow., 344; *Osterhout* v. *Roberts*, 8 Cow., 43. But if an action is brought against one of the trespassers, and a judgment is recovered against him, which is paid, such payment will bar an action against any of the other defendants. *Dexter* v. *Broat*, 16 Barb., 337; *Osterhout* v. *Roberts*, 8 Cow., 43. But until the plaintiff elects to collect a judgment, or until the amount of one of them is tendered to him, he may sue each defendant separately, and then elect which he will collect. He may collect the costs in each case, but he cannot have but one satisfaction. *Livingston* v. *Bishop*, 1 Johns., 290; *Osterhout* v. *Roberts*, 8 Cow., 43.

Misjoinder and nonjoinder of defendants.] The general rule is, that the plaintiffs may sue any or all the wrongdoers, at his election; and, as a consequence, the question of misjoinder or nonjoinder of defendants cannot be properly made in actions for torts unconnected with contract. If less than all the defendants are sued, the plaintiff may recover the full damages of those sued; and, if too many are sued, the plaintiff may recover against those who are liable, and judgment be rendered in favor of those not liable. *Dominick* v. *Eacker*, 3 Barb., 18; *Fox* v. *Jackson*, 8 Barb., 355; *Montfort* v. *Hughes*, 3 E. D. Smith, 591.

There is one class of cases in which it may be said that the damage was done by several, and yet they cannot be joined as defendants. Where cows, belonging to several owners, are found in the garden of an individual, committing a trespass, each owner is liable for the damage done by his own cow, and no more. *Partenheimer* v. *Van Order*, 20 Barb., 479. So if several dogs do mischief by worrying sheep, a joint action will not lie against all

the owners. *Van Steenburgh* v. *Tobias*, 17 Wend., 562; *Auchmuty* v. *Ham*, 1 Denio, 495; Vol. I, 850.

CHAPTER XV.

JOINDER OF CAUSES OF ACTION.

The question who are proper parties to an action has just been discussed. But, there is also an other question which immediately arises; because one person may have a right of action against an other for several different causes. The defendant may owe the plaintiff on contract, and he may also be liable for some wrongful act to personal or real property. In such cases, it becomes important to determine what causes of action *may* be joined; and also what causes of action *must* be joined together in the same action.

The Code, § 140 and § 69, has abolished all forms of actions. And this rule applies to justices' courts. Code, § 64, sub. 15, and Code, § 69.

As the law now stands the form of the action will not be any test to determine whether several different causes of action may be joined in the same action. But, although the forms of actions are abrogated, there are certain principles which relate to the joinder of causes of action which remain unimpaired. And the same rules which governed this question before the Code, are as applicable to justices' courts now, as they were before that act was passed.

In the higher courts, the Code has blended legal and equitable jurisdictions; and, as a consequence, other changes in the law became necessary; though it is not necessary to notice them in this work. But, in justices' courts the jurisdiction remains pretty much as it was before the Code, unless we except an extension of such jurisdiction as to amount, and in relation to actions of replevin, or the recovery of personal property.

The reason of the rule as to the joinder of causes of action in justices' courts remains the same as it has been for a long time; and there is no express change made by the Code in that respect; it is, therefore, safe to adopt the same rules which have long been established in relation to these courts.

Splitting single causes of action.] The law does not encourage, nor does it tolerate a plaintiff in making the defendant any unnecessary expense and trouble by splitting a cause of action, and bringing separate suits on each part of it. And, therefore, when a plaintiff has a single cause of action arising upon *contract*, although there may be many items of it, he must join them all in the same action; and, if he sues and recovers for a portion of the items, he will be precluded from bringing an action and recovering for the residue. *Bendernagle* v. *Cocks*, 19 Wend., 207; *Coggins* v. *Bulwinkle*, 1 E. D. Smith, 434; *Gurnsey* v. *Carver*, 8 Wend., 492; *Smith* v. *Jones*, 15 Johns., 229; *Phillips* v. *Berick*, 16 Johns., 136. But the cause of action must arise out of a single contract or transaction, for, where two bills of goods were sold to the defendant,

at different times, and a credit of six months was given on one bill, and none as to the other, it was held that the causes of action were separate and distinct, and that a recovery upon the bill first sold, was no bar to an action upon the second. *Staples* v. *Goodrich*, 21 Barb., 317.

Where there are several items of account for goods sold or work performed at different times, there must be either an express contract, or the circumstances must be such as to raise an implied contract embracing all the items, to make them a single or entire demand. *Secor* v. *Sturgis*, 2 E. P. Smith, 548, 554, 555, 558. This last case was decided by the court of appeals, and it is an elaborate exposition of the correct rule.

The same rule applies to actions for *torts*. And whenever a right of action exists for taking or injuring several articles of personal property, if they were all taken at the same time, or by a single wrongful act, the articles must all be sued for in a single action; and if an action is brought to recover for taking a portion of such articles, and the plaintiff recovers judgment, he will be barred from maintaining an other action for the residue of them. *Farrington* v. *Payne*, 15 Johns., 432.

But where a plaintiff sued for the recovery of the value of several articles, and it appeared on the trial that but a portion of the articles had been converted at the time when the suit was commenced, it was held, that the plaintiff might strike out of his complaint the cause of action for the articles which were not converted, and that this was not splitting up a single cause of action, so as to bar a right to the residue of the property. *Doty* v. *Brown*, 4 Comst., 71, Vol. I, 953.

So where a plaintiff has a right of action against two on a joint demand as partners, if he sues one and recovers a judgment against him, that will be a bar to an action against the other joint debtors. *Olmstead* v. *Webster*, 4 Seld., 413; *Robertson* v. *Smith*, 18 Johns., 459; *Benson* v. *Paine*, 9 Abb., 28.

If one or more of the debtors cannot be served with process because of their absence beyond the jurisdiction of the court the plaintiff may insert the names of all the debtors as defendants, and then proceed against all of them, even although but a portion of them were served with process. *Ante*, 61, 77, Vol. I, 56, §§ 113, 114.

Several causes of action on contract.] If a plaintiff has several causes of action against the defendant, and they all arise upon contract, they may all be joined in the same action. And this is the rule, although some of the causes of action arise upon sealed agreements, and some of them upon unsealed ones, and whether the liability is founded upon express or upon implied promises. And a cause of action for goods sold, services rendered, &c., may be joined with a right of action upon a bond or other sealed instrument.

Several promissory notes may be sued on in the same complaint, *Dorman* v. *Kellam*, 14 How., 184. And, an action upon

a justice's judgment in those cases in which it may be sued, may be joined with causes of action upon accounts, promissory notes, bills of exchange, or other demands of that nature, or with sealed contracts. Under the old forms of actions and pleadings, an action would not lie to recover upon an account, or a promissory note, if it was joined with a right of action upon a bond, or a judgment, because one of them ought to be sued in assumpsit, and the other in debt or covenant. But those forms having been abolished there can be no objection to their joinder in the same action, because the same kind of answer, judgment and execution would be appropriate in each case. Any causes of action which exist under the provisions of subdivisions 1, 4, 5, 6, 7, of § 53 of the Code may be joined in the same action.

Trespasses may be joined.] The plaintiff may join in the same complaint as many causes of action as he may have against the defendant, for trespasses committed by him, whether the trespass was to real or to personal property, or to both of them. This rule will include actions for the conversion of personal property. See Code, § 53, sub. 2.

Penalties.] Several penalties may be joined in the same action, when they all exist in favor of the same plaintiff, and against the same defendant. Code, § 53, sub. 3, and see *ante*, 286.

Contracts and torts cannot be joined.] Actions which arise upon contract cannot be joined with those which are founded upon torts or wrongs. An action for wrongfully killing cattle, cannot be joined with a cause of action arising upon a contract to carry the same cattle to a distant place, and an omission to do so, because they were killed by the way. *Colwell* v. *N. Y. & Erie R. R.*, 9 How. Pr., 311.

A claim for the unlawful conversion of goods, being founded upon tort, and one for money had and received, being upon contract, cannot be joined in the same action. *Cobb* v. *Dows*, 9 Barb., 230. This case was reversed, 6 Seld., 335, but not upon this point. A cause of action in *tort*, cannot be united with one on *implied contract. Hunter* v. *Powell*, 15 How. Pr., 221; *Hall* v. *Fisher*, 20 Barb., 442; *Martin* v. *Mayor of Brooklyn*, 1 Hill, 545.

A count in a complaint for a breach of warranty in the sale of a horse, cannot be joined with a count in fraud and deceit in wrongfully concealing the defects of the same horse. *Sweet* v. *Ingerson*, 12 How. Pr., 331. A complaint against a bailee of a horse cannot contain a count upon an implied contract to return him to the bailor, and also a count for a wrongful conversion of him by driving him to death. *Howe* v. *Cook*, 21 Wend., 29.

Causes of action must be in same right.] In joining causes of action, they must all belong to the plaintiff in the same right. And, therefore, a plaintiff cannot include in the same action, claims in his individual right, and as administrator of an other. *Lucas* v. *N. Y. Central R. R.*, 21 Barb., 245.

The causes of action must not only belong to the plaintiffs in

the same right but they must all be interested in the entire causes of action. *Ante*, 275; *Dunderdale* v. *Grymes*, 16 How. Pr., 195.

Action must affect all the defendants in the same right.] It is not sufficient that the plaintiff has a cause of action against all of the defendants. He must have a cause of action against them all in such a manner that they may be joined in the same action.

A constable and his sureties may be joined in the same action, when it is founded upon the neglect of the constable to return a justice's execution within the time required by law, or for keeping moneys collected, &c. *Moore* v. *Smith*, 10 How. Pr., 361; *Sloan* v. *Case*, 10 Wend., 370. But where one count in the complaint states a cause of action against a part of the defendants, and an other count states a cause of action against them all, it is a misjoinder of causes of action. *Wells* v. *Jewett*, 11 How. Pr., 242.

Where one of the causes of action against the defendant is against him individually, and an other as trustee, &c., they cannot be joined. *Alger* v. *Scoville*, 6 How. Pr., 131; *S. C.*, 1 Code Rep. N. S., 303. So, where the complaint demands judgment against one defendant individually, and against the other as a trustee, &c., they cannot be joined. *Ib.*

A cause of action against one defendant as principal, cannot be joined with a cause of action against an other defendant as surety of such contract. *Brewster* v. *Silence*, 4 Seld., 207, 215; *Phalen* v. *Dingee*, 4 E. D. Smith, 379, where several of the cases are collected, and see *ante*, 280, Parties to action. Several causes of action can be properly united in the complaint, in those cases only in which each cause of action affects all of the defendants. It is not enough that some of the defendants are affected by all of them. *Lexington, &c., R. R.* v. *Goodman*, 15 How. Pr., 85. It is not necessary, however, that the several causes of action should affect each of the defendants *equally*, it is sufficient that each cause of action affects each defendant in some degree. *Vermeule* v. *Beck*, 15 How. Pr., 333; *Beal* v. *Finch*, 1 Kern., 128; *O'Shea* v. *Kirker*, 8 Abb., 70; *S. C.*, 4 Bosw., 120.

Misjoinder of causes of action, how corrected.] If several causes of action are improperly joined in the complaint, the defendant's remedy is by demurrer for such misjoinder. The law has always permitted this to be done in justices' courts, as well as in courts of record, and that rule is not changed by the Code. *Howe* v. *Cook*, 21 Wend., 29; *Lucas* v. *N. Y. C. R. R.*, 21 Barb., 245; *Hall* v. *Fisher*, 20 Barb., 442.

Appeal does not lie.] If the defendant omits to demur to a complaint for a misjoinder of causes of action, the objection will be waived. And if the plaintiff proves a cause of action under either of the counts in his complaint, he will be entitled to recover, and the judgment will not be reversed for such misjoinder of causes of action. *Willard* v. *Bridge*, 4 Barb., 361; *Dunham* v. *Simmons*, 3 Hill, 609; *Whiting* v. *Crim*, 1 Hill, 61; *Lovett* v. *Pell*, 22 Wend., 369. If the defendant demurs to the complaint for misjoinder of causes of action, the plaintiff can amend by striking out one

cause of action, if he thinks the demurrer well taken. And so, if the justice decides that several causes of action are improperly joined, he must order the complaint to be amended in that respect. Code, § 64, sub. 7.

Election as to kind of action.] Under the old practice, where there were several different forms of action, it was frequently a matter of some consequence what form of action was adopted. But since the Code, there are but few cases in which any election can be made, because forms of action are abolished. Before the Code, if property was unlawfully taken or wrongfully converted, the owner might waive the tort and sue in assumpsit for the value. *Putnam* v. *Wise*, 1 Hill, 235, 240, note *a; Cummings* v. *Vorce*, 3 Hill, 282; *Berly* v. *Taylor*, 5 Hill, 577, 584, note *a; Osborn* v. *Bell*, 5 Denio, 370; *McKnight* v. *Dunlop*, 4 Barb., 36. And it has been held that the rules are the same since the Code. *Hinds* v. *Tweddle*, 7 How. Pr., 278, 281; *Doughty* v. *Crozier*, 9 Abb., 411. But if the plaintiff has an election to waive the tort, and sue for the value of the goods as though they were sold on contract, it is important to remember that by adopting that method, the defendant may introduce a set-off, which he could not do if sued in tort. And again, the plaintiff will also waive the right to arrest the defendant or to imprison him on the execution, if he elects to waive the tort. But, unless the defendant has actually sold the goods, the tort cannot be waived so as to sue for the goods sold, or for money had and received. *McKnight* v. *Dunlop*, 4 Barb., 36, 42; *Putnam* v. *Wise*, 1 Hill, 240, note *a*.

But there is one kind of remedy which may frequently be desirable. If an individual sells goods to an irresponsible person, who obtains the possession by a fraudulent statement, or if he by any means obtains possession of them fraudulently, it will be important to obtain the goods themselves. So, in other cases in which one person has personal property of an other, and he refuses to deliver it to the owner, an action of replevin is then preferable, as the identical property will then be recovered. Vol. I, 504 to 509.

And again, there is one class of cases in which replevin is the only safe remedy to be adopted. If an officer should levy an execution upon exempt property, the injured party should replevin the articles taken, and he will then secure the property itself with all the advantages which will arise from its use. But if, in such a case, the owner of the property should sue for the value of the property, and for the unlawful act of taking it, he might recover a judgment for the value of the property, and for damages for taking it; but the judgment so recovered would not be exempt property, but would be liable to be applied on the very judgment under which it was taken on the execution. *Mallory* v. *Norton*, 21 Barb., 424.

CHAPTER XVI.
GENERAL RULES OF PLEADING.

SECTION I.
GENERAL PRINCIPLES.

All *forms* of actions, and all *forms* of pleadings have been abrogated by the Code, §§ 69, 140, 64, sub. 15. The abolition of these forms was a necessity, when the principles of the Code became rules of law. The plain intention and spirit of the Code is, that every party, whether plaintiff or defendant, shall state fully and truly all the facts which constitute the cause of action, or the ground of defense. The old system permitted the litigation of causes under general pleadings, of which there were numerous forms, which were adapted to corresponding forms of action.

But the Code has introduced a system of special pleading which requires a statement of the particular facts of each case.

It must not be understood, however, that the abrogation of the *forms* of actions, or of pleadings, has also abrogated the *principles* of actions, or of pleadings.

If the facts, in a given case, would not constitute a cause of action before the Code, they will not constitute a cause of action now. *Cropsey* v. *Sweeney*, 27 Barb., 310.

The changes which the Code has made relate exclusively to the *manner* of stating the facts which constitute the cause of action, or the ground of defense, and to the proper parties to an action. It has no reference whatever to the rules of law by which it is determined, whether a particular state of facts is sufficient to constitute a cause of action or a ground of defense.

The law, in that respect, remains unchanged by the Code, unless it relates to the statute of limitations, or the assignment of demands, &c. The fundamental *principles* of pleading have not been abrogated; and the rules which were observed under the old law, are mainly the same as those now in use; or, in other words, it was the intention of the legislature to preserve all of the old rules that were applicable to the new system. *Knowles* v. *Gee*, 8 Barb., 300.

At the time of the enactment of the Code, the rules of pleadings provided by it were the same in all courts. But since that time the law has been changed in that respect; and, as the Code now stands, sections 140 to 177, both inclusive, apply to courts of record, while section 64 applies to justices' courts.

But, it does not follow, as of course, that these principles do not apply to a justice's court, merely because the Code does not so apply them. The principles which the Code has adopted are, many of them, nothing more than the common law rules of pleading, and they were always as applicable to a justice's court as to a court of record. And those common law principles which have not been abrogated, are as applicable now to a justice's

court as they ever were, unless in those cases in which the Code expressly changes the rule. But there is more than this to be observed.

The statute which confers jurisdiction upon justices' courts, expressly provides that these courts shall be vested with all the *necessary powers* which are possessed by courts of record in this state. Vol. I, 37, § 1. This section is clearly broad enough, both in language and spirit, to confer authority upon justices' courts, to control all matters of pleadings which are proper to be observed in these courts.

If the complaint shows on its face that there is a misjoinder, or a nonjoinder of parties, or that several causes of action have been improperly joined, a demurrer will lie to correct the error. So, if the complaint or answer does not state facts sufficient to constitute a cause of action or defense; or if the pleadings are not sufficiently explicit, a demurrer may be interposed. Code, § 64, sub. 6.

Form of pleadings.] Pleadings are not required to be in any particular form, but must be such as to enable a person of common understanding to know what is intended. Code, § 64, sub. 5. They may be oral, or in writing, except in certain specified cases in which the law requires them to be in writing, as when the defendant pleads title to lands. Code, § 64, sub. 2; Code, § 55.

If the pleadings are oral, the justice is required to enter the substance of them in his docket. Code, § 64, sub. 2. The term substance must be understood to embrace all the material allegations which the party makes, and which are essential to constitute a cause of action or defense.

The justice is not bound to enter in his docket any allegations but those which are made by the parties. And if the complaint or answer is defective, because it does not state sufficient facts, the opposite party may demur to the pleading. The defendant may demur to the complaint before he puts in his answer. And, the plaintiff may demur to the answer after it is put in.

The practical effect of the rules prescribed by the Code, is to cause the pleadings to be in writing, because if the party does not furnish written pleadings, the justice must reduce the material allegations to writing, and enter them in his docket. When the parties furnish written pleadings, the justice is required to file them and make an entry in his docket referring to them. Code, § 64, sub. 2.

In common practice, the allegations are very carelessly made, and there are very few complaints or answers which contain facts sufficient to constitute either a cause of action or a ground of defense. Parties have a right to litigate their causes in that way if they choose, but it will be found to be for the interest of both parties, if they each require the other to state fully and clearly all the material facts upon which they rely. There will then be less need of making amendments, and there will not be so many

disputes as to the questions which are in issue for trial. See *ante*, 259, 260.

Must be pleadings and issue.] The statute imperatively requires that there shall be pleadings in the action. And at the time of the first appearance of the parties, either to join issue voluntarily, or upon the return of process, the parties must join issue before an adjournment is had, except in those cases in which the defendant shall neglect or refuse to plead. Vol. I, 44, § 46; *Fanning* v. *Trowbridge*, 5 Hill, 428; and see *Thompson* v. *Sayre*, 1 Denio, 175. If the defendant does not appear, or if he does appear, but neglects or refuses to answer to the complaint, there will, of course, be no issue joined. But the plaintiff must put in his complaint, and it ought to show on its face a good cause of action, especially in those cases in which the defendant does not appear so as to waive any defects, either expressly or by implication.

Where a return from the marine court certified that the defendant did not appear in the cause, that no pleadings were put in, and that the justice received a statement of facts from the attorneys of the respective parties, whereon he rendered judgment. without examining any witnesses; it was held that the judgment could not be sustained. *Heidenheimer* v. *Lyon*, 3 E. D. Smith, 54.

Facts are to be stated.] No question seems to have perplexed the courts more than to determine *what* are the *facts* which are to be alleged. It is difficult to frame an exact definition which shall include every case, or to reduce to practice any of the numerous rules which have been stated.

The principle is this, each party must allege some acts or things which the other has done or omitted to do, in consequence of which there is a cause of action on the one hand, or a ground of defense on the other. This rule excludes the allegation of those facts or matters of evidence which go to prove that the other party has done, or omitted to do the alleged acts or things, and it also excludes any allegation of the legal conclusion which follows or results from the doing or the omission of the acts or things alleged in the pleadings to have been done or omitted.

Suppose that an action is brought to recover the value of goods sold; the complaint will allege that at a certain named time and place the plaintiff sold and delivered certain specified goods to the defendant at his request, that they were of a specified value, and that they are not paid for, those would be the facts, which, if admitted to be true, would be the plaintiff's cause of action.

He ought not to allege that on a certain day, at a specified place, the defendant *admitted* that he had purchased such goods; because that would be mere *evidence* of the allegation in the complaint that the goods were sold, &c. So, on the other hand, the plaintiff ought not to allege that the defendant is liable to pay for the goods sold and delivered; because that is a mere *conclusion of law* upon the facts alleged, if they are admitted or proved to be true.

It may be said that the *admission* of the party is a *fact*, and the remark is true; but it is also a fact which is mere *evidence* of the truth of the *facts* or *allegations* which the law requires to be stated.

It may be said, too, that the liability of the defendant is a *fact;* but that fact is a *conclusion of law* which the *court* is to draw from the facts which are properly alleged in the pleadings, and established as true. See also the very appropriate remarks of DUER, J., in *Mann* v. *Morewood*, 5 Sandf., 566, and in *Lawrence* v. *Wright*, 2 Duer, 674, 675, and of JEWETT, J., in *Allen* v. *Patterson*, 3 Seld., 478.

An other illustration may not be inappropriate. It is a principle of law, that when one person unlawfully converts, to his own use, the property of an other, the wrongdoer is liable to respond in damages for his acts.

A complaint for such a cause of action ought not to state this principle of law; but it ought to allege that the defendant, at a specified time and place, wrongfully and unlawfully took and converted to his own use certain property belonging to the plaintiff. No allegation of evidence of the truth of these facts ought to be made, such as the admissions of the defendant, or that a certain named witness will swear to the truth of these allegations.

The rule is this, the complaint ought to contain *allegations* which logically and legally show that the defendant is liable to an action; or that the plaintiff is entitled to the relief demanded.

So an answer, if it is not a mere denial, ought to contain such *allegations* as show a defense, if admitted to be true. There need not be any confusion on account of the rule introduced by the Code which requires the *facts* to be alleged; because the truth is, the whole system of pleadings is a mere method of making *allegations*, though those allegations relate to facts.

State enough to show cause of action or ground of defense.] The rule which requires the pleadings to state the facts constituting the cause of action or the ground of defense, means that all the material facts which are requisite for that purpose must be stated. Every fact which either party is required to prove at the trial must be alleged. *Allen* v. *Patterson*, 3 Seld., 478, per JEWETT, J. This rule however may be waived by the parties, and if neither party demurs to the pleadings of the other, the most informal and insufficient pleadings will answer. And if no demurrer is interposed the pleadings will be held sufficient to permit evidence to be given in support of any cause of action or defense which may have been intended to be pleaded, although that may have been very objectionably done. *Catlin* v. *Gunter*, 1 Kern., 368; *White* v. *Spencer*, 4 Kern., 247, at page 251, DENIO, Ch. J., said: "If the court can plainly see, as in this case, what the matter attempted to be pleaded is, the issue is not immaterial, though it may be defectively stated. *Mayor, &c. of N. Y.* v. *Mason*, 1 Abb., 345; *Hall* v. *McKechnie*, 22 Barb., 244, 245.

Questions of fact.] There are many allegations in pleadings which may be said to involve questions of fact; by which is to be understood, that certain allegations in the pleadings are mere conclusions from evidence.

Indeed a great portion of the allegations in any pleading is but the expression, in a logical and legal form, of the conclusions or deductions of facts which are drawn from other facts, or in other words, from the evidence which proves their existence.

When a complaint alleges that goods were *sold* to the defendant, the allegation of a sale is a mere conclusion of fact deduced from the evidence of the circumstances or transaction which constitutes a legal sale.

The intention with which an act was done is sometimes material, as that fact will sometimes form an important element in constituting a cause of action, or in the measure of damages. *Ives* v. *Humphrey*, 1 E. D. Smith, 197. An allegation of the unlawful conversion of personal property is a question of fact. *Covell* v. *Hill*, 2 Seld., 381. So is the question whether a person assented to a specified transaction, *Kemeys* v. *Richards*, 11 Barb., 312; whether a fraud has been committed, *Erwin* v. *Voorhees*, 26 Barb, 127; so as to the actual possession of land. *Parsons* v. *Brown*, 15 Barb., 590; that the plaintiff became the owner of certain property or choses in action, by purchase. *Prindle* v. *Caruthers*, 1 E. P. Smith, 425. And it may be stated, as a general rule, that every fact which is put in issue by the pleadings, and is to be determined by the court or a jury upon the evidence adduced, is a question of fact. There are also questions which are said to be mixed questions of law and of fact, which must be determined by the court or by a jury under the instructions of the court as to the law; or in a justice's court by the jury who are judges of both the law and the facts.

Questions of law.] A question of law arises when the law is to be determined upon *undisputed* facts. For, until the facts are determined, no question of law can arise upon them; although it has been incorrectly said that there may be mixed questions of law and fact, in which the law is declared conditionally, and it is to be applied in accordance with the findings of facts. As a general rule, conclusions of law are not to be alleged in the pleadings. An allegation that a party released a claim without stating that it was a written sealed instrument, &c., is alleging a conclusion of law. *Hatch* v. *Peet*, 23 Barb., 575.

A statement in a complaint that by means of a contract which is set forth, it became the duty of the defendant to perform certain acts, is not sufficient unless the facts necessary to show the duty are stated. *City of Buffalo* v. *Holloway*, 3 Seld., 493, 498. So, an allegation that the defendant has failed to fulfill his obligations by virtue of an agreement which is set out, without alleging any facts which show a breach of it, is an allegation of a conclusion of law and defective. *Van Schaick* v. *Winne*, 16 Barb., 90, 95. But there is a class of cases in which a conclusion

of law may be alleged in connection with other facts constituting a cause of action.

In an action for the conversion of personal property by the defendant, it is proper to allege the facts which show a conversion of it, and then to allege that the acts of conversion were *wrongfully* or *unlawfully* done. The law intends that every act done is lawful and innocent, unless it affirmatively appears that it was not so; and, therefore, the complaint would not show an unlawful or wrongful conversion if this allegation were omitted. *Walter* v. *Lockwood*, 23 Barb., 228, 233; *Ensign* v. *Sherman*, 14 How. Pr., 439; *Decker* v. *Mathews*, 2 Kern., 313; *Hunter* v. *Hudson River*, *&c.*, *Co.*, 20 Barb., 493; *Sheldon*, *&c.* v. *Hoy*, 11 How. Pr., 12, 16. So, in actions to recover damages for a fraud, the complaint ought to state the facts which constitute the cause of action, and then allege that the acts were fraudulently done, or the representations fraudulently made. So, in actions for negligence, the complaint ought to allege that the acts stated were negligently done, &c. *Brown* v. *Harmon*, 21 Barb., 511. So, in an action of replevin to recover the possession of personal property, the complaint may allege that the defendant unjustly detains the property, &c. *Childs* v. *Hart*, 7 Barb., 370.

This brief form of alleging a wrongful conversion of chattels, or of fraud, or of negligence, or of unjust detention of property, &c., is permitted as a matter of convenience, when the complaint sets out all the necessary facts to show a conversion, a fraud, negligence and the like, and when this allegation is made merely to show that the acts alleged were wrongful or unlawful. But a party is always at liberty to allege such facts as will show that the act is wrongful, fraudulent and the like, without making such allegation, if that is deemed advisable. If, on all the facts alleged, it can be declared as a matter of law, that a wrongful conversion is shown, no such allegation will be necessary, since it would be merely alleging a conclusion of law, which sufficiently appears from the facts stated. And, in all cases, if the complaint shows an unlawful conversion, &c., the allegation of a wrongful conversion would at most be mere surplusage.

Questions of law and fact.] There are questions which are said to be mixed questions of law and fact. Strictly speaking, there cannot be such a question, because there cannot be a question of law raised until the facts are settled, and when the facts are settled, there can be nothing left but questions of law.

The phrase, mixed questions of law and fact, originated in the practice which is adopted in courts of record. There are frequently questions to be decided in which no rule of law can be laid down except conditionally. The jury are instructed that if they find a given state of facts, then the law to be applied will be one thing; but if a different state of facts is found, then the law will be different in the case. In such cases the jury render a general verdict, including the questions of fact and of law; but that does not by any means make any question decided by them

a mixed one. On the contrary, they are expressly instructed to determine the questions of fact first, and then to apply the law according to the facts found. *Purvis* v. *Coleman*, 1 Bosw., 321, 326; *S. C.*, 7 *E. P. Smith*, 111; *Carroll* v. *Upton*, 3 Comst., 272.

The cases in which this question most frequently arises, are those in which it is important to determine whether certain articles are necessaries for which an infant is liable; whether a bill or note has been duly presented; whether due diligence has been used; whether a reasonable notice has been given; whether a proper demand has been made, and other cases of a similar nature. In pleading, the party ought always to allege such facts as will show that he has performed what he was bound to do, or that the other party has not done so.

Statement of evidence.] The law requires that the facts constituting the cause of action or defense shall be stated; and the parties ought never to state the evidence which shows those facts to be true. *Pattison* v. *Taylor*, 8 Barb., 250. A complaint in an action for a breach of promise of marriage, alleged, in substance, that in a conversation between the parties at a time and place specified, the plaintiff asserted, among other things, that the defendant had promised to marry her, and that, at the same time and place, the defendant said to the plaintiff he acknowledged he had done wrong in promising her as he did, and hoped she would forgive him; but if he should marry her, as they had talked, and she go to his house, it would make both miserable for life; and it further alleged, that the defendant said to the plaintiff, in reply to her entreaties, she must try to forget it, and acknowledged he had done wrong, and that he was sorry for it; but there was no other allegation of a promise by the defendant, it was held, on demurrer to the complaint, that it did not state facts sufficient to constitute a cause of action. *Buzzard* v. *Knapp*, 12 How. Pr., 504; see also *Page* v. *Boyd*, 11 How. Pr., 415. It is not sufficient to allege such facts as would be good evidence to authorize a jury to infer those facts which ought to be stated in the complaint. Such facts ought to be stated, that the court alone can determine what the law is, without the aid of a jury to find any facts, or without finding any facts for itself. *Page* v. *Boyd*, 11 How. Pr., 415, 417; *Buzzard* v. *Knapp*, 12 How. Pr., 504. This was the rule before the Code. *Fidler* v. *Delavan*, 20 Wend., 57, 60; *Benjamin* v. *De Groot*, 1 Denio, 151.

Legal presumptions.] Those things which the law presumes, need never be stated in the pleadings. In an action of slander, the plaintiff need not allege his good character, as the law presumes that. This illustration is convenient; but it will be remembered that a justice has no jurisdiction of actions for slander. Code, § 54, sub. 3. When a plaintiff's complaint shows that he was once the owner of property, at some time before the action was brought, he need not allege that he is still the owner, or that he never transferred it to an other; because the law will presume, in the absence of allegation or proof, that the owner-

ship continues. *Van Rensselaer* v. *Bonesteel,* 24 Barb., 366; *Niblo* v. *Harrison,* 7 Abb., 447.

Fictions in pleadings.] One of the objects in view in enacting the Code, was to abolish the former system of fictions in the pleadings.

In the old action of trover, the plaintiff alleged that he had lost certain goods, which the defendant found and converted to his own use. But, under the present rules of pleading, no such statement is proper.

The object of the present system is, that the parties shall state truly, clearly, and fully the facts upon which they rely. In an action for goods sold, there is seldom an express promise to pay for them, especially in those cases in which there is a running account existing between the parties. But, in all such cases, there is an implied promise to pay for them, arising from the legal liability to pay.

In such cases, no promise need be alleged in the complaint. It will be sufficient to state such facts as show a legal liability for the debt.

Positively.] The allegations in pleadings ought to be directly and positively made, and when all the material facts are thus stated, there will be a distinct and direct issue to try. The Code expressly requires that the complaint and answer shall state the facts in a plain and direct manner. Code, § 64, subs. 3, 4.

Hypothetical allegations.] The parties are required to make plain and direct allegations, as we have just seen. But it is a part of the system that the pleadings shall be true. It was the intention of the legislature to provide such rules of pleadings as would enable and also require parties to state nothing but the truth.

The result of this rule in practice is, to compel a party either to admit or to deny the allegations of a preceding pleading. A defendant, therefore, must either deny the material allegations in the complaint, or a part of them, or he must admit their truth either expressly or by implication by not denying them. If he denies all the allegations in the complaint, that will put them all in issue. If he denies a portion of the allegations, and is silent as to the others, or if he expressly admits the truth of a portion of them, the result will be that the facts which are denied will be in issue, while the remainder of them will be admitted as true.

The importance of this rule is greatest in those cases in which the defendant sets up an affirmative defense in his answer. If there is no denial interposed, the complaint will stand admitted, and the whole defense will rest upon the answer of new matter. In such cases, the answer cannot say, hypothetically, that *if* the facts stated in the complaint are true, that he then has a defense such as the answer sets up. Such an answer would neither be a denial nor an admission of the allegations in the complaint, and it is therefore bad pleading. *Dovan* v. *Dinsmore,* 33 Barb., 87; *McMurray* v. *Gifford,* 5 How. Pr., 14; *Boyce* v. *Brown,* 7 Barb., 80; *Conger* v. *Johnston,* 2 Denio, 96. But see *McCormick* v.

Pickering, 4 Comst., 277. Such an answer may be demurred to, because the plaintiff does not know what is intended, since it neither denies nor confesses and avoids the complaint. Code, § 64, sub. 6. The answer may, however, refer to the cause of action in the complaint by calling it the "alleged" or the "supposed" cause of action, because that assumes that there is a cause of action alleged which requires an answer by way of defense.

Duplicity.] One of the advantages of the Code is, that it reduces the system of pleadings to a plain, simple and brief statement of the facts in the case, without any unnecessary repetitions. Each separate cause of action ought, therefore, to be stated in a separate count in the complaint.

If several distinct and independent causes of action are blended together in a single count, confusion may naturally be expected to result. But if each distinct cause of action is separately stated, the court and the opposite party can readily see what is to be answered. And, besides this, it will facilitate a defense by requiring the defendant to answer each cause of action separately, when the defense is any thing more than a mere denial.

There is no particular mode by which counts or causes of action are to be separated and distinguished from each other in a complaint in a justice's court. Any mode which apprises the defendant of what is intended is sufficient. *Hall* v. *McKechnie*, 22 Barb., 244, 247; Code, § 64, sub. 5.

After a single cause of action is stated, a convenient method would be to allege, that the plaintiff for a further and other cause of action, says, &c. Each separate cause of action may thus be pointed out, and the allegations will then be seen to relate to a new and different cause of action instead of being a portion of the allegations pertaining to the previous cause of action. But there are other objections than that of stating several causes of action together in a single count. It is sometimes the case that a plaintiff sets out a single cause of action in several different counts. This is in direct violation of the letter and the intention of the Code. Liberal rules have been provided in relation to variances between the pleadings and the evidence, and also for amendments in those cases in which justice will be promoted by granting them. Code, § 64, subs. 10, 11. There is no need, therefore, for more than a single statement of any cause of action. In actions in the supreme court, if several unnecessary counts are thus added, they will be struck out on motion. *Churchill* v. *Churchill*, 9 How. Pr., 552; *Dunning* v. *Thomas*, 11 How. Pr., 281; *Stockbridge Iron Co.* v. *Mellen*, 5 How. Pr., 439; *Dickens* v. *N. Y. Cent. R. R.*, 13 How. Pr., 228.

A justice's court possesses the same power to protect itself and the defendant from any violation of the rules of pleading. Vol. I, 37, § 1. The proper method would be for the justice on motion of the defendant, to require the plaintiff to elect which count he

will proceed upon and then to strike out the others. But, it must be remembered, that if there are several distinct causes of action, the plaintiff not only may but he ought to set them out in separate counts.

Certainty as to time, place, quantity, and value.] The time when any material traversed fact occurred ought to be stated. *Gillet* v. *Fairchild*, 4 Denio, 80. But, if time is not essential in the particular instance, a demurrer will not lie for an omission to state it. *People* v. *Ryder*, 2 Kern., 434. And page 439, where the court said, "In contemplation of the Code, is the *time* generally when a fact happened, a *fact?* If the *time* when a fact happened is material to constitute the cause of action, it should undoubtedly be stated. The fact without the time would be insufficient to constitute the cause of action; but, if the time is immaterial, I do not think a demurrer will lie for omitting to state it." When a complaint or answer is not sufficiently explicit to enable the opposite party to understand it, because of an omission to state the time, a demurrer is expressly given by the Code, as to cases in justices' courts. Code, § 64, subs. 6, 7.

The same rules apply to allegations as to place. And when the place is a material fact in the case, it ought always to be truly alleged. In many actions the place where an act was done may be material as a jurisdictional question, and in others it may be material in order that a cause of action shall appear to exist. A demurrer will lie for an omission to state the place where an act was done, if that is material to the cause of action. Code, § 64, sub. 6; *Gillet* v. *Fairchild*, 4 Denio, 80.

It is a general rule of pleading, that if the matters alleged are local in their nature, the truth of the venue is material and of the substance of the issue. *Vermilya* v. *Beatty*, 6 Barb., 429; *Rightmyer* v. *Raymond*, 12 Wend., 51; *Morgan* v. *Lyon*, 12 Wend., 265.

Where a party seeks, in the courts of this state, to enforce a contract, which, by its laws is forbidden and declared void, he must aver and prove *where* it was made, and that by the laws of that place it was authorized and valid. *Thatcher* v. *Morris*, 1 Kern., 437. Where one party agrees to sell and deliver goods at a particular place, and the other agrees to receive and pay for them, an averment by the purchaser, of a readiness and willingness to receive and pay *at that place*, in case he sues for a non-delivery, is indispensably necessary to a good complaint. *Clark* v. *Dales*, 20 Barb., 42, 65. When time and place are not material facts, in constituting a cause of action, and they are not necessary for the purpose of making the pleading intelligible, a demurrer will not lie for omitting to state them.

The quantity or number of articles involved in the action ought generally to be alleged when that allegation is important.

But a party may always obtain a bill of particulars, if he demands it in the manner prescribed by law. Code, § 64, sub. 14.

As a general rule the value of articles or services are not material allegations.

If a cause of action is stated, the value relates merely to the amount of damages, not to the right of recovery. And, an omission to deny the value of property, is not an admission of the value alleged in the complaint; but the value must be proved at the trial. *Connoss* v. *Meir*, 2 E. D. Smith, 314; *Hackett* v. *Richards*, 3 E. D. Smith, 13; *Woodruff* v. *Cook*, 25 Barb., 510. In replevin the rule is otherwise. Vol. I, 880.

Facts necessarily implied need not be stated.] Those facts or conclusions which are necessarily implied from the facts which are stated, need not be alleged in the pleadings. There are numerous cases which illustrate this rule, and a few of them will be given for the purpose of showing the application of the principle. In all those actions which are founded on contract, and in which the liability of the defendant arises by implication of law, or, as it is sometimes expressed, from an implied promise, there need not be any allegation of a promise to pay unless a promise was actually made. And even then, the promise does not add anything to the validity of the demand, or to the liability of the defendant, because if he is already liable to pay, any number of promises could not do more than make a liability, and that already exists.

In all such cases of implied promises, it is not necessary to allege a promise to pay, but the complaint should *state* the *facts* which show such liability, and it will then be a conclusion of law from those facts, that the defendant is liable to pay. *Cropsey* v. *Sweeney*, 27 Barb., 310. Such conclusions of law are not to be alleged in the pleadings. See *ante*, 295, Conclusions of law, &c.

In a complaint which states a cause of action for a breach of a written contract, and the contract purports to be made "for value received," which contract is set out in the complaint, it is not necessary for the complaint to allege that there was a consideration, nor to allege what the consideration was, and in such a case, if the complaint alleges that the contract became the property of the plaintiff by purchase, that will be sufficient without stating when, from whom, or upon what consideration the purchase was made. *Prindle* v. *Caruthers*, 1 E. P. Smith, 425. But enough must appear to show that there was a consideration. *Spear* v. *Downing*, 22 How. Pr., 30. An allegation of purchase necessarily implies that in some legal manner the plaintiff acquired the title to the property.

All such matters as are impliedly averred may be traversed by the defendant, and a general denial puts them all in issue. *Prindle* v. *Caruthers*, 1 E. P. Smith, 429; *Bellinger* v. *Craigue*, 31 Barb., 534. An allegation that the defendant *accepted* a bill of exchange is sufficient, without stating that the acceptance is in writing, although the law requires it to be in writing. *Bank of Lowville* v. *Edwards*, 11 How. Pr., 216.

In a complaint by the payee of a promissory note against the maker, it is not necessary to allege that the plaintiff has not parted with the note, or that he is the holder. A complaint which shows that the defendant made the note payable to the plaintiff

and delivered to him; and that it has not been paid is sufficient on demurrer. *Niblo* v. *Harrison*, 7 Abb., 447; and see *Keteltas* v *Myers*, 5 E. P. Smith, 231.

In an action by the payee against the maker of a promissory note, it is sufficient to allege that the defendant *made* his promissory note, &c. It is not necessary to allege that the note was *delivered*, because that is implied in the term *made* his note, &c. *Chappell* v. *Bissell*, 10 How. Pr., 274; *Peets* v. *Bratt*, 6 Barb., 662; *Keteltas* v. *Myers*, 5 E. P. Smith, 232, per ALLEN, J.; *Burrall* v. *De Groot*, 5 Duer, 379.

There is a numerous class of cases under the statute of frauds, which requires certain agreements to be in writing in order to make them valid. But in all such cases it will be sufficient to state the agreement or promise without alleging that it was in writing. As a rule of evidence, it will be necessary to prove a valid written agreement or promise, if issue is taken upon it, but as a rule of pleading, there need be no allegation that the agreement or promise is written. The averment that an agreement, &c., was made, necessarily implies that it was a valid one, and such as the common law or the statute requires. *Stern* v. *Drinker*, 2 E. D. Smith, 401; *Horner* v. *Wood*, 15 Barb., 371; *Livingston* v. *Smith*, 14 How. Pr., 490, 492; *Hilliard* v. *Austin*, 17 Barb., 141.

When a plaintiff sues upon a claim which has been assigned to him, it is sufficient to allege that the claim was *duly assigned*, without stating the manner in which it was done. *Fowler* v. *N Y. Ind. Ins. Co.*, 23 Barb., 143; and see *Brown* v. *Richardson*, 1 Bosw., 402. No consideration need be alleged for the assignment. *Richardson* v. *Mead*, 27 Barb., 178.

An allegation "that the property, after being in the possession of the plaintiff, came into the possession of the defendant, who, although requested so to do, has not delivered the same to the plaintiff, but *wrongfully detains* the said goods," is sufficient to show a *conversion*. *Sheldon* v. *Hoy*, 11 How. Pr., 12, 16. The conversion is a legal inference and ought not to be stated, though the statement would do no harm.

Judicial notice.] Those things of which the court take judicial notice need not be alleged in a pleading. It is not necessary or proper to state what the common law is in relation to the case, for it is the business of the court to know and administer the law. *Shaw* v. *Tobias*, 3 Comst., 188, 190.

So it is not necessary to refer to or allege a public statute, under which an action is brought, unless the action is for the recovery of a penalty given by statute, when a proper reference must be made. *Shaw* v. *Tobias*, 3 Comst., 188, 190; *Brown* v. *Harmon*, 21 Barb., 508; *Methodist Ep. Church* v. *Pickett*, 5 E. P. Smith, 482, 486; *People* v. *Herkimer*, 4 Cow., 345; *Brown* v. *Scofield*, 8 Barb., 239, 241; *Carris* v. *Ingalls*, 12 Wend., 70, 72; *Bayard* v. *Smith*, 17 Wend., 88; *Goelet* v. *Cowdrey*, 1 Duer, 132, 139. Private statutes must be pleaded, 1 Bla. Com., 85; Steph.

Plead., 347; so of the by-laws of a municipal corporation, *Harker* v. *Mayor of N. Y.*, 17 Wend., 199, and this rule includes the by-laws of every incorporated city or village. *Ib.* The laws of other states must be pleaded, *Holmes* v. *Broughton*, 10 Wend., 75; so of the laws of foreign countries, *Monroe* v. *Douglass*, 1 Seld., 447. The public divisions of the state need not be pleaded, because the courts take judicial notice of them. *Chapman* v. *Wilber*, 6 Hill, 475; *People* v. *Breese*, 7 Cow., 429; *Bronson* v. *Gleason*, 7 Barb., 472; so of the days of the week, as of Sunday, *Mechanics', &c., Bank* v. *Gibson*, 7 Wend., 460. There is a large number of things, besides these which have been named, of which the courts take judicial notice; and it is a general rule that a party need not allege in pleading any of those facts of which the courts take such notice.

Negativing defense.] It is sufficient for a plaintiff to state facts sufficient to constitute a cause of action; and it is not necessary for the complaint to negative such facts as would constitute a defense, if well pleaded and proved in evidence by the defendant. It is not necessary, therefore, for the complaint to allege that the cause of action accrued before it was commenced; that is a ground of answer, or of nonsuit at the trial; but the omission to allege it is not a ground of demurrer to the complaint. *Smith* v. *Holmes*, 5 E. P. Smith, 271.

A policy of insurance against fire, upon which the action was brought, contained this clause: "Camphene, spirit gas, or other burning fluid, when used as a light, subjects the goods, &c., &c., to an additional premium of ten cents per $100, and premium for such use must be indorsed in writing upon the policy." The complaint did not aver that camphene, &c., was not used as a light, or, if used, that the premium was indorsed upon the policy; and it was held, that it was not necessary to negative in the complaint a breach of this provision; its observance not being necessary to be proved on the trial as one of the facts constituting the cause of action; and that if broken, the breach was a matter of defense, which, as such, should have been stated in the answer. *Hunt* v. *Hudson River Fire Ins. Co.*, 2 Duer, 481. An action was brought against a canal commissioner for a neglect of his duties as such officer, in not repairing the banks of the canal, in consequence whereof the plaintiff was damaged, &c. It was held that the complaint need not allege that the defendant had funds for that purpose, because that ought to be alleged as a defense. *Griffith* v. *Follett*, 20 Barb., 620; and see *Adsit* v. *Brady*, 4 Hill, 631.

There are some cases in which a justice of the peace is authorized to render a judgment for a sum greater than the ordinary jurisdiction. Code, § 53, sub. 6, 7.

In an action, in such cases, all that the plaintiff need allege or prove is, that there is a valid cause of action. He need not allege or prove any facts which ought to be pleaded as a defense. *Humphrey* v. *Persons*, 23 Barb., 313, 314. So, in actions upon claims,

which are barred by the statute of limitations, the complaint need not allege a new promise nor a part payment; that is a matter of defense, and must be set up in the answer. Code, § 74; *Clark* v. *Atkinson*, 2 E. D. Smith, 112; *Esselstyne* v. *Weeks*, 2 Kern., 635.

When the facts which constitute the plaintiff's cause of action are supposed to be within the knowledge of the defendant, but not of the plaintiff, less particularity of statement is required in the complaint than would otherwise be necessary. *Van Rensselaer* v. *Jones*, 2 Barb., 643.

In an action for the recovery of a penalty for a violation of a statute, if there is a proviso in it which excuses certain persons from the penalty, the complaint need not negative that fact as to the defendant. He must plead it to avail himself of the defense. *Sheldon* v. *Clark*, 1 Johns., 513; *Bennet* v. *Hurd*, 3 Johns., 438; *Hart* v. *Cleis*, 8 Johns., 41.

But when the exceptions in a statute are contained in the enacting clause, and not in a proviso, the complaint in an action for a violation of the statute must negative the exceptions. *Trustees, &c.*, v. *Utica, &c., R. R.*, 6 Barb., 313.

Surplusage.] Surplusage consists of useless and immaterial statements, in addition to those which are necessary to constitute a cause of action, or a ground of defense.

If the pleading is legally sufficient without such surplusage, the insertion of such useless and immaterial matter will not vitiate the pleading. *Nellis* v. *DeForest*, 16 Barb., 61, 66; *Thomas* v. *Roosa*, 7 Johns., 461; *Chapman* v. *Smith*, 13 Johns., 80.

In courts of record, matters which are clearly surplusage, will be struck out on motion. *Stone* v. *De Puga*, 4 Sandf., 681; *Lee* v. *Elias*, 3 Sandf., 736; Code, § 160.

There are instances in which a pleading may be so framed as to cause an unnecessary allegation to be a subject of much inconvenience.

In an action for the conversion of personal property, or for an injury to it, it will be sufficient to state such facts as show a cause of action. But, if the plaintiff in such an action should allege that a trespass was committed on certain real estate, which is described, and also that the conversion or injury of the personal property was done at the same time and place, and as a part of the trespass upon the real estate, he will be bound to prove all the allegations. In actions for torts it is generally sufficient to prove a portion of the allegations, if they constitute a cause of action, and any unnecessary allegations need not be proved. But, where the cause of action is alleged to be a trespass to lands, and the injury to personal property is an incident or matter of aggravation, the trespass to the real estate must be proved or the whole action will fail. *Frost* v. *Duncan*, 19 Barb., 560; *Schermerhorn* v. *Buell*, 4 Denio, 422, 424; *Howe* v. *Willson*, 1 Denio, 181; *Houghtaling* v. *Houghtaling*, 5 Barb., 379.

Repugnant, inconsistent, &c.] All pleadings ought to be true;

but if they are repugnant or inconsistent they cannot possibly be true as to all the allegations. And they would be liable to a demurrer, because they would not be sufficiently explicit for the opposite party to understand them. Code, § 64, sub. 6.

If a single, separate, affirmative defense in an answer should deny the allegations in the complaint, and should also plead a tender, these would be inconsistent defenses. *Livingston* v. *Harrison*, 2 E. D. Smith, 197.

But a defendant may plead a general denial, and then set up a separate and affirmative defense, because both answers may be true. A person may not owe an other anything, even if such a claim is made, and yet he may tender something for the purpose of avoiding costs in case an unjust claim is proved against him.

In an action to recover the possession of personal property, the defendant may answer by a general denial, and may also set up as a separate defense such facts as constitute a justification. *Hackley* v. *Ogmun*, 10 How. Pr., 44; *Stiles* v. *Comstock*, 9 How. Pr., 48; *Mott* v. *Burnett*, 2 E. D. Smith, 50.

How facts ought to be stated.] It has been seen, *ante*, 298, that the pleadings ought not to state the evidence of the facts, nor the conclusions of law which arise upon them. The true rule is, for the pleader to allege the facts according to their logical and legal effect. That was the rule before the Code. *Bayley* v. *Onondaga, &c., Co.*, 6 Hill, 476; *Scott* v. *Leiber*, 2 Wend., 479; *Grannis* v. *Clark*, 8 Cow., 36. But, in stating a written agreement, it was also proper under the former practice to set out the paper itself and leave the court to construe it according to its legal effect. See cases just cited.

These principles of pleading have not been changed by the Code, for it has been held in numerous cases, that it was sufficient to state a contract according to its legal effect, whether the contract was verbal or written. In an action against a principal, for a fraud committed by his agent, the complaint alleged that the frauds were committed by the principal; but no reference was made to the acts of the agent, and the court of appeals held this to be correct. *Bennett* v. *Judson*, 7 E. P. Smith, 238, 240; *Sherman* v. *N. Y. Central R. R.*, 22 Barb., 239. The principle of this decision is, that the act of an agent within the scope of his authority, is the act of his principal, and therefore, it ought to be alleged according to its legal effect. The same principle was applied in the following cases: *Boyce* v. *Brown*, 7 Barb., 80; *Pattison* v. *Taylor*, 8 Barb., 250; *Dollner* v. *Gibson*, 3 Code Rep., 153; *Stewart* v. *Travis*, 10 How. Pr., 148, 153; *Cady* v. *Allen*, 22 Barb., 388, 395. The same rule applies to cases under the statute of frauds, for it is not necessary to allege that the contract was in writing, nor to state those other acts which make such a contract binding. See *ante*, 302, "Facts necessarily implied." *Livingston* v. *Smith*, 14 How. Pr., 490, 492. So in relation to sales, or assignments, it is sufficient to allege that goods were sold, or

that a chose in action was assigned, without stating the particular acts which constitute the sale or assignment. *Ante,* 302, "Facts necessarily implied." But it has also been held that there is no harm in stating these facts just as they were, as, for instance, it may be alleged that a contract was made by an agent duly authorized, &c. *Ives* v. *Humphreys*, 1 E. D. Smith, 196, 201; *St. John* v. *Griffith*, 1 Abb., 39; or, a written contract may be set out in the complaint. *Fairbanks* v. *Bloomfield*, 2 Duer, 349; or, in an action for money had and received, the complaint may state how the defendant received the money. *Lienan* v. *Lincoln*, 2 Duer, 670. But when a party elects to state the facts of the case, instead of their legal effect, he must be careful to avoid the statement of mere evidence, or of legal conclusions. *Ante,* 296, 298.

In declaring upon written agreements, it is always easier to set out the contract itself, and then make such additional allegations as constitute a cause of action. And, when the cause of action or defense is founded upon an account, or an instrument for the payment of money only, it is sufficient to deliver it to the court, and state that there is a specified sum due, &c. Code, § 64, sub. 9.

Recitals.] When a written instrument is sued upon, and a copy of it is set out in the complaint, or when a written instrument is set out in an answer, the recitals in the instrument set out will constitute a part of the allegations in the pleading. But, if the instrument set out does not show a cause of action or defense upon its face, as for instance, if it does not show any consideration, there must be allegations to show a consideration. *Spear* v. *Downing*, 22 How. Pr., 30. If the instrument shows a consideration, then a recital of its contents is a pleading of facts. *Prindle* v. *Caruthers*, 1 E. P. Smith, 425; *Slack* v. *Heath*, 1 Abb., 331; *Spear* v. *Downing*, 22 How. Pr., 30; and see Code, § 64, sub. 9; *Keteltas* v. *Myers*, 5 E. P. Smith, 231; *Farron* v. *Sherwood*, 3 E. P. Smith, 227.

Facts not denied are admitted.] It is a rule of very extensive application, that any material fact in a pleading which is not denied in a subsequent pleading is admitted. And this principle was well settled before the Code. *Raymond* v. *Wheeler*, 9 Cow., 296, 302; *Jack* v. *Martin*, 12 Wend., 311; *S. C.*, 14 Wend., 507. This rule is expressly applied to courts of record by the Code, § 168. And it is equally applicable to justices' courts. *Walrod* v. *Bennett*, 6 Barb., 145. But, in a justices' court, the rule cannot be applied except in those cases in which allegations in the complaint are not denied in the answer.

There is no reply in these courts, and therefore no denial can be made of those matters of defense which are stated in the answer. Every material allegation in an answer is considered as denied, and besides that all new matter by way of avoidance of the answer is admissible without any reply. *Hodges* v. *Hunt*, 22 Barb., 150. But even in relation to the complaint, the rule is, that if there is a general denial of the facts in the complaint, or a special denial of a portion of them, any answer which sets

up new matter will not admit the facts so put in issue by the previous denial. *Swift* v. *Kingsley*, 24 Barb., 541; *Troy, &c., R. R.* v. *Kerr*, 17 Barb., 581.

The rule itself has no application except as to material allegations which are necessary to constitute a cause of action, and an omission to deny immaterial allegations, or mere matters in aggravation, or mere conclusions of law, is not an admission of them.

An admission of the facts stated in the complaint may be made by expressly admitting their truth, or they may be admitted by implication. If an answer is interposed, and there is no denial of any of the allegations in the complaint, then the whole complaint is admitted by implication. If a part of the allegations are denied, and there is no denial as to a part of them, then those allegations which are not denied are admitted by implication. If the defendant does not appear and answer in the action, there is not any implied admission, and the plaintiff must prove his case in the same manner as though a general denial had been interposed. Code, § 64, sub. 8; *Perkins* v. *Stebbins*, 29 Barb., 523; *Swift* v. *Falconer*, 2 Sandf., 640; *Carter* v. *Dallimore*, 2 Sandf., 222; *Jones* v. *Pridham*, 3 E. D. Smith, 155; *Howard* v. *Brown*, 2 E. D. Smith, 247. If the defendant appears and joins issue, but does not appear at the trial, the plaintiff must still prove his case. *Alburtis* v. *McCready*, 2 E. D. Smith, 39. But that must relate to a case in which the answer put in issue the facts alleged in the complaint. If the defendant should appear and answer in an action, and his answer should not deny any allegation in the complaint, but should set up an affirmative defense to the cause of action alleged in the complaint, the plaintiff would not be bound to prove a cause of action, whether the action were tried at the joining of issue or at an adjourned day. *Dennison* v. *Carnahan*, 1 E. D. Smith, 144, 146; *Walrod* v. *Bennett*, 6 Barb., 144; *Bridge* v. *Payson*, 5 Sandf., 210. But there may be cases in which such an admission may not admit any thing more than that there is a cause of action for nominal damages. And if that is all that is admitted, then the plaintiff must prove the amount of damages in the same manner as though a general denial had been interposed.

Facts admitted by the pleadings cannot be disproved by evidence. They are to be taken as true for the purposes of the action. *Bridge* v. *Payson*, 5 Sandf., 210; *Walrod* v. *Bennett*, 6 Barb., 145.

What allegations are material will be next discussed.

What are material allegations.] A material allegation is one which is necessary to constitute a part of the facts upon which the plaintiff relies to recover a judgment; or one which is necessary to constitute a part of the matters of defense. It is an allegation which it is material to establish on the trial, either by evidence or by some rule of law which stands for proof in relation to such allegation. *Fry* v. *Bennett*, 5 Sandf., 54; *Newman* v. *Otto*, 4 Sandf., 668. A test of materiality is, to strike out the

allegation which is deemed superfluous, and, if a good cause of action or ground of defense is still stated, then the allegation is not material; but if there is no cause of action or ground of defense stated without the allegation, then it is material. *Mayor, &c., of Albany* v. *Cunliff*, 2 Comst., 170, 171, CADY, J.; *Oechs* v. *Cook*, 3 Duer, 161, 165.

Allegations may be material in one point of view and immaterial in an other. Special damages and matters in aggravation may be material to be alleged for the purpose of allowing proof of them at the trial, but they are not material for the purpose of constituting a cause of action; and, therefore, an omission to deny them is not an admission of their truth. And besides that, such allegations are not traversable, because no issue can be formed upon such allegations alone. An affirmative defense which does not deny any allegation in such a complaint, merely admits a case for nominal damages. *Gilbert* v. *Rounds*, 14 How. Pr., 46, 49, 50; *Moloney* v. *Dows*, 15 How. Pr., 265; *Bates* v. *Loomis*, 5 Wend., 134; *Root* v. *Foster*, 9 How. Pr., 37.

Facts not alleged cannot be proved.] This rule does not possess the same importance in relation to variances that it did under the former practice when a variance was fatal, and when amendments could not be made as they now may. But, as the rule now stands, a plaintiff cannot declare for one cause of action and prove a different one under an objection of the defendant. For instance, the plaintiff cannot complain upon contract and prove and recover for a tort. *Waldhein* v. *Sickel*, 1 Hilt., 45. And when a case has been tried as one sounding in tort, the pleadings cannot be changed on an appeal to an action on contract. *Andrews* v. *Bond*, 16 Barb., 633; but see *Doughty* v. *Crozier*, 9 Abb., 411. And when special damages are sought to be recovered, they ought to be alleged, in order to admit proof of them. *Vanderslice* v. *Newton*, 4 Comst., 130; *Low* v. *Archer*, 2 Kern., 277, 282; *Moloney* v. *Dows*, 15 How. Pr., 265.

But there is one point of view in which this rule is of far greater importance than any it ever had under the old rule.

Every affirmative defense whatever must now be set up in the answer, or no evidence will be admissible to prove it.

A general denial will permit the defendant to disprove any allegation in the complaint, if it is a material one, or it will permit the defendant to disprove such facts as the plaintiff may prove to establish his cause of action. But every defense which is founded upon the assumption that the complaint states a cause of action, but to which there is a valid defense, even if the complaint is true, must be set out in the answer. For instance, in an action upon a promissory note, the defendant may have made the note, but he has paid it; now payment must be set up in the answer, or it cannot be proved; and so of every affirmative defense. See Denial, and what defenses may be proved under it. Vol. I, 879 to 884.

But, in justices' courts, if the parties set out a cause of action

or defense ever so defectively, and no demurrer is interposed to it, the justice must permit any evidence which is proper to prove such cause of action or defense, in the same manner as though the cause of action or defense were properly stated. *White* v. *Spencer*, 4 Kern., 247; *Chapman* v. *Carolin*, 3 Bosw., 456; *Young* v. *Rummell*, 5 Hill, 60; see Variance. And if the pleadings are ever so defective, or if a defense not set up in the answer is proved without objection, the judgment will be valid, and not reversed on an appeal. *Tifft* v. *Tifft*, 4 Denio, 175; *Hall* v. *McKechnie*, 22 Barb., 245; *Neff* v. *Clute*, 12 Barb., 466; *Bell* v. *Davis*, 8 Barb., 210; *Young* v. *Rummell*, 5 Hill, 60.

Matters in aggravation, &c.] When an action can be maintained, and the circumstances attending it are of an aggravated character, such circumstances may be alleged, so as to authorize evidence in relation to the measure or amount of damages. *Root* v. *Foster*, 9 How. Pr., 37; *Gilbert* v. *Rounds*, 14 How. Pr., 46, 50; *Brewer* v. *Temple*, 15 How. Pr., 286; *Bates* v. *Loomis*, 5 Wend., 104. And the same rule applies to special damages. See Complaint, Special damages, and also the next subject which follows.

Special damages.] General damages are such as *necessarily* result from the injury complained of, and may be recovered without a special averment in the complaint. But such damages as are the natural but not the necessary result of the injury, are special, and must be stated in the complaint to prevent a surprise upon the defendant. *Vanderslice* v. *Newton*, 4 Comst., 130, 133; *Low* v. *Archer*, 2 Kern., 277, 282; *Armstrong* v. *Percy*, 5 Wend., 535; *Moloney* v. *Dows*, 15 How. Pr., 265; *Briggs* v. *Vanderbilt*, 19 Barb., 222; *Bogert* v. *Burkhalter*, 2 Barb., 525. A justice may permit an amendment at the trial, by inserting a claim for special damages, when no injury will result to the defendant; and substantial justice will be promoted; and upon such terms as may be just. *Miller* v. *Garling*, 12 How. Pr., 203; Code, § 64, sub. 11.

Scienter, &c.] There are instances when knowledge upon the part of the defendant will make him liable for his acts or representations, when, without such knowledge, he would not be liable. And knowledge and intent are frequently important in their influence upon the amount of damages. Whenever knowledge by the defendant is essential to a cause of action, such knowledge must be alleged in the complaint. The cases in which this principle is applicable, are those which relate to mischief done by domestic animals, representations as to the solvency of third persons, and the like. The cases will be noticed in appropriate places. See Vol. I, 846 to 853.

Duly, &c.] There are frequent instances in which it is alleged that some act was duly done. When the question arises upon undisputed facts, it is a matter of law; and when the question is, whether the act was properly done in fact, then it is a question of fact.

The general rule is, that such facts should be stated in the

pleading as will show that the alleged act was duly performed. It has been held, that it was a proper allegation to allege that a chose in action was *duly* assigned. *Fowler* v. *N. Y. Ind. Ins. Co.*, 23 Barb., 143. So an allegation that a bill of exchange was duly protested, has been held sufficient. *Woodbury* v. *Sackrider*, 2 Abb., 402; but see contra, *Price* v. *McClave*, 6 Duer, 544, 548, 549. In an action by a receiver of an insolvent corporation, such, for instance, as fire insurance companies, on premium notes, it is not sufficient to allege that the plaintiff was duly appointed receiver, &c. He must allege the facts which show a valid and legal appointment. *White* v. *Joy*, 3 Kern., 83, 91; *Gillet* v. *Fairchild*, 4 Denio, 80; and cases.

Profert, &c.] The system of making a formal profert of papers, by stating in the pleadings, that they are so offered, is not now the practice, even in courts of record. *Supervisors, &c.*, v. *White*, 30 Barb., 72; *Mayor, &c.*, v. *Doody*, 4 Abb., 128; *Welles* v. *Webster*, 9 How. Pr., 251. In justices' courts, the justice is authorized, on the request of either party, to require the other to exhibit his account or demand to the party who asks for its production. Code, § 64, sub. 14.

Construction of pleadings.] The construction which is put upon pleadings depends materially upon the time when, and the manner in which, the question is presented. If, at the joining of issue, either party demurs to a pleading of the other, on the ground that it does not contain sufficient facts to constitute a cause of action or a ground of defense, the justice must decide this issue. And in such a case, his decision is not a mere discretionary one. He must decide it according to the rules of law. And if the pleading demurred to is not legally sufficient, he must sustain the demurrer and order the opposite party to amend such defective pleading.

If a pleading is of doubtful construction, and a demurrer is interposed to it, the justice should sustain the demurrer and order it to be amended, because the object of pleading is to frame an issue upon pleadings which both of the parties and the court can clearly understand. And in deciding upon the sufficiency of a pleading which is demurred to, the justice ought always to give it a reasonable construction, with a view to substantial justice between the parties. *Allen* v. *Patterson*, 3 Seld., 476, 480. The cases upon this question will be fully considered when treating of demurrers. If no objection is made by way of demurrer to the pleadings, they must be construed liberally, and a party ought to be permitted to give evidence of any cause of action or defense which he has pleaded in any manner, however defectively or informally. *Ross* v. *Hamilton*, 3 Barb., 609; *Willard* v. *Bridge*, 4 Barb., 361, 365; *White* v. *Spencer*, 4 Kern., 247; see *ante*, 309, 310, "Facts not alleged, &c." If no objection is taken to the pleadings in the justice's court, none can be made on an appeal. See *ante*, 309, "Facts not alleged, &c."

SECTION II.

COMPLAINTS.

We have already discussed some of the general rules of pleadings, which are equally applicable to either complaint or answer. It is now proposed to explain with more particularity those rules which apply to each of them separately; and this will include complaints, answers and demurrers, which are the only pleadings permitted in justices' courts. The first pleading in a cause is the complaint of the plaintiff. And in this he is required to state those facts, or to make those allegations which he claims will constitute his right of action when those facts are admitted by a demurrer or answer, or when established by proof at the trial.

There are some formal parts of a complaint which are to be observed in drawing a written complaint, when the party draws such a one; or in those cases in which the justice takes down the substance of the allegations of the plaintiff.

Every complaint ought to state the name of the court, the name of the justice, the names of the parties, plaintiff and defendant, the right or character in which the parties sue; and the name of the county and town in which the action is brought.

The formal part of the commencement of a complaint may be framed thus:

JUSTICE'S COURT—FULTON COUNTY, *ss:*

John Doe
agst.
Richard Roe. } Before JOHN FROTHINGHAM, Esq.

Number of parties.] There are some rules in relation to this formal part of the complaint, which are worthy of a more particular notice than merely to give their form, because the complaint must correspond with the process in certain particulars.

The complaint must correspond with the process, whether it be a summons, a warrant, or an attachment, in the number of parties to the action, whether plaintiffs or defendants.

If two persons are named as plaintiffs in the process, they must also be both named in the complaint as plaintiffs, and so in relation to defendants. But if the parties join issue voluntarily, without any objection, the proceedings will be regular as to those who so join issue, and the case may be treated as one in which a voluntary issue is joined by the parties without process. Vol. I, 38, § 9.

But if objection is made by the defendant, the justice ought to require the complaint to correspond with the process as to the names and the number of parties named in such process.

Names of parties.] The names of all the parties ought to be stated in the title of the complaint. Though, if they are not

all stated in the title, but are all stated correctly in the body of the complaint, that will be sufficient. *Hill* v. *Thacter*, 3 How. Pr., 407; *S. C.*, 2 Code Rep., 3.

The name of each of the parties ought to be stated in full, except middle names, which may be represented by the initial letters.

In an action by a firm of partners, it is not sufficient to state the names of the firm as "Dunn & Davis," when the names of the partners are James Dunn and George P. Davis. Their names ought to be stated in full. So if there are several partners, and a portion of them are named, but there is the addition of "& Co." to the names, this is not sufficient, for the names ought to be all stated in full. *Bentley* v. *Smith*, 3 Caines, 170. If the name of a defendant is not correctly stated, he may set that up in his answer as matter in abatement. *Mann* v. *Carley*, 4 Cow., 148.

When the name of a defendant is not known to a plaintiff, the defendant may be sued by a fictitious name in a summons or warrant, but not by attachment, and if an answer in abatement is interposed by the defendant, the justice must amend the proceedings to correspond with the truth, and then proceed as though the proper name had been properly inserted at first. Vol. I, 74, § 207.

Character or right in which action is brought.] When the action is brought in the name of a person who sues in a representative capacity, the complaint ought to show that fact.

There are numerous cases in which actions may be brought in justices' courts, by plaintiffs in a representative capacity, such as administrator, executor, assignee for benefit of creditors, trustee of an express trust, receiver or public officer, of town or county. In all these cases, and in others of a similar character, the complaint must show clearly that the plaintiff has a right to sue, and that he does sue in such capacity.

Assignee for benefit of creditors.] When a plaintiff sues as assignee of an insolvent debtor, the complaint ought to state such facts as will show that he is such assignee, and how he became such. It will not be sufficient to name him as assignee in the title of the action, but the body of the complaint must show clearly, by proper allegations, that he is assignee, and that he sues as such. A trustee must sue *as such* to avoid a personal liability for costs. And when he sues in his own right and is defeated, he is liable for costs. *Murray* v. *Hendrickson*, 6 Abb., 96; *S. C.*, 1 Bosw., 635. But if he sues as assignee, and acts in good faith, he is not chargeable personally with the costs in case of defeat. *Cunningham* v. *McGregor*, 12 How. Pr., 305.

Administrator or executor.] When the plaintiff sues as administrator or executor, he must show, in the body of the complaint, by proper allegations, that he sues as such, and not in his individual capacity. The proper allegations will be stated in the form of complaint given in this work.

Complaint by infant and next friend.] When an infant is plaintiff and a next friend has been appointed, the complaint ought to show in the body of it, that the plaintiff is an infant, and that the next friend was properly appointed to prosecute the action. See the form of complaint by infant, for the proper allegations.

Receivers.] In actions by receivers the complaint must show that they were legally appointed as such. The proper averments will be found in the precedent of complaint.

Public officers.] The same rule applies to public officers, which has been shown to apply to receivers, executors, &c. The complaint must show authority to sue. See Form of complaint.

General rules.] There are so many cases in which plaintiffs may sue in a representative capacity, in a justice's court, that it will not be convenient to enumerate them all. And the same rule is applicable to all such cases, and that is, that the complaint must clearly show in the body of it that the party is entitled to sue, and that there is a cause of action. In every instance, the complaint ought to agree with the process as to the character in which the plaintiff sues, and when it does not, the justice must set aside the complaint on motion, if that is made before issue is joined. *Tuttle* v. *Smith*, 14 How. Pr., 395; *S. C.*, 6 Abb., 330; *Allen* v. *Allen*, 14 How. Pr., 248; *Blanchard* v. *Strait*, 8 How., 83. But if no objection is made until after issue joined, it will then be too late, and the issue must be tried as one which was voluntarily joined, as though no process had been issued.

Cause of action stated in the process.] The complaint need not correspond with the process as to the cause of action. The object of the process is to bring the party into court, and thus give the justice jurisdiction. And when that is done, the complaint will inform the defendant of the cause of action which is alleged against him; therefore, a variance between the cause of action stated in the complaint, and that stated in the process will be entirely immaterial. *Delancy* v. *Nagle*, 16 Barb., 96; *Cornell* v. *Bennett*, 11 Barb, 657; *Park* v. *Hitchcock*, in note, 11 Barb., 657; *Ante*, 46.

Within jurisdiction.] In all inferior courts the complaint must keep within the limits of the court, either as to amount of recovery, *Bellinger* v. *Ford*, 14 Barb., 250, or as to subject matter of the action. *Ante*, 15, Jurisdiction. In *Bellinger* v. *Ford*, 14 Barb., 250, and in *Gould* v. *Glass*, 19 Barb., 179, it is said that a complaint cannot be amended on appeal under § 173 of the Code, because that does not relate to justices' courts. But if that section does not relate to these courts, there is an other section which gives express authority to amend pleadings in justices' courts on an appeal. Code, § 64, sub. 11. This section of the Code was entirely overlooked in both of the cases cited. A complaint may be amended in a jurisdictional matter as well as any other. *Woolley* v. *Wilber*, 4 Denio, 570; *Bull* v. *Colton*, 22 Barb., 94.

If the cause of action proved, and the judgment actually

rendered are within the jurisdiction of the court, the pleadings ought to be amended, or the defect disregarded, whenever the question arises on an appeal.

Contract, complaint on.] We will now proceed to notice what facts ought to be stated in the body of the complaint, in an action arising upon contract. If the cause of action is local, the complaint ought to show affirmatively that the action is brought in the proper county or town. *Vermilya* v. *Beatty*, 6 Barb., 429; and see *ante*, 310, "Certainty of time and place."

If the cause of action is a transitory one, and it is illegal by the laws of this state, though it was legal where the contract was made, the complaint must show where it was made, and what the law was there, so as to show it legal here. *Thatcher* v. *Morris*, 1 Kern., 437. A complaint need not be dated, nor need it show affirmatively, that the debt for which the action is brought, was due before the suit was commenced. *Maynard* v. *Talcott*, 11 Barb., 569; *Smith* v. *Holmes*, 5 E. P. Smith, 271. If the complaint shows on its face, that the action was commenced before the cause of action accrued, it will be defective, and may be demurred to. *Cheetham* v. *Lewis*, 3 Johns., 42. The right of action must be complete at the time when the action is commenced; and, if it is not, though it becomes perfect before the trial, that will not be of any avail, and no amendment of the pleadings will aid the matter. *McCollough* v. *Colby*, 4 Bosw., 603; *Hare* v. *Van Deusen*, 32 Barb., 92, 99. The nature of the action is determined by the facts which are alleged, and not by the name which the plaintiff may choose to give to the action. *Cornes* v. *Harris*, 1 Comst., 223; *Burdick* v. *Worrall*, 4 Barb., 596.

Complaint, when to be special.] When an action is brought for the breach of any executory agreement, whether verbal or written, sealed or unsealed, or upon a justice's judgment, the complaint must set out the facts which constitute the cause of action; or, in other words, the cause of action must be specially declared on in the complaint. The exceptions to this rule are those cases in which the plaintiff may recover his demand under the common counts; and those cases in which an account is claimed, or some instrument is sued on which is for the payment of money only. Code, § 64, sub. 9. In all cases in which damages are claimed for the breach of a contract, in consequence of a neglect or refusal to perform it, the complaint must be special, and must state all the facts which are necessary to constitute a cause of action; unless it is an instrument for the payment of money only, as has been just explained.

It will be found in practice, that there is a very large class of cases in which the complaint must be special, because the cause of action is not upon an account, nor upon an instrument for the payment of money only. And it is for this reason, that a knowledge of some of the principal rules of pleading is essential to justices and to all persons who practice in justices' courts. One great advantage will be obtained by those who know how to

allege a cause of action properly, viz.: they will know accurately what facts it is important to prove to make a case. And this is a very great advantage, whether one is prosecuting, or is defending a cause.

Inducement.] There are many cases in which it is important to make some statements, by way of explanation or introduction to the main cause of action. Any such statements are called the inducement. In an action against a carrier for the non-delivery of goods, delivered to him for carriage, it is proper to state that he was a common carrier, &c., by way of inducement, and then to allege the delivery of the goods to him, as such carrier, &c.

Matters stated by way of inducement must be such as are important to show a cause of action, when taken in connection with all the other facts stated. In some instances, it is important to state that the plaintiff is an officer, or that he is acting in some representative capacity, or some similar fact, and such allegations will be proper in all cases, and in some cases indispensable to the statement of a cause of action.

Plaintiff's interest in the subject matter of the action.] Every action must be brought in the name of the real party in interest, with few exceptions. *Ante*, 264 to 267. And, therefore, the complaint ought in all cases to show that he has the real interest in the subject matter of the action, if he sues in his own individual right. And when he sues for the benefit of an other person, the complaint must state such facts as show his right to maintain an action. See Executor, Receiver, Assignee, &c., *ante*, 313, 314.

Consideration.] In every action founded upon contract, the complaint must show affirmatively that there was a sufficient legal consideration for the promise or agreement of the defendant, or it will not state facts sufficient to constitute a cause of action. Suppose, for instance, that the complaint should allege that on a certain day, at a specified place, the defendant was a carpenter, and that he then and there promised to build a house for the plaintiff by a specified time, which the defendant had not done. It is very evident that such a complaint is defective, because it does not show any consideration whatever for the promise of the defendant, and, therefore, he was under no legal obligation to perform his promise. Such a complaint would be liable to a demurrer under the Code, § 64, sub. 6.

When an action is brought upon an instrument in writing, which does not show any consideration, such allegations must be made in the complaint as will show that there was in fact a sufficient consideration. And this is the rule, even when the instrument purports to be for the payment of money only. *Spear* v. *Downing*, 22 How. Pr., 30. If the instrument recites a consideration, as for instance, "for value received," that will be sufficient to show a consideration for the promise of the defendant. *Prindle* v. *Caruthers*, 1 E. P. Smith, 425; *Miller* v. *Cook*, 9; E. P. Smith, 495, S. C. 22 How. Pr., 66. The nature of considerations will be fully explained elsewhere. Vol. I, 86–111.

Promise by the defendant.] In every action which is founded upon an actual and express promise of the defendant, such promise or agreement must be alleged in the complaint. If the agreement is in writing, a copy of it may be set out in the complaint, which will show precisely what was promised, and the court can then decide upon the legal effect of such promise or agreement. *Prindle* v. *Caruthers*, 1 E. P. Smith, 425. If the right of action is not founded upon an express promise, but is founded upon an implied promise, or one which arises by implication of law, the promise need not be alleged, but it will be sufficient to allege such facts as will show a legal liability on the part of the defendant, and the court will adjudge a liability as a matter of law. *Cropsy* v. *Sweeney*, 27 Barb., 310; *Farron* v. *Sherwood*, 3 E. P. Smith, 227. If the promise is one which the statute requires to be in writing in order to be binding, it is not necessary to allege in the complaint that such promise is in writing. *Ante*, 303.

The agreement or promise ought to be truly and accurately stated, although under the liberal rules which now exist in relation to variances, it is not as important now to be as particular in that respect as it was under the old practice. It is always sufficient to state enough of the contract to show the defendant's liability. When the contract is in the alternative, it must be set forth and the alternative shown. *Stone* v. *Knowlton*, 3 Wend., 374; *Hatch* v. *Adams*, 8 Cow., 35. But a variance is amendable. Code, § 64, sub. 11.

Profert.] In general it is not necessary in a pleading to set out a copy of an instrument sued on, nor to offer a copy of it. But it is generally the most convenient mode of pleading to set out a copy of such paper. And if it is not set out in the pleadings at the joining of issue, the justice, on the request of the opposite party, may require a copy of it to be furnished to him by the party pleading it. Code, § 64, sub. 14. But when one sues as executor, he need not offer to produce his letters testamentary, &c. If he alleges in due form that he is executor, &c., and issue is taken upon it, he will have to prove his authority at the trial. It is a matter of allegation in the pleadings, and proof at the trial. *Bright* v. *Currie*, 5 Sandf., 433; *Supervisors, &c.* v. *White*, 30 Barb., 72. And in all cases in which the plaintiff sues in a representative capacity, he does not make a profert of his authority. He may properly allege that he has it, and then, if the allegation is put in issue, it will be a matter of proof at the trial. It will be remembered, however, that when an instrument is sued on as a cause of action, the opposite party has a right to see it and take a copy, and the justice must order it to be given, if demanded at the joining of issue. Code, § 64, sub. 14.

Averments of performance by plaintiff.] When it appears by the terms of the contract or agreement which is set out in the complaint, that the plaintiff was bound to do some act before the defendant was required to perform the contract, &c., the complaint must allege that the plaintiff has performed all such acts

on his own part. And it is not enough to merely allege the fact by way of allegation of a conclusion of law, nor by way of mere evidence, but the facts showing performance by the plaintiff must be distinctly alleged. *Hatch* v. *Peet*, 23 Barb., 575; *Smith* v. *Brown*, 17 Barb., 431.

When the plaintiff has not performed such conditions precedent, but he has a legal excuse for the non-performance, he must allege the facts which show such excuse, instead of alleging performance. *Kelley* v. *Upton*, 5 Duer, 336, 342; *Smith* v. *Brown*, 17 Barb., 431; *Rider* v. *Pond*, 18 Barb., 179. Sickness or death is a sufficient excuse for the non-performance of personal services. *Fahy* v. *North*, 19 Barb., 341; *Wolfe* v. *Howes*, 24 Barb., 174, 666; *S. C.*, 6 E. P. Smith, 197. So, where performance becomes impossible by the act of the law, that is an excuse. *Jones* v. *Judd*, 4 Comst., 411.

Request, notice, demand, &c.] It is frequently the case that the plaintiff is required to make some request, give some notice, or make some demand of the defendant, before a right of action becomes perfect. In all cases in which such request, &c., is necessary to perfect the right of action, the complaint must allege that such request, &c., was made, and such facts must be alleged as will show that it was properly done. There are also numerous cases in which no demand, &c., is necessary before an action is brought, and in such cases no demand, &c., need be alleged in the complaint.

Breach of the agreement, &c.] In every action founded upon contract, whether written or unwritten, sealed or unsealed, the main ground of the action is that the defendant has broken the contract. This is true of the most ordinary cases, such as accounts, promissory notes, and the like. The breach of the contract, in such cases, is the non-payment of the debt. And in all cases of special contracts, there is some non-performance alleged, or some act done which the defendant agreed not to do. In short, the basis of all actions upon contracts rests on the ground that the defendant is guilty of a breach of the agreement. And every complaint will be defective if it does not, in some manner, show that there has been a breach of the contract by the defendant. And, even under the common counts, it is alleged that the money due to the plaintiff is unpaid.

When the action is founded upon a special agreement, the facts which show a breach on the part of the defendant must be stated fully; and a mere allegation that the defendant has broken the contract will not do, but the particular manner in which it is broken must be stated, so that the court and the defendant can see in what respect it is claimed that the contract has been violated. When the action is for the recovery of money under the common counts, and no demand is necessary before suit brought, it will be sufficient to allege the breach in general terms, such as that the money is due, unpaid, &c.

Damages.] Nearly all the actions which are brought in a justice's

court, are instituted for the recovery of damages, either for the breach of some contract, express or implied, or for some injury wrongfully done. The complaint must allege such damages as the plaintiff claims to recover. It is usual to claim costs, though this is not necessary, as they follow the judgment as a matter of course. Damages are general, or special. General damages may be claimed by a general allegation of damages; but special damages must be stated with particularity. See *ante*, 310. "Special damages," and *ante*, 309, "Facts not alleged," &c.

Conclusion of complaint.] The conclusion of the complaint shows what judgment the plaintiff demands. It may be for the recovery of damages, or it may be for the recovery of specific personal property, with damages, &c. In every case the complaint ought to show clearly what judgment the plaintiff demands. And it must in all cases show that the judgment demanded, is one which the justice has jurisdiction to render. *Bellinger* v. *Ford*, 14 Barb., 250; *Gould* v. *Glass*, 19 Barb., 179; *ante*, 314, "Within jurisdiction." But a defect in this respect is amendable. *Woolley* v. *Wilber*, 4 Denio, 570; *Bull* v. *Colton*, 22 Barb., 94; Code, § 64, sub. 11.

Several counts.] When the plaintiff has several different causes of action arising upon contract, and they are not recoverable under the common counts, but require a special count for that purpose, each separate cause of action ought to be separately stated in the complaint. And the plaintiff may insert as many separate counts as he has separate causes of action which require to be stated in special counts. Each of these causes of action must be separately stated, and the commencement of each new cause of action, or count, may commence thus: "And for a further and separate cause of action," &c. It is a very convenient method to number the causes of action, when there are several of them, as this will facilitate a reference to each cause of action, when the defendant is answering them. And, besides that, it will tend to render the issues themselves plain and familiar to the parties, to the court, and to the jury if one is called. See *ante*, 300, "Duplicity," where the subject is discussed in relation to several counts for the same cause of action.

Common counts.] There has been some difference of opinion upon the question, whether the Code did not abolish the common counts, and require every cause of action to be stated specially. But it is now entirely settled that the mode of declaring upon the common counts is as proper now as it was before the Code. *Farron* v. *Sherwood*, 3 E. P. Smith, 227; *Allen* v. *Patterson*, 3 Seld., 476; *Cudlipp* v. *Whipple*, 4 Duer, 610; *Graham* v. *Camman*, 5 Duer, 697; *Merwin* v. *Hamilton*, 6 Duer, 245, 253. But in framing such counts they are drawn more fully and particularly than some of the old forms of the common counts. The forms which will be hereafter given will show what it is necessary to allege in them under the practice introduced by the Code. The plaintiff cannot recover under the common counts in such cases

as those in which a special count is necessary; as for instance, in those cases in which the plaintiff claims to recover damages for the breach of an agreement other than for the payment of money. See *ante*, 315, "Complaint when to be special."

The Code has not changed the former rule of pleading, that a party who has fully performed a special contract on his part, may count upon the implied assumpsit of the other party to pay him the stipulated price, and he is not bound to declare specially on the agreement. *Farron* v. *Sherwood*, 3 E. P. Smith, 227. But the kind of special contracts which will authorize a recovery upon the common counts, must be of that nature, that when the plaintiff has fully performed the contract on his part, the defendant has nothing to do on his part but to pay a sum of money. For instance, a contract may be a special one for the building of a house, and the furnishing of the materials, and if the builder has fully performed the contract on his part, he need not set out the contract specially, but may recover the money due to him on the common counts, if they are properly framed. *Farron* v. *Sherwood*, 3 E. P. Smith, 227; *Clark* v. *Fairchild*, 22 Wend., 576, 583. But the principal convenience of these common counts is found in those cases in which the plaintiff claims to recover for labor done, professional service rendered, or for goods, wares and chattels sold, for money lent, &c., &c. And, in all such cases, where the plaintiff seeks to recover upon either, an express or an implied agreement, these counts will generally be proper.

The use of this form of pleading is recommended by its obvious convenience. And if the defendant desires particular information of the items of the claim or demand against him, he may demand a bill of particulars.

Bill of particulars.] The Code, § 64, sub. 14, has greatly enlarged the powers of justices of the peace in relation to ordinary bills of particulars to be furnished by either of the parties to the other. Compare Vol. I, 49, § 69, and Code, § 64, sub. 14.

"The court may, at the joining of issue, require either party at the request of the other, at that or some other specified time, to exhibit his account on demand, or state the nature thereof as far forth as may be in his power, and in case of his default, preclude him from giving evidence of such parts thereof as shall not have been so exhibited or stated." Code, § 64, sub. 14.

By the very terms of the Code this demand must be made at the joining of issue. But there is an other provision of the statute which confers power on the justice to order particulars to be furnished, although not demanded at the joining of issue. "No adjournment shall be allowed in any case to a party applying therefor, who shall have seen the account or demand of the opposite party, unless such applicant, if required, shall exhibit his account or demand, or state the nature thereof, as far forth as may be in his power, to the satisfaction of the justice." Vol. I, 49, § 69.

Under this section, a defendant may, at any time when he asks

for an adjournment, be required to furnish particulars. It will not apply to the plaintiff, except at the joining of issue, as he cannot have more than one adjournment. But, in applying these sections to practice in cases before justices they ought to construe them liberally, so as to advance the object which the legislature had in view. When the pleadings are general, as they are under the common counts, the only information which either party can have of the claims made by the other must be derived from such an exhibition of the other's demand; or it must be derived from the knowledge which they each have of the past transactions between them. But there are many instances where such knowledge would be of little value to a party in preparing his cause for trial. If either of the parties has purchased or taken an assignment of an account or demand which exists against the other, the party against whom it is presented for the first time at the trial, may be greatly surprised, and gross injustice may be done to him if he is not permitted to meet the claim by evidence, which he cannot possibly have procured to be present at the trial, to meet such a demand.

But it is not the duty of the justice to require either party to exhibit his claim unless it is demanded by the other; and, if there is an omission to make such request, it is the neglect of the party himself, who must abide by the consequences.

The statute says the claim or demand must be *exhibited*, or the nature of it must be stated, &c. The object of permitting each party to demand such information was, that it might be useful to him in preparing for trial. *The People* v. *Monroe*, C. P., 4 Wend., 200; *Bowman* v. *Earle*, 3 Duer, 694. And, for that reason, the justice ought to require each party, if a proper request is made, at the proper time, to furnish the other with a written copy of the items of his demand; or at any rate he ought to require him to furnish the original, so that the party applying may copy it for himself, if he desires to do so.

If neither party is prepared to do this at the time of joining issue, or if one of the parties is not prepared at that time, the justice is authorized to specify some other time when the account, &c., shall be exhibited. And, there are few things in practice, in which the justice may render himself more instrumental in advancing the cause of truth and justice, than in requiring a full compliance with the spirit of this section. When the accounts, &c., are not exhibited at the joining of issue, and the justice specifies an other time for the purpose, that time should be such as to give either party ample time to secure his evidence before the trial, to meet the claim so exhibited, &c.

The party who is required to exhibit his demands, ought to be careful to furnish all the items of it, for the penalty which is annexed to a neglect or refusal to do so, is to be debarred at the trial from proving any of the items which were not so exhibited or stated.

The statute is not imperative that the evidence shall be excluded

in case of a default in exhibiting a claim. The court may preclude him, is the language of the statute. If a party by mistake should omit to furnish all the items the justice may permit an amendment of the items, just as he would do in relation to a pleading, because the particulars are nothing more than a complete specification of the claims of the party. If an amendment is allowed, it ought to be on the same terms as the amendment of a pleading. Code, § 64, sub. 11, 15.

If either of the parties willfully refuses to exhibit his account, &c., as required by the justice, the justice ought to exclude evidence in support of the accounts, or items thereof, which were not exhibited. But, if such party has any reasonable excuse for not exhibiting such account or demand, the justice may permit him to do it at any time before the trial, or during the trial, on such terms as shall be just. But if an adjournment will be necessary for the other party in consequence, an adjournment ought to be made the condition of granting the favor. And, besides that, such costs ought to be imposed as will be necessarily incurred by the opposite party, such as the witnesses' fees for those witnesses who are present at the time when such amendment is permitted.

When an account is sued on, or when it is a subject of set-off, the parties ought to furnish the items in detail, specifying the date, the price and the amounts, as near as may be done, or as it is in the original account. *Humphrey* v. *Cottleyou*, 4 Cow., 54. If the bill is defective, the justice may order it to be made more definite. *Kellogg, &c.*, v. *Paine, &c.*, 8 How. Pr., 329; *McKinney* v. *McKinney, &c.*, 12 How. Pr., 22. Neither party is bound to do more than to furnish the items which he claims against the other. He is not required to state any credits, or set-offs, in favor of the other party. *Williams* v. *Shaw*, 4 Abb., 209; *Ryckman* v. *Haight*, 15 Johns., 222. A variance between the items furnished and the proof ought to be disregarded, if no injury is done to the opposite party. *Seaman* v. *Low*, 4 Bosw., 345; *Brown* v. *Williams*, 4 Wend., 360. The question of variance ought to be disposed of like a variance between pleadings and evidence, and an amendment should be granted in like cases as in pleadings.

More space has been devoted to this subject than would be done if this power of the justice had not been materially enlarged, so that it is nearly the same as that possessed by courts of record in similar cases. And since the question will frequently arise with parties, what they ought to do in such cases, there has been thus much said upon the subject.

Complaints in actions for torts.] The general rules in relation to the formal parts of a complaint in an action for a tort, is the same as in an action upon contracts, as to title. See *ante*, 312, Number of parties; *ante*, 312, Names of parties; *ante*, 313, Characters, &c., of parties; *ante*, 314, General rules, &c.; *ante*, 314, Action named in process; *ante*, 314, Jurisdiction. In actions for wrongs, there are some matters in which the complaint will

differ in its details from that of a complaint in an action upon contract. And the general rules which ought to be observed in framing complaints in actions for torts, will be now noticed.

Actions for torts may affect personal rights, as when a person wrongfully persuades a servant to leave his employer, or when a fraud is perpetrated. They may also relate to injuries to personal property, or they may relate to real estate and to injuries done to it. And, therefore, the first thing which the body of the complaint ought to show, is, that there are such rights, or property, which may be affected. The manner in which allegations ought to be made will be shown in the precedents of complaints in such actions.

Plaintiff's interest in thing injured.] The complaint must allege those facts which show that the plaintiff has such an interest in the thing injured, as will authorize an action in his favor for the injury done. A mortgagee of personal property has an interest in the property so mortgaged, but in an action for a conversion of the property, he must allege such facts as show that he is a mortgagee. Merely saying that he has a mortgage is not sufficient; such facts must be stated as will authorize the court to decide whether the instrument is a mortgage. *Fairbanks* v. *Bloomfield*, 2 Duer, 349; and see *Tuthill* v. *Wheeler*, 6 Barb., 362. A constable who has an execution, by virtue of which he has levied upon personal property, has such an interest as will authorize an action against a wrongdoer who takes the property, but the complaint must show his right to the property. And whenever the plaintiff claims an interest in the property, or right of action in any manner except in his own individual right, the complaint must state such facts as will authorize an action. There are instances in which the plaintiff may merely allege that the defendant wrongfully took the property out of the possession of the plaintiff, and he need not allege how his interest in it arose, even when he claims as bailee, or as an officer having a levy upon it, &c. The precedents given will show the necessary allegations. When the action is for an injury to personal property, or for a conversion of it, if the plaintiff sues as owner, he will show that fact by proper allegations in the complaint. Injuries to real estate are generally charged to be injuries to the possession, which is all the right a plaintiff need have to maintain trespass.

Motives, intent or negligence of the defendant.] The general rule is, that when a person does an unlawful act to the injury of another, he must respond in damages, although he did not have any wrongful or unlawful intent in doing the act. For this reason, it is not necessary, in ordinary cases, to allege a wrongful intent on the part of the defendant.

If a justice is sued for making a false return on an appeal, it is not necessary to allege or prove that his motives were corrupt. *Houghton* v. *Swarthout*, 1 Denio, 589. So, where the defendant injures the plaintiff by blasting rocks on the defendant's land, and the fragments fly upon the plaintiff's premises and injure his buildings, it will not be necessary to aver negligence on the part

of the defendant. *Hay* v. *Cohoes Co.*, 2 Comst., 159; *Tremain* v. *Cohoes Co.*, 2 Comst., 163.

In such cases of unlawful acts, an action will lie, although no improper motive existed on the part of the defendant. See the last three cases cited, and *Vandenburgh* v. *Truax*, 4 Denio, 464. But there are cases in which the gist of the action is the manner and the intent with which the act was done, as where a constable acts in an oppressive and unlawful manner in executing an execution, and in such cases, the complaint must allege those facts which show his acts to be unlawful. *Rogers* v. *Brewster*, 5 Johns., 125; *McDonald* v. *Neilson*, 2 Cow., 182.

In some cases the motive with which an act was done may be material on the question of damages, and in those cases, an allegation of the motives, and of the circumstances in aggravation of the action may be properly alleged. *Gilbert* v. *Rounds*, 14 How. Pr., 46, 49, 50; *Molony* v. *Dows*, 15 How. Pr., 265; *Bates* v. *Loomis*, 5 Wend., 134; *Root* v. *Foster*, 9 How. Pr., 37. In common practice, nearly all complaints for trespasses to lands, for conversions of personal property, or for injuries to it, or for detaining it, allege that the acts were wrongfully or unlawfully done. But an act may be unlawful, or legally wrongful, when the defendant is not guilty of any intentional wrong, so far as his motives are concerned. That points out the precise distinction shown by the casés cited upon this subject, since there may be an unlawful act without any actual wrongful intent or motive. And in all complaints where an unlawful or wrongful act is charged, the legal effect of the allegation is to show that the act was not legal, although the motives may have been ever so proper in the given case, unless it is in those cases where the motive is the ground of action, or it relates to the measure of damages.

There is one class of cases which may deserve notice here, and that is infancy. If an infant intentionally injures property, he is liable for the tort, when he could not be made liable otherwise. *Fish* v. *Ferris*, 5 Duer, 49; *Campbell* v. *Stakes*, 2 Wend., 137. In such cases, the wrongful intent must be alleged as well as the fact of infancy.

Statement of wrongful acts of defendant.] Every complaint in an action for a tort must state such facts as will show clearly and affirmatively that the acts of the defendant are wrongful and unlawful in such a manner as to give a legal remedy in consequence of them.

A complaint must set forth *facts* by which the court can see that the plaintiff has sustained a legal injury, or it is bad on demurrer. A general averment that the acts of the defendant are contrary to the statute, without setting forth in what manner, is not sufficient. *Smith* v. *Lockwood*, 13 Barb., 209.

In an action for negligence, a statement in the complaint, that by means of a contract which is set forth, it became the duty of the defendant to perform certain acts, is not sufficient unless

the facts necessary to show the duty are stated. *City of Buffalo* v. *Holloway*, 3 Seld., 493.

When an action is brought to recover damages for an injury sustained in consequence of falling into a vault which was insecurely covered, if it is sought to make the defendants liable on other grounds than those of negligence, in not constructing the cover of the vault properly, or in not keeping it in a proper condition; such as that the area is within a public street, or that a duty imposed by some municipal ordinance has been violated, those grounds should be stated in the complaint, so that issue can be taken upon them, and the defendants may come prepared to try them. *Congreve* v. *Morgan*, 4 Duer, 439.

In actions for injuries resulting from a fraud, the complaint must allege the facts which show that a fraud has been committed, a mere allegation that the defendant has committed a fraud is entirely insufficient. *McMurray* v. *Gifford*, 5 How. Pr., 14.

In an action for *false and fraudulent* representations, the complaint must state what the representations were, so that the court may judge whether they were sufficient to mislead; otherwise the plaintiff does not show a cause of action; and it ought also to state that they were made with intent to deceive and defraud the plaintiff. *Wells* v. *Jewett*, 11 How. Pr., 242; *Addington* v. *Allen*, 11 Wend., 374, 386; *Zabriskie* v. *Smith*, 3 Kern., 322, 330.

In actions for injuries to real property, or for injuries to personal property, or for a conversion of it, the complaint ought to allege what injurious acts were done; and the allegations ought to be so particular and specific that the court can adjudge as a matter of law that a cause of action exists.

The particular manner of stating the facts may be seen in the precedents.

When there are several defendants, the complaint must show a cause of action against all of them.

Corporations are liable for torts in the same manner that individuals are, but the complaint must state facts which show that the injurious acts were done by their legal agents or officers, and that they were acting within the scope of their duties, or within such instructions as the corporation has given them, and also it must appear what the injurious acts were. *Howell* v. *City of Buffalo*, 1 E. P. Smith, 512; *Mayor, &c. of N. Y.* v. *Bailey*, 2 Denio, 433.

Time and place.] The same rules are applicable in complaints for torts, as are observed in actions on contracts. See *ante*, 301.

Scienter.] The subject has been already discussed in relation to motives or intention. *Ante*, 323, 324.

But there is also a class of cases, in which *knowledge* on the part of the defendant in relation to certain things will render him liable to an action, when, without such knowledge on his part, no action could be maintained against him.

If a domestic animal is accustomed to do mischief to other animals, or to persons, and the defendant has knowledge of that

fact, he will be liable for such injuries as the animal may do, although he did not desire the injury to be done, and even although he had no knowledge that the mischief would be done. But the complaint must allege that the defendant *knew* that such domestic animal was accustomed to do such mischief. *Fairchild* v. *Bentley*, 30 Barb., 147; *Lyke* v. *Van Leuven*, 4 Denio, 127; *Buckley* v. *Leonard*, 4 Denio, 500; *Wheeler* v. *Brant*, 23 Barb., 324.

In those cases in which knowledge is not necessary to create a liability on the part of the defendant, it need not be alleged in the complaint, as, for instance, when a dog *kills* or *wounds* sheep, because the statute makes the owner liable for such injuries whether he knew of their mischievous propensities or not. 2 R. S. 975, § 9, 5th ed.; *Fish* v. *Skut*, 21 Barb., 333.

But, if the action is merely for *chasing* and *worrying* sheep, then knowledge must be alleged. *Auchmuty* v. *Ham*, 1 Denio., 495.

There is an other class of cases in which the owner of domestic animals is liable for such injuries as they may do to other animals, or to persons, although the owner did not know of their mischievous propensities; and those cases are, when the animal of the defendant is trespassing upon the lands of the plaintiff, and does the mischief there. In such cases knowledge need not be alleged or proved. *Van Leuven* v. *Lyke*, 1 Comst., 515; *Dunckle* v. *Kocker*, 11 Barb., 387.

When knowledge is made the ground of proving a fraud, or of increasing damages, it is generally synonymous with motive, intent, &c., which words have been explained. *Ante*, 323. And see "Damages," in complaints for torts. It must be recollected, too, that knowledge is always an essential element of a fraud, and in such actions it must always be alleged in the complaint.

Demand.] In actions for the recovery of the possession of personal property, or in actions for a conversion of such property, it is sometimes essential to a right of action, that some demand should be made of the defendant before an action is brought against him.

The general rule is, that when one person wrongfully and unlawfully takes or converts the property of an other to his own use, an action will lie against such wrongdoer without any previous demand. *Farrington* v. *Payne*, 15 Johns., 431; *Ladd* v. *Moore*, 3 Sandf., 589; *Tallman* v. *Turck*, 26 Barb., 167; *Tompkins* v. *Haile*, 3 Wend., 406. But when property has lawfully come into the possession of a person, and he has not converted it, a demand must be made before he is liable to an action. *Hall* v. *Robinson*, 2 Comst., 293, 295.

There are many cases in which a demand is indispensable to the maintaining of the action, and such demand must be proved at the trial, and yet it is not necessary to allege a demand in the complaint. A demand and refusal to deliver property is *evidence* upon which a conversion may be found; but it is not proper to plead mere matters of evidence. *Ante*, 298. In complaints for

converting personal property, it is the usual practice, therefore, to allege a wrongful and unlawful conversion, and then to prove the demand at the trial, if such proof is necessary. An allegation of a demand and a refusal in addition to an allegation of a wrongful, &c., conversion, would be useless, but it would not vitiate the pleading, since it would be mere surplusage. See *ante*, 305.

Penalties.] In actions to recover penalties which are given by statute, it is sufficient to declare in the brief form prescribed by the Revised Statutes. 3 R. S., 633, §§ 1, 2, 3, 5th ed.; 3 R. S., 784, § 13, 5th ed. The Code has not changed the rule of pleading in such cases. Code, § 471; *People* v. *Bennett*, 5 Abb., 384; *S. C.*, affirmed, 6 Abb., 343; *Hall* v. *McKechnie*, 22 Barb. 244.

The general rule is, that no reference need be made to the statute. *Ante*, 303. But, in actions for penalties, it is the general practice to refer to the chapter and section of the statute which gives the penalty. *Hall* v. *McKechnie*, 22 Barb., 244; *People* v. *Brooks*, 4 Denio, 469; *O'Maley* v. *Reese*, 6 Barb., 658. In suits to recover penalties, where no general form of declaring is given, the plaintiff must set forth the particular acts and omissions which constitute the cause of action. *People* v. *Brooks*, 4 Denio, 469.

Public statutes need not be recited, *ante*, 303; and the most that can be required in actions for penalties, is that a correct reference shall be made to the section and chapter of the statute. *People* v. *Brooks*, 4 Denio, 469; *O'Maley* v. *Reese*, 6 Barb., 658. As to negativing defense, see *ante*, 304, 305.

Assignment of demand or right of action.] There are several instances in which a right of action for a tort is assignable. *McKee* v. *Judd*, 2 Kern., 622; *Waldron* v. *Willard*, 3 E. P. Smith, 466. What causes of action are assignable, and the manner of making the assignment, has been elsewhere explained. Vol. I, 94 to 96. When the action is brought for a tort upon an assigned demand, the complaint must first show a cause of action in favor of the assignor, in the usual form, and it must then show that such cause of action has been assigned to the plaintiff.

Damages.] The damages, whether general or special, must be claimed and alleged in the same manner as in actions upon contracts. *Ante*, 310.

Conclusion.] The conclusion of the complaint is the same as in actions upon contracts when damages are claimed. But when the action is for the recovery of the possession of personal property, the demand of judgment is different, as will be seen by looking at the precedent of a complaint in such an action.

SECTION III.

ANSWERS.

When a defendant appears in court in obedience to process which has been duly issued, served and returned, his first question to determine is, whether he will defend the cause. He should, therefore, wait until the plaintiff delivers his complaint

to the justice, so that he may see what cause of action is alleged against him. If the cause of action is one in which the justice is a material witness for the defense, he must take the proper steps for discontinuing the action. How this is done is explained elsewhere. *Ante,* 237. Again, if the defendant wishes to show title to real estate in his defense, he must take such steps as the law requires. See Answer of Title, &c., *ante,* 245. As to other preliminaries before appearance and answer, see *ante,* 1 to 4, and *ante,* 153, 77 to 80.

If the defendant concludes to defend the action, he must either demur to the complaint or answer it, because the law requires that an issue of fact or of law shall be joined. See *ante,* 294. A demurrer raises a question of law which must in all cases be decided by the court as a matter of law.

Any answer, whether it is a mere denial, or an answer setting up an affirmative defense of new matter, will in all cases make an issue of fact which must be tried by a jury, or by the justice in the place of a jury, upon such evidence as may be introduced at the trial.

There is no reply nor any subsequent pleadings permitted in justices' courts, so that all issues of fact will be joined on complaint and answer, so far as pleadings are put in for that purpose. But, although no reply is allowed, the law has adopted a rule which supplies the place of a reply. If the answer sets up any new matter which would need to be denied if a reply were allowed, such matter is deemed to be denied. And not only that, the plaintiff may give in evidence any new matter by way of avoiding the new matter set up in the answer. *Hodges* v. *Hunt,* 22 Barb., 150. And, as a general rule, it may be further stated, that any matters which cannot be set up in the pleadings for want of a reply, &c., may be deemed at issue either by way of denial or confession and avoidance, and that evidence ought to be admitted upon all such issues, precisely as though they were set up in pleadings.

The only pleadings which are permitted in justices' courts, besides complaints and answers, are demurrers. Either party may, in a proper case, demur to a pleading of the other.

Some general rules which relate to all answers will now be noticed, and the particular matters which are important to answers of each class, will be discussed under each precedent.

Most of the general rules of pleading which have been stated, *ante,* 292, are as applicable to answers as to complaints. In every affirmative defense the answer must state facts, *ante,* 294, and not conclusions of law, *ante,* 294, nor mere matters of evidence, *ante,* 298, nor need it state mere legal presumptions. *Ante,* 298. It must not state fictions but truth, *ante,* 299, must be positive. *Ante,* 299. It must not be hypothetical, *ante,* 299, nor must pleadings be double, although a party may state as many defenses as he has, if he states them separately, and no pleading will be double, if it does not state any facts but such as are

necessary to constitute a single separate answer. *Patcher* v. *Sprague*, 2 Johns., 462; *McClure* v. *Erwin*, 3 Cow., 313, 320; *Tucker* v. *Ladd*, 7 Cow., 450; *ante*, 300. It must be certain as to time and place in relation to material facts. *Ante*, 301. Facts necessarily implied need not be stated, *ante*, 302, nor matters of which the court takes judicial notice. *Ante*, 303.

An answer need not negative such matters as are properly a subject of reply. *Ante*, 328. Surplusage will not vitiate. *Ante*, 305. Each separate answer must be consistent with itself, *ante*, 305; but it is not necessary that separate answers shall all be consistent with each other. *Ante*, 306.

Facts ought to be stated in an answer in the same manner that they are alleged in the complaint, so far as the *mode* of alleging facts is concerned. *Ante*, 294. Recitals have the same effect in answers that they do in complaints. *Ante*, 307. Facts not denied are admitted. See *ante*, 307. But that rule relates to material allegations of facts, and not to allegations of conclusions of law, nor of evidence, &c. *Ante*, 308.

Facts not alleged cannot be proved. *Ante*, 309. This is a most important rule in its effects upon the rights of defendants. Nearly, if not quite every defense must be specially set up in the answer, unless the defense consists of a mere denial of the truth of the allegations in the complaint. *Ante*, 309. Under the precedent of a general denial, the rule will be fully explained, so that it will be evident what defenses may be introduced under a denial, and what defenses must be specially set up in the answer. Vol. I, 879 to 886.

Matters in aggravation, special damages and *scienter*, are all put in issue by a general denial. See *ante*, 310.

Every cause of action in the complaint must be put in issue, or it will be admitted; and if there are several counts in the complaint, each one must be put in issue, or it will be admitted. If there is a single count in the complaint, and a single cause of action stated in it, there cannot be a demurrer to a part of it and an answer to the residue. *Ingraham* v. *Baldwin*, 12 Barb., 9; *S. C.*, affirmed, 5 Seld., 45. But, if there are several counts and several causes of action, a demurrer may be interposed to one and an answer to an other, &c. The answer must be adapted to the nature of the action. If the complaint is for a tort, a set-off cannot be pleaded in the answer. *Pattison* v. *Richards*, 22 Barb., 143. Nor can torts be set off against torts. *Murden* v. *Priment*, 1 Hilt., 75; *Pattison* v. *Richards*, 22 Barb., 143. And if the action is upon contract, a separate independent tort cannot be set up as a recoupment or otherwise. *Piser* v. *Stearns*, 1 Hilt., 86. Each separate answer must be a sufficient defense of itself; and, if it is defective, it is demurrable.

SECTION IV.

DEMURRER.

What a demurrer is.] A demurrer is an exception or objection, by one of the parties to an action, to some pleading of the opposite party, on the ground of its legal insufficiency to sustain the action, or to constitute a defense. In such cases the objecting party is said to *rest* or abide upon the question made, and to submit it to the judgment of the court whether such objection or exception is well taken. A demurrer raises a question of law which must, in all cases, be decided by the justice, and not by a jury.

In actions in justices' courts it is indispensable that a demurrer should be interposed if either party wishes to raise any question as to the form or the sufficiency of the pleading of the opposite party. *Neff* v. *Clute*, 12 Barb., 466; *Hall* v. *McKechnie*, 22 Barb., 244; *Mayor, &c., of N. Y.* v. *Mason*, 4 E. D. Smith, 142.

If either party wishes to object to a pleading of his adversary on the ground that it is not sufficiently explicit, or that it does not state a cause of action or ground of defense, he must raise such objection by demurrer, and if he omits to do so, the objection will be waived. *Ib.* And if the parties go to trial on extremely defective pleadings, the judgment will not be reversed on account of their insufficiency, provided a good cause of action, or a sufficient ground of defense is proved by the evidence. *Ib.* But if a complaint does not set forth a cause of action, and on the trial there is not sufficient evidence to prove a cause of action, a judgment in favor of the plaintiff will be reversed even though the defendant took issue upon the allegations of the complaint instead of demurring. *Tifft* v. *Tifft*, 4 Denio, 175, 178; *Stephenson* v. *Hall*, 14 Barb., 228, 229.

One of the rules relating to a demurrer is that it operates as an admission of the truth of all the material allegations which are contained in the pleading demurred to. The meaning and the extent of the rule, however, is this, it admits their truth for the purposes of obtaining the decision or judgment of the court upon the sufficiency of the pleading under consideration. But the admission does not extend beyond that, for if an issue of fact is subsequently joined upon the pleading demurred to, the admission by way of demurrer will not have any effect upon the trial of such issue of fact.

An other rule is, that the court, on rendering judgment on a demurrer, will examine the whole record, and render judgment against the party who committed the first fault in pleading. *Auburn, &c., Canal Co.* v. *Leitch*, 4 Denio, 65; *Lipe* v. *Becker*, 1 Denio, 568; *Schwab* v. *Furniss*, 4 Sandf., 704; *Ayres* v. *Covill*, 18 Barb., 260. And, therefore, if the plaintiff demurs to a defendant's answer, the defendant may attack the complaint, and if it is insufficient, judgment will be given against the plaintiff, who

will be required to amend it by stating a sufficient cause of action. And when that is done the defendant will be required to answer anew or abide by his former answer as he may elect. But, after the plaintiff has amended his complaint, in such a case, he may then demur again to the answer if it is insufficient.

Where several separate affirmative defenses are set up in the answer, and the plaintiff demurs to one of them, if the defendant attacks the complaint on the ground that it is defective in substance, the plaintiff cannot supply the defects in such complaint by referring to or claiming the advantage of admissions contained in the other separate defenses not demurred to. *Ayres* v. *Covill*, 18 Barb., 260.

In what cases a demurrer may be interposed.] The Code has provided a system of pleadings which must be observed in justices' courts. Vol. I, 10, § 64.

The sixth subdivision of this section declares in what cases a demurrer may be interposed. If the pleading of the opposite party is not sufficiently explicit to enable him to understand it; or if it contains no cause of action or defense, it may be demurred to. *Hall* v. *McKechnie*, 22 Barb., 244; *Neff* v. *Clute*, 12 Barb., 466.

But in every case the defect must be such as is apparent from the face of the pleading itself. For instance, if the complaint does not state facts sufficient to constitute a cause of action, even if all that are stated are assumed to be true, there will be no doubt but the defect is apparent. In such a case, the omissions would afford a ground of demurrer. But a complaint might also be so framed as to show that the action is not maintainable under the circumstances disclosed. If the facts stated in the complaint show a cause of action in favor of A. and B., jointly, and the action is brought by B. alone, this will be a ground of demurrer, and the defect will appear upon the complaint itself, provided it also appears that A. is still living. So, too, if the complaint shows a joint cause of action against two defendants, and but one of them is sued, this will furnish grounds of demurrer, provided it appears that the defendant not sued was living at the time of the commencement of the action. But, if that fact does not appear, the objection must be taken by answer in abatement, and cannot be taken by demurrer. *Brainard* v. *Jones*, 11 How., 569; *Scofield* v. *Van Sycle*, 23 How., 97.

Where a joint action is brought against two defendants, and there is a good cause of action set out against one of them, but the other party is improperly joined as a defendant, a joint demurrer will not lie in favor of both of the defendants. *People* v. *Mayor of N. Y.*, 28 Barb., 240; *Phillips* v. *Hagadon*, 12 How., 17; *Eldridge* v. *Bell*, Id. 547. So, too, the misjoinder of too many defendants does not afford any ground for a separate demurrer by the party who is properly sued, and against whom a good cause of action is alleged. *N. Y. and New Haven R. R.* v. *Schuyler*, 3 E. P. Smith, 592; *Pinckney* v. *Wallace*, 1 Abb., 82; *Brownson* v. *Gifford*, 8 How., 389. But where a defendant is

improperly joined as a defendant, and no cause of action is stated as against him, he may interpose a separate demurrer which will be sustained. *Chapman* v. *West*, 3 E. P. Smith, 125; *Eldridge* v. *Bell*, 12 How., 547. And if two defendants are sued jointly for two separate causes of action, where the complaint shows a cause of action against each separately, a joint demurrer by both defendants will be sustained. *Hess* v. *Buffalo, &c., R. R.*, 29 Barb., 391.

An answer which sets up new matter by way of confession and avoidance may be demurred to, and the demurrer will be sustained provided it is well taken. But where the defense is not affirmative, and it consists of mere denials, whether general or special, no demurrer will lie. *Lund* v. *Seaman's Bank*, 37 Barb., 129; 23 How., 258; *Rice* v. *O'Connor*, 10 Abb., 362; *Ketcham* v. *Zerega*, 1 E. D. Smith, 553; *Smith* v. *Greenin*, 2 Sandf., 702. So, too, a demurrer cannot be interposed to a part of a single separate defense. *Cobb* v. *Frazee*, 4 How., 413. And where an answer is amended during a trial in a court of record, no demurrer can then be interposed, since the objection to the amendment is of itself sufficient to raise the question as to the propriety of its allowance. *Therasson* v. *Peterson*, 22 How., 98.

The time for interposing a demurrer is at the joining of issue in the action. If the complaint is defective it ought to be then demurred to if the defendant desires to raise the question. And if he omits to demur then, but joins issue upon the merits upon a question of fact, the right to demur to the complaint is gone. And the same rule applies to an answer, which must be demurred to at the time when it is interposed, or the right to do so will be waived.

There may be a demurrer to one of several causes of action or defense, although no demurrer is allowed to a part of a single cause of action or defense. And for that reason there may be issues both of law and of fact joined in the same action.

If two separate causes of action are set out in the complaint, the defendant may demur to one of them, and join issue upon the other upon a matter of fact. So, too, one of several separate defenses may be demurred to, and the others will be deemed to be at issue upon matters of fact. But a party is not permitted to demur and also to answer to the same matter. *Munn* v. *Barnum*, 1 Abb., 281.

Decision or judgment on the demurrer.] As a general rule, the judgment on a demurrer ought to be given at the joining of issue, so that there may be an immediate amendment of any defective pleading, and so that the cause may be at issue upon questions of fact before any adjournment is made.

There is no legal objection, perhaps, to an adjournment for the decision of a question of law, and yet it does not fall within the general scope of adjournments which are usually granted for the purpose of procuring evidence. The correct practice will be to decide a demurrer promptly after it is interposed and argued

if argument is made. This mode of practice will avoid any necessity for adjournments, except in those cases in which it is important to obtain evidence for the trial of issues of fact. Where there are issues both of law and of fact, the issues of law ought first to be disposed of. *Wright* v. *Williams*, 2 Wend., 632; *Pittstown* v. *Plattsburgh*, 15 Johns., 398. And this is especially true in those cases where the demurrer will dispose of the entire cause of action. *Booth* v. *Smith*, 5 Wend., 107; *Shaw* v. *Raymond*, 2 Cow., 512. In such a case, if the issues of fact were first tried, but the final judgment on the demurrer were in favor of the defendant, he would recover costs against the plaintiff on the whole record. *Ib.* But there is no provision for two separate trials of issues in a justice's court, except so far as it may be done in the mode already pointed out, of trying the demurrer immediately at the joining of issue, and then requiring the joinder of an issue of fact when that is proper.

Where there is an issue of law which disposes of the entire right of action, or the whole ground of defense, there will be no occasion to try any other issues joined upon the facts. *Love* v. *Humphrey*, 9 Wend., 500; *Jack* v. *Martin*, 14 Wend., 507; *Backus* v. *Richardson*, 5 Johns., 476.

Under the former system of pleadings, the court sometimes had a discretion to exercise whether the judgment on a demurrer should be final, or whether it might be withdrawn, or whether a defective pleading might be amended. But under the Code, the rule is *imperative* that the judgment shall be that the defective pleading be amended. Vol, I, 10, § 64, sub. 7. And whenever the justice decides that a pleading which has been demurred to is defective, he must order an amendment of such pleading, and if he gives final judgment instead of ordering an amendment, his judgment will be reversed on an appeal. *Hilliard* v. *Austin*, 17 Barb., 141; *Turck* v. *Richmond*, 13 Barb., 533; *Glasse* v. *Keulsen*, 3 Abb., 100; *Smith* v. *Mitten*, 13 How., 326; *Stern* v. *Drinker*, 2 E. D. Smith, 402.

Where an amendment is ordered, the justice has no authority to select what the amendment shall be. And where an answer of title to land had been interposed and held defective on demurrer, it was held that the justice had no right to decide that the answer should not be so amended as to present the question of title again in the amended answer. *Smith* v. *Mitten*, 13 How., 326. A general demurrer is sufficient to reach every defect that exists in a pleading in a justice's court. *Stern* v. *Drinker*, 2 E. D. Smith, 402.

Where the defendant demurs to a complaint, and the justice overrules the demurrer, and the defendant then answers and joins an issue of fact, which is tried, the decision of the justice on the demurrer cannot be reviewed upon an appeal. *Irvine* v. *Forbes*, 11 Barb., 587; *Peck* v. *Cowing*, 1 Denio, 222; *Jones* v. *Thompson*, 6 Hill, 621.

If the demurrer is well taken, and the justice improperly over-

rules it, the party demurring, may, if he chooses, refuse to amend or join any other issue, and if a judgment is rendered against him in the action, he may, on appeal, review the decision of the justice on the demurrer, and if it is erroneous it will be reversed. *Jones* v. *Thompson*, 6 Hill, 621; *Keteltas* v. *Myers*, 5 E. P. Smith, 231; *Allen* v. *Patterson*, 3 Seld., 476. Thus much has been said in relation to demurrers, because the subject is one of growing importance in justices' courts. The jurisdiction is such, that quite important questions are tried in these courts, and the parties ought to know both their rights and their duties in relation to the manner of litigating the cause. But the question has an importance far greater than any which relates to the trial in the justice's court, for as the law now stands, nearly every cause of importance may be retried in the county courts, and on a trial there, the court is bound to try those issues which the parties joined before the justice. And there is no power of amending, by allowing the insertion of a new cause of action, or of a new ground of defense. *Savage* v. *Cock*, 17 Abb., 403. But see *Post*, 874.

It is for the interest of the parties, therefore, to insist upon correct pleading in the first instance, for there will be several advantages arising from it. In the first place, the parties will know precisely what issues are to be tried, which is indispensable to a full and fair trial. Again, an omission to demur to a defective pleading, waives all objection to it afterwards on the trial or upon an appeal. And finally, if the pleadings are left defective until a new trial in the county court, important rights may be lost from the want of power to supply the defect. The form of a demurrer and of a judgment thereon, will be given in a subsequent place in this work.

CHAPTER XVII.

ADJOURNMENTS.

The statutes relating to adjournments have already been given in full. Vol. I, 47 to 49. There are few questions which can arise in relation to adjournments that are not fully answered by some of the sections referred to. And a careful examination of their provisions is generally indispensable whenever a doubt exists as to the correct practice in a given case. There are also numerous decisions which have been made by the courts upon this branch of the practice, and the more important of them will be noticed while examining this subject.

The granting or the refusing of an adjournment is generally a matter of some importance to the parties, and for that reason a justice ought to exercise great care in the discharge of this duty. The object of pleadings, is to apprise each party of what the other claims. *Ante*, 292, &c. And after joining issue, the law gives to both or either of the parties, an adjournment for the purpose of preparing for the trial of the issues. A full and a fair trial is what the law intends to give to all litigant parties. After

issue joined, an adjournment is so much a matter of course, that disputes seldom arise in relation to it. It occasionally happens, however, that one of the parties is prepared with his evidence, and desires to proceed to the trial on the return day of the process. But this is not of itself any reason for requiring the opposite party to proceed with the trial without his evidence.

The law gives one adjournment to each party for the express purpose of collecting and arranging the evidence which is to be adduced at the trial. Neither party is presumed to know what his adversary claims until the pleadings are put in; and, therefore, neither party is expected to be ready for trial on the return day of the process.

If both parties are prepared and desire to proceed with the trial on that day, there is no legal reason why the cause should not be then tried. Though there are sometimes reasons why the justice cannot conveniently hear the cause at that time, and he may adjourn the trial on his own motion, as we shall see in a subsequent place. Whenever a motion is made to postpone the trial of a cause, the first question is, whether the application is made for the promotion of justice. An adjournment is not given for the purpose of delaying the prosecution of a just demand, and, therefore, the application ought to be one which is made in good faith by the party applying. But it is not to be understood that the justice is to inquire as to the mere equities which exist between the litigant parties. If the plaintiff has a legal right of action, the law gives him a right to as full and fair a hearing in a technical or a hard action, as it does in the most equitable one. So, on the other hand, where the defense is a legal one, but it is not favored by the courts, as, for instance, when the defendant relies upon the statute of limitations, or of usury, or other similar cases, the defendant is entitled to the same right to prepare for the trial of these issues, as he would be were the defense a favored one.

The principle is this, whenever the law gives a right of action, or secures a ground of defense, it also confers all the powers and facilities which are requisite to enforce the right of action, or to secure the ground of defense. The object of a trial, is to determine the legal rights of the parties in relation to the matters involved in the issue made; and the justice should carefully guard the rights of both parties, so that there shall be a full, fair and impartial trial.

On whose motion; on motion of the justice.] There are cases in which a justice may adjourn the cause either with or without the consent of the parties. This right, however, cannot be exercised by him at any other time than on the return of a summons or an attachment, or on the joining of issue without process; and such adjournment cannot be for a time exceeding eight days. *Ante*, 47, §§ 57, 58. But a justice has no right to adjourn a cause on his own motion in an action commenced by warrant. *Ib.* In those cases in which a justice may adjourn a cause on

his own motion, the power is one which is in terms confided to the *discretion* of the justice. Vol. I, 47, § 57. In the exercise of this discretion the justice may sometimes find it useful to secure his own interests and convenience as to the time of hearing the cause. But the power conferred, is not an arbitrary one which is to be used regardless of the rights, interests or convenience of the parties. When a plain case is made for a first adjournment, the justice is bound to grant it as a matter of right. But occasionally the proof for the purpose of procuring an adjournment may be defective, and, if the justice is satisfied that justice will be promoted by an adjournment, this section places it within his power to adjourn the cause for a time not exceeding eight days.

As a general rule, the decision of the justice in granting an adjournment in such cases is final. *Kittle* v. *Baker*, 9 Johns., 354; *Nellis* v. *McCairn*, 35 Barb., 115. But in one case where it appeared that a child of the defendant was dangerously sick, which was sworn to by the defendant's father, who requested an adjournment on the return day of the summons, which was denied and a judgment rendered in favor of the plaintiff on the same day, this judgment was reversed because the justice refused the adjournment. *Rose* v. *Stuyvesant*, 8 Johns., 426. The justice must act in the exercise of his discretion, and not on motion of either of the parties, or the right will be considered as waived, and the adjournment irregular. In one case where issue was joined on the return day of a summons, and the defendant asked for an adjournment, but the plaintiff objected to granting it, and demanded proof and bail. The defendant refused to make oath or to give bail, and the justice decided that he was entitled to an adjournment without either proof or bail, and granted the motion for an adjournment on the motion of the defendant without proof or bail, and not on motion of the justice. This decision was held to be erroneous because the justice did not act upon the discretion conferred upon him, and if he acted upon the motion of the defendant, the proof and security demanded by the plaintiff ought to have been required. *Peck* v. *Andrews*, 32 Barb., 445.

A justice is limited strictly as to the time when he may exercise this discretion, and if he adjourns the cause at any time except that specified by the statute, the adjournment will be irregular. *Aberhall* v. *Roach*, 11 How., 95; *Gamage* v. *Law*, 2 Johns., 192.

If the first adjournment is by consent of the parties, that will not authorize the justice to adjourn the second time on his own motion. *Kilmore* v. *Sudam*, 7 Johns., 530. But if the plaintiff consents in such a case, and the defendant does not object, it will be deemed an adjournment by the consent of the parties. *Ib.*

On motion of the plaintiff.] A plaintiff is presumed to be possessed of evidence, sufficient to maintain his action, since it would be most unreasonable for him to commence an action, without any evidence to support it. The law gives a plaintiff, a right to one adjournment, if the application is made at the return

of a summons, or an attachment, or upon the joining of issue, without process. Vol. I, 47, § 59. But if the defendant is ready for trial, at the joining of issue, he may require the plaintiff or his attorney, to make oath, that the plaintiff cannot safely proceed to trial, for the want of some material testimony or witness. *Ib.* The plaintiff is entitled, as a matter of right, to one adjournment, at the time of joining issue, provided he complies with this statute. *Ib. Nellis* v. *McCairn,* 35 Barb., 115. It is not necessary that the plaintiff should state in terms, that the absent witness is material, if he states that he cannot safely proceed to trial without him. Or at any rate if that statement is material, the objection will be waived if the opposite party does not object, on that account nor examine the plaintiff on that point.

A plaintiff cannot, as a general rule, have more than one adjournment on his own motion. The exceptions to this rule will be noticed hereafter. The rule which denies the plaintiff a right of adjournment at any other time than the one mentioned, is enforced quite strictly by the courts.

It is not important on whose motion the first adjournment is granted, for, whether it is done by mutual consent, on the motion of the plaintiff, or on motion of the defendant, neither contingency will authorize a further adjournment in behalf of the plaintiff.

The practice under the old statutes, and under those now in force, is the same. Where issue was joined on the return of process, and the cause was adjourned for trial, and the plaintiffs appeared, but the defendant did not appear, on the adjourned day; and the plaintiffs stated to the justice, that they and the defendant had agreed to adjourn the cause until the defendant should be further notified, and that they had notified the defendant for a day, which was specified. The plaintiffs also made oath, that they could not safely proceed to the trial of the cause, for the want of a material witness, who resided at a distance. The justice then adjourned the cause to the day specified, at which time the plaintiffs appeared, but the defendant did not appear, and the plaintiffs recovered judgment, which was reversed on the ground that the justice had no authority to adjourn the cause a second time, on the motion of the plaintiffs. *Proudfit* v. *Henman,* 8 Johns., 391.

So where issue was joined, on the return day of a summons, and the cause was adjourned by consent, and on the adjourned day, the parties appeared, and the plaintiff asked for a further adjournment, and made oath that a material witness had been subpoenaed, but that he did not attend. The defendant objected to a further adjournment, but the justice granted it for six days; at the expiration of that time, the defendant did not appear. but the plaintiff did, and he then proceeded, and took a judgment against the defendant, which was reversed for erroneously granting this adjournment. *Payne* v. *Wheeler,* 15 Johns., 492, and see *Bailey* v. *Delaplaine,* 1 Sandf., 11; *Horton* v. *Auchmoody,* 7 Wend., 200. If the defendant expressly consents, the justice may grant

any number of adjournments to a plaintiff. So if a defendant is present, when a second or further adjournment is asked by the plaintiff, and no objection is made, such silence will be construed into an acquiescence, that the adjournment may be made. *Kilmore* v. *Sudam*, 7 Johns., 529.

On motion of the defendant.] Applications for the postponement of a cause are most frequently made by the defendant. And this is almost invariably the case after a first adjournment. The statute provides that an adjournment may be had by a defendant at the joining of issue upon certain specified conditions. And it also provides for a further adjournment by a defendant upon his compliance with the requirements of such statute.

The cases in which adjournments may be had in cases commenced by warrant, will be noticed in a subsequent place. In ordinary cases, when a defendant makes a first application to postpone a cause, he will be merely required to make his application at the time of joining issue, to make oath if required by the plaintiff or the justice, that he cannot safely proceed to trial for the want of some material testimony or witness, which he must specify; and further, he must give proper security if that is required by the plaintiff. Vol. II, 48, § 64.

When the application is made at the joining of issue, the defendant need not show that he has used diligence to procure his witnesses or his evidence, nor need he disclose what he expects to prove by his absent witnesses. The first adjournment on motion of the defendant, may be for any time not exeeding ninety days. In determining the length of time for which the cause should be postponed, the justice must exercise his best judgment upon all the circumstances which are disclosed upon the application. If the parties live at a very great distance from the justice, so that it is not convenient for them to attend frequently, and it is probable that the desired witness cannot be procured on a short adjournment, it will be advisable to adjourn to such time, not exceeding ninety days, as will render it probable that the attendance of the witness may be secured at the time to which the cause is postponed. It ought, however, to be a case in which a witness is clearly a material one, and in which his attendance cannot be procured at an earlier day, to induce a justice to delay the trial so long, especially if the plaintiff is unwilling to assent to the arrangement. So much is left to the discretion of the justice in relation to the length of time for which a cause may be adjourned within the statutory limits, that no general rules can be given which will be applicable to every particular case. This discretion has been given for the express purpose of enabling a justice to protect the rights of the parties, and to see that justice is done to all concerned.

There are two classes of cases which will frequently come up for adjudication. One of them is when a defendant has no substantial or meritorious defense, and he desires to postpone the cause for the mere purpose of delay. This the law disapproves,

and no justice ought to tolerate justice to be delayed or frustrated by any such improper practice. But he ought to be equally careful to comply with the statute, and to grant an adjournment when it is a legal right, and in every case in which he has authority to do so, if he is clearly satisfied by competent proof that justice will be promoted by granting the application. The other class of cases is when a plaintiff is prepared for trial, but the defendant is not, and the plaintiff desires to press the cause on to trial. A plaintiff may have several reasons for taking this course. He may consider his claim a just one, and the defense an unjust or unfounded one, or he may have witnesses in attendance whose evidence is important to him, and whom he will not be able to produce at a subsequent time, or he may wish to avoid the expense and delay of several adjournments. But it is sometimes the case, that a plaintiff desires to obtain an unfair and an unjust advantage over a defendant who has a full and meritorious defense upon the merits, if his evidence is attainable, but whose witnesses cannot be procured without an adjournment. Such reasons and motives will prompt a plaintiff who is prepared for trial to press the cause on to trial as against his opponent who is unprepared.

The justice, however, must look at both sides of the question, and so dispose of the matter as to secure the just rights of all the parties so far as that can be done. A plaintiff may urge an unjust claim as earnestly as a just one. And if the defendant has a legal defense to an unjust demand, he ought to have every reasonable facility for establishing his defense. So there are also unjust defenses which are improperly interposed. The law permits a defendant to raise such issues as he chooses, if the grounds of defense are such that if true they would be a legal bar to the plaintiff's right of action, or if they would abate an action in the form, or at the time at which it was brought. The truth or the falsity of a defense, is a matter to be established at the trial. And it is not generally the case, that a justice can determine what the merits of the action or defense are, upon a mere motion to adjourn the cause for the purpose of preparing to try that precise question. It is true, that the circumstances which transpire on the application for a postponement, sometimes indicate the probabilities of the result of the trial, if the cause was tried upon such evidence as may then be disclosed. But it is rarely the case that a defendant is willing, or that he is legally bound, to disclose all the evidence upon which he relies for establishing his defense. And all that a defendant need establish, is that he has material evidence which is necessary to his defense, unless the application is made at a time subsequent to the joining of issue, when other facts must be shown.

Second or further adjournment.] Some of the remarks which have just been made are equally applicable to a second or further adjournment. The statute provides that a defendant may have any number of adjournments which may be necessary to enable

him to establish his defense, provided that such adjournments do not in the aggregate exceed ninety days from the joining of issue in the action. Vol., II, 48, 49, §§ 64, 65, 68.

But such adjournments on the motion of the defendant are not to be granted as a matter of course. The statute has requirements and conditions which must be complied with before an adjournment can be demanded as a legal right. A first adjournment is presumed to be sufficient to enable the parties to prepare fully for the trial. But this presumption does not always accord with the facts. If the plaintiff fails to secure his evidence at the adjourned day he must go to trial at a disadvantage, or must discontinue his action, since he cannot have a second or further adjournment. *Ante*, 337. With the defendant the case is otherwise. If he gives such security as the law requires, and proves by his own oath, or otherwise, to the satisfaction of the justice, that he cannot safely proceed to trial for want of some material testimony or witness, which evidence or witness he has been unable to obtain, after due diligence for that purpose, he is entitled to a further adjournment. Vol. II, 48, § 65.

There is one material difference between an application by a defendant for a first adjournment, or an application for a further or subsequent one. On a first application at the joining of issue, no diligence in procuring witnesses or evidence need be shown, since the law does not require any effort to be made to procure witnesses until the cause is at issue, so that each party may know what evidence will be material at the trial. But, on a second or further application, at a time when the cause was set down for trial, a defendant must prove more than the mere fact that he has material evidence or witnesses which are absent. The statute in terms requires him to prove that he has used *due diligence* in procuring such evidence or witness. Vol. II, 48, § 65. If he has material evidence or witnesses, but he takes no steps to procure their appearance at the trial, it is his own folly, and he must abide by the consequences which result from such negligence. A party may neglect to use due diligence because he is ignorant of the statutory requirements. But, this is not a legal answer to the objection that there has been a neglect to comply with the law. The law requires every man to know what its requirements are, or to submit to the inconveniences which ignorance of its provisions imposes.

The statute, however, is not imperative, for if the justice is satisfied that the defendant has acted in good faith in procuring his evidence and witnesses, and that he has used such diligence as was reasonable, a further adjournment may be granted, especially if the promotion of justice will thereby be facilitated. But, as a general rule, convenience and justice require that a defendant shall fully comply with the requirements of the statute.

Unless diligence were required, an unscrupulous defendant would have a great advantage over a plaintiff, who can have but one adjournment, and must then be ready to try the cause at

the adjourned day. A plaintiff must, therefore, always be prepared for trial, at any adjourned day, whether the cause was adjourned on his motion, by consent of parties, or on motion of the defendant. A knowledge of this fact may induce an unscrupulous defendant to adjourn as frequently as possible, for the purpose of subjecting the plaintiff to as great expense as possible; and if at any time he should appear unprepared for trial, then to urge the case for trial with the advantage of depriving the plaintiff of a portion of his evidence. When a defendant attempts to practice in that unfair manner, an intelligent justice will scarcely fail to discover it, and apply the proper corrective, by denying the adjournment thus unfairly sought. But a justice must be careful to ascertain that the application is an unfair one, before he assumes to act upon such a supposition, because if a defendant makes a clear case for an adjournment, it must be granted, if the other requisites of the statute are complied with.

It sometimes happens that a justice is in doubt whether the facts proved are sufficient, or whether the application for an adjournment is made in good faith. In all such cases, the safer rule will be to grant the application, because the inconvenience of a brief delay will generally be the principal consequence which will result from granting the motion; while a denial of the motion might deprive a defendant of important evidence.

When the case is one on which the decision of the justice is final, whether he grants or refuses an adjournment, on the ground that the decision is one of fact upon all the evidence, it is frequently the case that a justice may impose reasonable terms upon the defendant as a condition of granting his request.

If the adjournment of the cause will deprive the plaintiff of evidence or witnesses who are then present in court, but who will be absent at the adjourned day, the justice may require the defendant to stipulate in writing that the plaintiff may have an adjournment if that becomes necessary in consequence of granting the defendant's application.

Such a stipulation is valid, and it is binding upon the party who gives it, and it ought to be fully enforced by the court, whenever a case arises in which justice requires the enforcement of it. In one case the parties agreed before the justice, on the return day of a warrant, that the cause might be adjourned for three days, and that if one S. Y., a witness whom both parties wanted, should not attend at the adjourned day, that then the justice might adjourn for such reasonable time as he might deem necessary, in order to procure the attendance of S. Y. On the adjourned day S. Y. did not attend, and the plaintiff made oath of the absence of S. Y., and asked a further adjournment, for the purpose of obtaining his attendance. The defendant objected to an adjournment, but the justice granted it for seven days; at this adjourned day the defendant did not appear, and judgment was rendered against him, which was affirmed by the supreme court. The court said: "Here was a valid and binding agreement be-

tween the parties, which neither had a right to rescind without the consent of the other. By this they had authorized the justice to adjourn. It is to be presumed, that had it not been for the agreement, an application would have been made and granted, on the return of the warrant, to adjourn for a longer time than three days. The oath of the plaintiff was merely to satisfy the justice that it was proper to exercise the power given by the agreement." *Richardson* v. *Brown*, 1 Cow., 255.

It must be remembered, however, that when a defendant makes a clear and plain case for an adjournment as a matter of right, no such stipulation can be properly required, since the law gives him an adjournment in that event, without any qualifications or conditions except such as the statute imposes. But, in those cases in which a clear case is not made out, the justice may frequently impose this condition in a manner which is at once legal and just to both parties. The stipulation need not be reduced to writing; but it will be advantageous to do so, since in that case there can be no dispute as to the fact of the agreement or as to its terms. And see *Staples* v. *Parker*, 41 Barb., 648.

It may be in the following form:

JUSTICE'S COURT—ALBANY COUNTY, *ss.:*

A. B., *Plaintiff,* *agt.* C. D., *Defendant.*	Before E. F., Esq., a Justice of the Peace of the town of New Scotland.

Whereas I, the defendant C. D., have this day made application for an adjournment of this cause from the 13th day of December, 1864, to the 20th day of December, 1864, at 10 o'clock A. M., at the office of the said Justice E. F., in the town of New Scotland. Now, in consideration that the said cause shall be adjourned on my motion and at my request now made, I do hereby stipulate and agree that a further adjournment shall be granted to the said plaintiff, for such time as to said justice shall seem proper, if such adjournment shall be necessary, and if satisfactory proof of such necessity shall be made before the said Justice E. F., on the said 20th day of December, 1864. C. D., *Defendant.*

Dated December, 13th, 1864.

After the execution of this agreement it should be left with the justice. And if, on the adjourned day, the plaintiff is not able to proceed safely with the trial, after due diligence to have his evidence and witnesses there, the justice ought to grant a further adjournment to the plaintiff, upon due proof of the absence of material evidence or witnesses, and of due diligence in attempting to procure them at the trial. The agreement or stipulation need not be in the precise form of the precedent given; it may be varied according to the circumstances of the particular case, and in a proper case it may be an absolute agreement to adjourn upon the happening of some specified event, as, for instance, the absence or illness of a specified witness. This being an adjournment by the consent of parties, they may limit the time of adjourning to ninety days, or they may extend it beyond

that time, if they so agree. And the agreement ought to state whether the further adjournment is to be for a specified number of days, and if so, that number ought to be stated; or the agreement may leave the time to be fixed by the discretion of the justice.

When to apply.] When the justice does not adjourn the cause on his own motion on the day of joining issue, it must be adjourned by the mutual consent of the parties or on motion of one of them. When the application is made by the plaintiff, it must be made at the time of joining issue, and not afterwards, unless it is done in pursuance of some agreement like that just mentioned, or in some other special case not included in this general rule as to adjournments. The defendant, however, may apply at any time within ninety days of joining issue, provided he does not ask to exceed ninety days from such issue, and provided he makes due proof of the necessity for the adjournment and gives the necessary security. But a defendant may make his application in such a manner and at such a stage of the proceedings as to waive his rights which he might have claimed in a proper application.

If he neglects to apply for an adjournment until a jury is impanneled and sworn, the application will be too late, and the justice will not have authority to grant the motion. *Matthews* v. *Fiestel*, 2 E. D. Smith, 90; *Pollock* v. *Ehle*, Id., 541; *Story* v. *Bishop*, 4 E. D. Smith, 423; *Aberhall* v. *Roach*, 11 How., 95; *Fairbanks* v. *Corlies*, 1 Abb. 150; *S. C.*, 3 E. D. Smith, 582; *Parmelee* v. *Thompson*, 7 Hill, 77; *Fink* v. *Hall*, 8 Johns., 437. So, too, an application to adjourn comes too late after the trial has commenced before the justice without a jury. The swearing of a witness in the cause, and his examination partially or wholly, is a commencement of the trial in such a case.

If a witness refuses to be sworn, or if sworn he then refuses to testify or to answer proper questions, he may be committed to jail, and the cause adjourned. Vol. I, 73, §§ 204, 205, 206.

There are cases however, in which a justice may delay a cause for a short time, even after a trial has commenced, before the justice alone, or when the trial is by jury. And if an important witness is unexpectedly absent, or if a material witness is, near the court, and can be procured in a short time, the justice may, in his discretion, hold open the cause a short time for that purpose. In one case a justice held open the cause for two hours after a jury was impanneled to enable the plaintiff to procure witnesses, and this was held to be within the discretion of the justice. *Pease* v. *Gleason*, 8 Johns., 409. But this discretion is not an arbitrary one, and if the delay is unreasonable, it will be error. And where a trial had commenced, and the justice held open a cause for twenty hours to enable the defendant to go twelve miles to procure evidence, this was held to be unreasonable. And where the justice proceeded with the trial in this case, in the absence of the plaintiff, at the time fixed for resuming the trial, a judgment in favor of the defendant was reversed. *Green*

v. *Angel*, 13 Johns., 469; and see *Aberhall* v. *Roach*, 11 How., 95; *S. C.*, 3 E. D. Smith., 345. There are numerous cases in which the law authorizes a justice to hold open the cause for some considerable time. This frequently arises from the necessity of the case, when a jury has been demanded, and a venire issued, it frequently takes a long time to procure a sufficient number of persons. In such a case the delay is unavoidable, and the delay excusable, even if it happens that the cause must be held open from one day to the next. *Day* v. *Wilber*, 3 Caines, 134; Vol. I, 37, § 1. So, when a justice is engaged in the trial of a cause, he may delay the trial of an other cause until the first cause has been disposed of. *Hunt* v. *Wickwire*, 10 Wend., 102. So, in case a jury disagrees and is discharged, it is proper to issue a new venire, which must be returnable within forty-eight hours, and the cause may be held open in the meantime. Vol. I, 54, § 102. This limitation of time may be waived by express agreement, or by implication arising from the acts of the parties. In one case a cause was tried by a jury on the 14th day of the month, and the jury disagreed and were discharged by the justice, and the justice then proposed to the parties to postpone the cause until the 17th day of the same month, to which neither party made any objection. There was no other consent than this, which was implied by the silence of the parties, and the justice then adjourned the cause until the 17th of the month. The plaintiff appeared on that day, but the defendant did not, and a judgment was rendered in favor of the plaintiff. This judgment was held to be regular, and the judgment valid. *Fiero* v. *Reynolds*, 20 Barb., 275.

After a trial has been had and the jury is discharged, because of an inability to agree upon a verdict, the defendant cannot insist upon an adjournment as a matter of right. Having once declared himself ready for trial, and having once proceeded to the trial, it is too late to insist that he could not procure his evidence or witnesses before the trial commenced. An action was pending before a justice, and a trial commenced before a jury called by the defendant, and after a partial trial of the cause, it was adjourned on motion of such defendant. On the adjourned day, five only of the jurors appeared, the sixth being absent on account of illness. The defendant refused to try the cause before the five jurors who appeared. He also objected to a new venire, or to having a talesman called. The justice, at the request of the defendant, then dismissed the five jurors. The plaintiff then insisted upon an immediate trial, and requested the defendant to take out a new venire, returnable immediately, which the defendant refused to do, but on the contrary, he made an application for an adjournment for the purpose of procuring the attendance of two witnesses who resided eight miles from the place of trial, who had not been subpœnaed, nor had any effort been made to procure their attendance. A witness was sworn as to the materiality of the absent persons as witnesses. The justice decided to grant the adjournment on the terms that the defendant paid

$1.75 to the plaintiff, which was the amount of fees payable to material witnesses of the plaintiff then in attendance. The defendant refused to comply with these terms, and the plaintiff insisted upon proceeding immediately with the trial, and he also consented to issuing a new venire returnable immediately. The justice offered to issue such new venire returnable immediately, but the defendant objected to an immediate trial, and insisted that the cause must be tried by a jury, though at a subsequent day. The plaintiff then asked to have the cause tried without a jury, which request the justice granted, and the cause was tried without a jury, and the plaintiff had judgment. This was held to be regular and the judgment was affirmed. *Babcock* v. *Hill*, 35 Barb., 52. It was held that the neglect to subpœna the witnesses named was a want of due diligence, and that the justice would have been justified in refusing an adjournment upon any terms. So, it was also held that the conduct of the defendant amounted to a waiver of a jury, for he had refused to have a venire to obtain a jury on the trial day, although he wished for one for a subsequent day, and this amounted to a refusal to have a jury at the time the cause was tried.

When a material witness has been subpœnaed, and he neglects or refuses to appear in pursuance of the process of the court, an attachment may be issued against him. And for that purpose, the justice may hold open his court for the return of the attachment, whether it is applied for by the plaintiff or by the defendant. This application ought to be made, however, before the trial is commenced, especially if the witness has not appeared at all. *Aberhall* v. *Roach*, 3 E. D. Smith, 345. But in such a case, if the justice has any discretion to exercise, it must be reasonably and not arbitrarily exercised. *Ante*, 336. When practicable, it is best to hold open to a definite term, as for instance, for so many hours, or to a certain hour of a specified day. An indefinite holding open for several days is improper. *Wilcox* v. *Clement*, 4 Denio, 160. But if a witness has appeared and he disappears during the progress of the trial, the justice may hold open the cause for a short time for the purpose of bringing him before the court on an attachment, as in the case of an absent witness. *Ante*, 343.

Where to apply.] The application for an adjournment must be made at the place at which the process is returnable, or at the place to which it has been adjourned. A justice has no right to try a cause in the absence of the defendant at a place different from the place named for his appearance, if the trial proceeds on the return day. *Stewart* v. *Meigs*, 12 Johns., 417; *Case* v. *Van Ness*, 1 Johns. Cas., 243. But where both parties have appeared, the justice may adjourn the cause for trial at an other place, whether the parties consent or not. *Morrell* v. *Near*, 1 Cow., 112. In that case, the application must be made at the place fixed for trial, if the application is made on the day so fixed for trial.

How to apply.] When an adjournment is sought, there must in every case be an appearance for that purpose by the party who

desires the adjournment. This appearance may be in person or by attorney or agent. But there must be an appearance by some one. A cause was adjourned with a provision that if the defendant filed security as provided by the statute, he should have a further adjournment. He filed the security, but neglected to appear at the adjourned day to procure the further adjournment, and judgment was rendered against him on that day. This was held to be a regular judgment. *Muber* v. *Held*, 3 Abb., 110. The application for an adjournment may be made by the plaintiff in person, or by any attorney or agent in his behalf, if duly authorized for that purpose.

The statute expressly authorizes a plaintiff or a defendant to appear and prosecute or defend by attorney. Vol. I, 43, §§ 37, 39. These sections are a full authority to an attorney to do any act which it may be necessary to do in the cause during its progress, if duly authorized by the party represented. And since there are no regular attorneys in a justice's court, any person may be employed as an attorney. See Appearance, *ante*, 224. A justice is bound to permit a duly authorized attorney or agent to make the necessary proof for an adjournment, and a refusal to do so will be an error for which a judgment will be reversed. *Seers* v. *Grandy*, 1 Johns., 514. In a subsequent case, it was said to be a matter of discretion. *Killmer* v. *Crary*, 13 Johns., 228. But the previous decision was overlooked by the court, since it is not mentioned in the opinion. Both of these decisions were made before the enactment of the Revised Statutes. And since those statutes, it is entirely plain that an adjournment may be procured by an agent or an attorney as a matter of right, in any case in which a party might in person demand it. It is not necessary that proof should be made that the party cannot attend in person to make the application, since the law does not require his personal attendance, but permits him to appear by agent or attorney if he chooses.

In many cases the agent or attorney is well acquainted with all the material facts which the several witnesses know, and which it will be important to prove on the trial of the cause. In such cases, and indeed in all cases, it is proper that the application should be made by any duly authorized person. And the only conditions required for an adjournment are, that sufficient proof be made, and that proper security be given if that is required. There is one qualification to the rule in relation to an application by an agent. No person can legally act as agent or attorney for both parties, plaintiffs and defendants, and such an appearance would be irregular. *Sherwood* v. *Saratoga and Washington R. R. Co.*, 15 Barb., 650; see Appearance, *ante*, 225.

An adjournment cannot be made by a justice in the absence of both parties. In one case issue had been joined, and the cause adjourned to the 20th day of May, for trial. The justice then left his office, but returned in a short time, when he found a note or written consent upon his table signed by the counsel for the

respective parties, authorizing an adjournment to the 18th day of May, instead of the 20th as agreed. The justice was requested to "note the fact," and he thereupon, in the absence of the parties, adjourned the cause to the 18th of May. On that day the parties appeared, but the defendant refused to proceed with the trial on the ground that the adjournment was irregular, and he asked for a further adjournment, promising to waive the irregularity if the adjournment should be granted. This application was refused, and the plaintiff had a judgment which was reversed on account of the irregular adjournment in the absence of the parties, which irregularity was not waived by any act of the defendant. *Weeks* v. *Lyon*, 18 Barb., 530. In an other case, issue was joined on the 15th day of July, and the cause adjourned by consent until the 20th day of the same month. A further adjournment by consent was made until the 15th day of October. On the 10th day of October the plaintiff's agent or attorney went before the justice, and swore that the plaintiff and one of the defendants had both authorized him to appear and adjourn the suit to some day beyond the 1st of January following. The cause was adjourned to the 9th day of January mentioned, when the plaintiff appeared, but the defendants did not appear, and a judgment was obtained by the plaintiff, which was reversed on account of the irregular adjournment. *Deland* v. *Richardson*, 4 Denio, 95.

In an other case, the parties appeared on the return day, at the place mentioned in the process, but the justice did not appear. The justice sent a note, which was not signed, to the person at whose house the process was returnable, adjourning the cause to a subsequent day. On that day the justice and the plaintiff appeared, but the defendant did not, and the plaintiff obtained a judgment which was reversed because of the irregular adjournment. *Wiest* v. *Critsinger*, 4 Johns., 117. These cases show with what strictness the courts enforce the rule that the justice and the parties, or at least the justice and the plaintiff, must be present in court before a regular and valid adjournment can be made.

In the case of a first adjournment, a defendant is required to specify some material testimony or witness if the plaintiff demands it. Vol. I, 48, § 64, sub. 2. But this is not to be construed as meaning that the defendant shall state the facts which he expects to prove by the witness specified. He is required to specify the witness, not to state the evidence which such witness will give.

When a defendant asks for a second or further adjournment, no such requirement is mentioned in the statute. Vol. I, 48, § 65. He is simply required to prove that he cannot safely proceed to trial for want of some material testimony or witness, and that he has used due diligence to obtain such testimony or witness. *Ib.* The proof may be made by the oath of the defendant *or otherwise*, which means by any competent legal proof of the fact. It

is also said that proof must be made to the satisfaction of the justice, which means that he shall be judicially satisfied by the proofs, and not an arbitrary discretion which would not be satisfied with the clearest proofs.

Nothing is more common than one objection urged by a plaintiff when a defendant asks for a second or further adjournment. The condition which the plaintiff would impose is, that the defendant shall disclose the facts which he expects to prove by the absent witness or witnesses. The plaintiff never has a right to require this to be done. And the only case in which it can ever properly be done is, when the circumstances show that the application is not an honest and a just one, and the justice has just suspicions in relation to the good faith of the defendant. A defendant will not be permitted to trifle with the rights of a plaintiff, nor to impose upon a court of justice by obtaining useless and harassing adjournments. And when the facts fully convince a justice that an application is made for such a purpose, he may require the defendant to state on oath or otherwise, what facts he expects to prove by such absent witness or witnesses. An examination upon that point need not be carried further than to show that the grounds of the application are well founded. And a justice ought never to permit a defendant who is acting in good faith, to be compelled to disclose his whole evidence on such an examination. To tolerate such a practice would give a plaintiff an unfair advantage, since he would then know the evidence on both sides of the case, with the superior advantage of the right to open and close the case to the jury.

It is a delicate duty to discharge when a justice is required to decide between a defendant whose sole object is delay, and a plaintiff who desires to compel a disclosure of facts from a fair defendant in violation of his just right to defend himself, without being compelled to disclose on oath the grounds of his defense.

Where an application was made for a commission to take the evidence of a witness who was not a resident of this state, and the materiality of the witness was positively sworn to, it was held that the applicant was not bound to state what he expected to prove by the absent witness, and a refusal to issue the commission was held to be a sufficient ground to reverse the judgment obtained by the opposite party. *Eaton* v. *North*, 7 Barb., 631. The application is usually made orally, and the proof made by swearing the party or his witnesses as to the facts of the case. The application may, however, be made upon proper and sufficient affidavits. But when the affidavits are defective, or the application is evidently made in bad faith, the justice may require the applicant to be examined orally on oath.

In such cases, if the defendant refuses to be sworn, and to state what facts he expects to prove, the justice may deny the adjournment. *Onderdonk* v. *Ranlett*, 3 Hill, 323, which is an instructive case; *Irroy* v. *Nathan*, 4 E. D. Smith, 68.

The courts declare, however, that the justice ought not to refuse the adjournment unless the case is clearly one of well grounded suspicion. *Ib.*

Form of oath.] The oath which is administered on an application for an adjournment is quite general. Since it requires true answers to all questions which the justice may decide to be proper. The oath may be in the following form.

You do swear that you will true answers make to such questions as may be put to you in relation to the necessity of an adjournment, in the cause of John Doe against Richard Roe, now pending before me.

After this oath is administered, the person sworn may be examined in relation to such matters as will show the necessity for an adjournment. When the party himself is sworn, he usually states the absence of his witness, his materiality and the probability of his attendance at the adjourned day.

It is quite usual for the opposite party to examine the person sworn, somewhat in the manner of a cross-examination.

But this is a matter which rests in the sound discretion of the justice. He may permit such cross-examination, or if he is satisfied that an adjournment ought to be granted, he may dispense with any further examination, since the whole object of introducing proof is merely to satisfy the justice, by legal proof, of the propriety of granting an adjournment.

Form of affidavit for an adjournment.

JUSTICES' COURT.

John Doe *agst.* Richard Roe.	Before A. B., Esq., a Justice of the Peace of Watervliet, in Albany county.

Albany County, *ss.:*

John Doe, being duly sworn, says, that he is the defendant in the above entitled action; that C. D. and E. F. are material witnesses to the defense of this deponent, and that without the testimony of each of said witnesses he cannot safely proceed to the trial of said action. Deponent further says that C. D., one of the said witnesses, resides out of the county of Albany, or of any adjoining county, and that he resides in the city of Buffalo, in Erie county, N. Y. Deponent further says that the said E. F. is a resident of the county of Albany, and that he is at present absent from the county of Albany, as defendant is informed and verily believes, and that said E. F. is now in the city of New York; that issue was joined in this action on the 14th day of December, 1864, and on the same day the cause was adjourned, by consent of parties, to the 22d day of December, 1864, for trial; that on the said 14th day of December this deponent procured a subpœna from A. B., the justice before whom the said action is pending, and that on the same day and immediately after receiving said subpœna, this deponent went to the residence of the said E. F., for the purpose of subpœnaing him as a witness on the trial of said action; that deponent was unable to find the said E. F., and was then and there informed by the wife of said E. F., that he had, on the 13th day of December, 1864, left the city of Albany to go to the city of New York, to attend to business which would require his absence

from Albany, and his attendance in the city of New York, until the first day of February, 1865; that New York is not in Albany county, nor in any county adjoining thereto; that deponent has used due diligence in procuring the attendance of said E. F. as a witness; and deponent further says, that he expects to be able to procure the attendance of the said witness, E. F., within ninety days from the joining of issue in said cause.

RICHARD ROE.

Subscribed and sworn before me, this 22d day of December, 1864, } A. B., *Justice, &c.*

In the precedent just given, the affidavit is made by the defendant in person. But this is not necessary, for if any other person knows facts sufficient to make a proper case, the affidavit may be made by him. So there may be oral evidence given in addition to the affidavits. It is the usual practice to swear the witnesses, and let them state orally the facts which are required to be proved. But in some cases the defendant may be at a great distance from the justice's office, or he may be absent by reason of illness, and besides that he may be the only person who is able to swear to the facts which entitle him to an adjournment; in all such cases, or others of a similar character, the justice ought to act upon the affidavit when presented, on the application made by the attorney or agent of the defendant.

The principal thing to be attained is, that there shall be a *bona fide* application for the adjournment, and sufficient legal proof of facts to authorize the justice to grant it.

Statutory requirements.] The parties are required to join issue on the return of process, or voluntarily, so that there may be some issue to try. And after both parties appear upon the return of process, an issue must be joined before an adjournment can be had, unless the defendant neglects or refuses to plead. *Ante*, 294. When the defendant neglects or refuses to plead by putting in a demurrer or answer, the plaintiff should file his complaint, and the justice will then adjourn the cause on his own motion, or on that of the plaintiff, for a short time, to enable the plaintiff to prepare for trial. Though if the plaintiff is ready for trial, no adjournment need be had in such a case.

After issue joined, no adjournment can be had by either party without oath, if that is required by the opposite party. Vol. I, 47, 48, §§ 59, 60, 64, 65; *Peck* v. *Andrews*, 32 Barb., 445.

And when an adjournment is necessary to secure a full and fair trial, an application must be made in the court below for such adjournment, and the application must be founded upon a proper affidavit, or upon some sworn evidence of its necessity, for a mere oral statement of the necessary facts, without oath, will not be sufficient. *Edwards* v. *Drew*, 2 E. D. Smith, 55; *Lynsky* v. *Pendegrast*, Id., 43; *Rawson* v. *Grow*, 4 E. D. Smith, 18. A plaintiff is not required in any case to give a bond as a condition for the granting of an adjournment.

But a defendant may be required in every case to give a proper bond before he can have an adjournment, if that is required by

the plaintiff. Vol. I, 48, §§ 64, 65; *Belshaw* v. *Colie*, 1 E.D. Smith, 213.

The plaintiff may waive the right to a bond if he chooses. And this waiver may be express or implied. When the defendant is a person of undoubted responsibility it is not usual to require a bond to be given.

And when the adjournment is opposed on the ground that the proof is not sufficient, and no objection is made in relation to the necessity of a bond, the justice may treat the matter as amounting to a waiver of a bond. *Richardson* v. *Brown*, 1 Cow., 255.

The plaintiff may, however, insist upon having a bond given by the defendant, if the demand is made at any time before the adjournment is actually granted. The giving of a bond as a condition to an adjournment is a right which the plaintiff may insist upon or not, as he may elect; and a bond is required in those cases only in which the plaintiff *requires it*. Vol. I, 48, § 64, sub. 3, § 65. When the plaintiff requires such a bond to be given, the justice has no right to dispense with the condition; and if he adjourns the cause without requiring a bond, it will be error. *Peck* v. *Andrews*, 32 Barb., 445.

And the bond cannot be dispensed with even on the return day of process, if the cause is adjourned on motion of the defendant, and not by the justice on his own motion. *Ib.*

If a cause is adjourned several times on motion of a defendant, it is not necessary to give a new bond on each application, if he gave a proper bond on the first adjournment. If, however, such bond becomes inoperative, or the sureties become insolvent, or such sureties desire to be relieved from liability, the justice may require a new bond to be executed. Vol. I, 49, § 66. The statute prescribes the form of the security and the conditions which it shall contain, and there ought in all cases to be a careful compliance with its requirements. Vol. I, 49, § 66. The conditions which the bond will contain will depend upon the nature of the action. And when an execution may issue against the person of a defendant, such conditions will differ from those in which an execution cannot be issued against anything but the property of such defendant.

Bond for adjournment when execution issues against the body.

Know all men by these presents, that we, C. D., and E. F., of the town of   in the county of   , are held and firmly bound unto A. B., in the sum of two hundred dollars, to be paid to the said A. B., his heirs, executors, administrators or assigns, for which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals, and dated the 13th day of December, 1864.

Whereas, an action has been commenced before D. K., a justice of the peace of the town of Watervliet in the county of Albany, by the said A. B., against the defendant G. H., for a cause of action which authorizes an execution against the body, and now, upon the application of the said G. H., the trial of the said action is adjourned until the 1st day of January, 1865, at ten o'clock in the forenoon, at the office of the said justice in the said town of Watervliet.

Now, therefore, the condition of this obligation is such, that in cas judgment shall be given against the said defendant at the said adjourned day, or at any time thereafter, and execution be issued against his person, the said defendant shall render himself upon such execution before the return day thereof; or in default thereof, if the said defendant G. H., or his sureties C. D., and E. F., or either of them, shall pay the judgment so recovered with interest, then this obligation to be void, otherwise of force.

C. D. [L. S.]
E. F. [L. S.]

Sealed and delivered in presence of
I. J.

Approval by the justice.

I approve of the sureties in the foregoing (or the within) bond. December 13, 1864.
D. K., *Justice.*

Bond for adjournment when execution cannot issue against body.

Know all men by these presents, that we, C. D., and E. F., of the town of   in the county of   , are held and firmly bound unto A. B., in the sum of two hundred dollars, to be paid to the said A. B., his heirs, executors, administrators or assigns, for which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals, and dated the 13th day of December, 1864.

Whereas, an action has been commenced before D. K., a justice of the peace of the town of Watervliet in the county of Albany, by the said A. B., against the defendant G. H., for a cause of action which does not authorize an execution against the body, and now, upon the application of the said G. H., the trial of the said action is adjourned until the 1st day of January, 1865, at ten o'clock in the forenoon, at the office of the said justice in the said town of Watervliet.

Now, therefore, the condition of this obligation is such, that in case judgment shall be rendered against the said defendant on the said adjourned day, or at any time thereafter, and if execution shall be issued against the property of the said defendant, and if no part of the property of the said defendant liable to be taken on execution shall be removed, secreted, assigned or in any way disposed of, except for the necessary support of himself and family, until the said plaintiff's demands shall be satisfied, or until the expiration of ten days after the said plaintiff shall be entitled to have an execution issued on the judgment obtained in this action, if he shall obtain such judgment, then this obligation to be void, otherwise of force.

C. D. [L. S.]
E. F. [L. S.]

Sealed and delivered in presence of
I. J.

Approval by justice as in preceding form.

If no adjournment is granted at the time of giving the bond, or afterwards, in consequence of the execution of the bond, no action can be maintained upon it. *Mosier* v. *McKay*, 4 Denio, 116. And where a bond is executed by a person as surety, and an adjournment is granted, and on the adjourned day the surety is desired as a witness, and a new bond is executed by a new surety, but the new bond is dated at the time of its execution, and no further adjournment is had, no action will lie upon such new bond. *Ib.*

When the execution may issue against the body of the defendant, it must be issued within ten days after the rendition of the judgment, since an execution may now issue immediately. Vol. I, 49, § 67. Id. 11, § 64, sub. 12. And before an action can be maintained on the bond, such execution must be returned with a return thereon, that the defendant could not be found. *Ib.*

When the execution issues against the property merely, and not against the body of the defendant, such execution must also be issued within ten days after the rendition of the judgment. Vol. I, 76, § 222. It is important that the condition of this bond should not be broken in any particular, since any breach of the condition of the bond will subject the sureties to the payment of the whole judgment. If, therefore, the defendant should dispose of, assign, secrete, &c., any part of his property unlawfully, or in violation of the condition of the bond, such act would render the surety liable for the whole judgment, although the property disposed of did not exceed a tenth part of that sum in value. Though, of course, if any part of the judgment were paid, that would reduce the recovery for so much as had been paid, or levied upon the execution.

When a surety is offered and the plaintiff does not make any objection to him, he is received as a matter of course. The surety must be such as the justice shall approve. Vol. I. 49, § 66. The general remarks already made in relation to sureties are equally applicable here. See *ante*, 161.

The justice may either on his own motion if he chooses, or at the request of the plaintiff, require the surety to justify. And this may be done in the form of an affidavit, or by being sworn and examined orally. If sworn and examined the oath may be as follows: "You do swear that you will truly answer such questions as may be put to you in relation to your competency as a surety for the defendant, G. H., on his application to adjourn this cause."

The surety may then be examined by the defendant for the purpose of showing his responsibility. The plaintiff is also permitted to cross-examine such surety as to any matter relating to his responsibility. To specify in what particulars the examination would be material or proper is useless, since each case must present features peculiar to itself. The only object, however, is to ascertain the responsibility of the surety, and the examination and cross-examination ought to be confined within such limits as will accomplish the object in view.

An affidavit of justification by sureties may be in the following form:

JUSTICE'S COURT.

John Doe *agst.* Richard Roe.	Before A. B., a justice of the peace of Watervliet, in Albany county.

ALBANY COUNTY, *ss:* C. D. being duly sworn says, that he is a resident and householder (or freeholder) of the town of New Scotland, in the

county of Albany; that he is worth four hundred dollars (double the sum recoverable) over all his debts or liabilities, and exclusive of property exempt from execution. C. D.

Sworn before me, this 13th day of December, 1864, }
A. B., *Justice, &c.*

If the affidavit is offered, and the plaintiff is satisfied that the surety is sufficient, that ought to dispose of the question. But the justice may require the surety to submit to an oral examination on oath by the plaintiff if he desires it. That, however, is a matter entirely discretionary with the justice, and such oral examination will not be required, in addition to the affidavit, unless the justice is satisfied that justice will be promoted by it.

The law requires every person to act with promptness in legal proceedings, or to submit to such consequences as may follow neglect. And, therefore, the statute requires a defendant to show that he has used due diligence in preparing for trial, as a condition to granting a second or further adjournment. What is due diligence is a matter which depends upon circumstances. In some cases certain acts would clearly be using due diligence, while under other circumstances the same acts would be construed to be gross carelessness and neglect.

If at the time of joining issue, or if at any time before there is an opportunity to subpœna a material witness, he is absent and beyond the reach of such subpœna, and this is well known to both parties, or to the defendant, and such witness is to remain absent for a specified time, but will return in time to try the cause before the expiration of the ninety days fixed by law, the law will not require the defendant to do more than to show these facts to entitle him to an adjournment. And whenever it appears that no diligence would secure the attendance of an absent witness before a particular time which has not yet elapsed, nothing more is required than to show that the defendant has taken prompt action in ascertaining whether the witness could be procured. So if a witness is dangerously sick, so that he could not possibly be procured as a witness on the adjourned day, it will not be necessary to subpœna such witness, even though he may be within reach of the subpœna. In such cases the court is governed by the principle that impossibilities are not required. And whenever it appears that the defendant has taken the most effective means, or such reasonable means as may be in his power, to procure his witnesses, that will be due diligence. Good faith and an honest and practical effort to be ready for trial is what the law demands, and when this is shown the law will be satisfied. But when a witness might readily have been subpœnaed in due time, and this has been neglected, or when a defendant takes no steps whatever to prepare for trial, or when he commences to act at so late a day that his efforts are unavailing, when an earlier and a reasonable attention to the matter would have secured the attendance of his witness, he cannot be

said to have used due diligence. Still a defendant may sometimes have a reasonable excuse for his delay. He may have made reasonable inquiries, and have failed to ascertain the existence of facts which subsequently came to light, or he may have received erroneous impressions from mistaken or false representations made by others to whom he has properly applied for information as to facts of which he himself had no knowledge. In such cases, the justice will determine whether the acts done are not due diligence within the intent and meaning of the statute. And if he is satisfied that the defendant has thus used due diligence, it is always better to grant the adjournment upon such terms as may be just to both parties. The extreme views which will usually be urged are two in number. One side will insist that the utmost possible diligence must be observed, while the other side will claim that any convenient acts which he may have done are sufficient to constitute due diligence. Neither of these extreme views are such as the law contemplates, and neither of them will be apt to receive the sanction of an intelligent justice. See *Powers* v. *Lockwood*, 9 Johns., 133; *Easton* v. *Coe*, 2 Johns., 383.

There was formerly a ground on which an adjournment might have been refused under certain circumstances. As when one party had seen the account of the other, but refused to exhibit his own to the opposite party. Vol. I, 49, § 69; and see *Harrington* v. *Ensign*, 11 Wend., 554. This section, however, is of little practical importance now, as either party has it in his power to require a bill of particulars if he takes the necessary steps for that purpose. *Ante*, 320; and Code, § 64, sub. 14.

What is a ground of adjournment.] The principal reason why an adjournment is required, is that the proper evidence may be procured in time for the trial of the action.

The most common ground for postponing a cause, is the absence of a material witness, and the statute makes this a sufficient cause for an adjournment. Vol. I, 47 to 49, §§ 59, 64, 65, 66. So, when a commission is taken out by either party, the cause may be adjourned for a time not exceeding the usual limits of ninety days from joining issue. Vol. I, 68, § 170. So, when a material witness refuses to be sworn, or being sworn refuses to answer proper questions, this is a good ground of adjournment. Vol. I, 72, § 206. But besides the cases mentioned in the statute, there are other instances when an adjournment may properly be granted. See *ante*, 338.

When a defendant is too sick to be able to attend the trial, and it is important that he should be present as a witness or otherwise, this is a sufficient ground for an adjournment, since it would be a good cause for postponing a trial at a circuit, and a justice has all necessary powers. Vol. I, 37, § 1.

Sickness of a child or other member of a defendant's family, is equally a good cause. *Rose* v. *Stuyvesant*, 8 Johns., 426. The case just cited was where the application for postponement was

made on the return of process, when the justice had a discretionary right to postpone. But justice and humanity require an adjournment in favor of a defendant when severe or dangerous illness in his family requires it. It was held in one case that the absence of the defendant's counsel was not sufficient to authorize the demand of an adjournment as a matter of right. *Ranney* v. *Gwynne*, 3 E. D. Smith, 59. But the unexpected illness or absence of the defendant's attorney or counsel is a good and reasonable cause for postponing the trial, especially if the cause is an important one. *Hayley* v. *Grant*, Say., 63; Anon., 2 Salk., 645.

The reason why counsel was not present must be shown, or a sufficient cause will not be shown. *Post* v. *Wright*, 1 Caines, 111; *Sayer* v. *Finck*, 2 Caines, 336; *Fourdrinier* v. *Bradbury*, 3 Barn. & Ald., 328. And whenever the defendant has early notice that his counsel will not be able to be present at the trial, and there is sufficient opportunity to procure other counsel in season, there will not be a good cause for postponement. *Ib.*

Where the defendant complies with the statute by making sufficient proof, and then offers proper security, he may demand an adjournment as a matter of right. *Beekman* v. *Wright*, 11 Johns., 442; *Hemstract* v. *Youngs*, 9 Johns., 364; *Belshaw* v. *Colie*, 1 E. D. Smith, 213. The justice has no right to refuse an adjournment because the defendant has not paid the costs incurred in consequence of a prior adjournment, nor because he refuses to pay the justice for his services in drawing a bond in the cause. *Ib.* And if the justice should refuse to adjourn the cause on such grounds, he would render himself liable to an indictment. *People* v. *Calhoun*, 3 Wend., 420.

How long adjournment should be granted.] When the adjournment is made by the consent of parties, it may be for such length of time as may be agreed upon by the parties. And when a witness refuses to be sworn or to answer proper questions, the time is not limited, unless it be that it shall be continued until the witness is sworn, or answers, or becomes dead or insane. But, in ordinary cases, the cause cannot be adjourned for a time exceeding ninety days from the joining of issue.

Within those limits the justice may adjourn a cause for such time as to him seems proper and right. If the witnesses all reside near the place of trial, and none of the witnesses are absent, a short time will be the most reasonable one. If, however, a part of the witnesses, or all of them, reside at a distance, or if some of them are absent so that their attendance cannot be procured under some time, it is advisable to put off the trial to such time as it is reasonable to suppose will enable their attendance to be secured. So much depends upon circumstances, and so much is left to the discretion of the justice in this particular, that no general rule can be laid down, unless it should be, that the justice should be careful to give both sides a reasonable opportunity to procure all material witnesses.

Adjournment in warrant cases.] The statute is explicit as to the cases in which adjournments shall be granted, in actions commenced by warrant or short summons. Vol. I, 48, §§ 60, 61, 62, 63, Id, 75, § 214. When a suit is commenced by a warrant, or a short summons in favor of a non-resident plaintiff, the first adjournment cannot be for more than twelve, or for less than three days, unless the parties otherwise agree. *Ib.*, 48, § 63.

There may be an adjournment by consent as in other cases. Vol. I, 48, § 60, sub. 1.

So the defendant is entitled to an adjournment on making oath that he has a good defense to the action, and that he is not ready to proceed to the trial. *Ib.*, sub. 2. But the adjournment cannot be granted, if the plaintiff has witnesses present, and such plaintiff desires to have their examination taken, unless such defendant will consent that such witnesses may be examined on oath by the justice, and the testimony reduced to writing, for the purpose of using it at the trial. *Ib.*, sub. 2.

The examination may be in the following form:

JUSTICE'S COURT.

John Doe *agst.* Richard Roe.	Before A. B., a justice of the peace of Watervliet, in Albany county.

ALBANY COUNTY *ss:* This suit having been commenced by a warrant (or a short summons), in favor of the said John Doe a non-resident plaintiff, and the said defendant having requested an adjournment of the said cause, the plaintiff produced C. D., a witness attending on behalf of said plaintiff, and desired that his examination should be taken pursuant to the statute. And the said C. D., being duly sworn says, on his direct examination, as follows: (insert the evidence.) And on his cross-examination, the said C. D., says: (insert the evidence.) C. D.

Subscribed and sworn before me, this
15th day of December, 1864,

A. B., Justice, &c.

If the witness is re-examined, or further cross-examined state that fact in connection with the other evidence.

The certificate of the justice should be written at the foot of the evidence, or indorsed upon it, as follows:

I certify that C. D. was sworn as a witness on the part of the plaintiff, and in attendance at the time of joining issue in the said cause, on the 15th day of December, 1864, and that at the request of the plaintiff, and by the consent of the defendant, the said C. D., did testify as a witness to the facts stated and contained in said affidavit.

E. F., Justice, &c.

When the cause is adjourned by the defendant, he must give proper security or remain in the custody of the constable during the time of the adjournment. Vol. I, 48, § 61.

If adjourned by consent of both parties, or on motion of the plaintiff, the defendant is to be discharged from custody, but the cause is not thereby discontinued. Vol, I, 48, § 62; *Pope* v. *Hart*,

35 Barb., 630; *S. C.*, 23 How., 215. The plaintiff is entitled to an adjournment by showing on oath, that he cannot safely proceed to trial for want of some material witness or testimony. Vol. I, 48 § 60, sub. 3.

The first adjournment must be for a time not less than three nor more than twelve days, as has been seen. But the defendant is entitled to further adjournments if necessary, as in other cases. Vol. I, 48, § 65.

An adjournment may be granted for the purpose of issuing a commission to take the evidence of an absent or a foreign witness. Vol. I, 67, 68, §§ 169, 170; *Parmelee* v. *Thompson*, 7 Hill, 77; *Eaton* v. *North*, 7 Barb., 631.

When adjournment may be refused.] A justice may refuse an adjournment when the proof is not sufficient to authorize it, or when no bond is given if required, even if the proof is sufficient. So it may be refused when the application is evidently made in bad faith, and for the mere purpose of delay. *Ante*, 340, 341, 348.

So, in some cases, an admission by the plaintiff will dispense with the necessity for an adjournment. In one case the plaintiff agreed to admit what was expected to be proved by a specified absent witness, and the statement was reduced to writing by the justice, and the defendant acceded to this agreement. But he subsequently refused to abide by it, and demanded an adjournment, which was refused by the justice, and this held to be proper. *Brill* v. *Lord*, 14 Johns., 341. The admission, however, must be that the facts stated are true, for it will be no answer to the application to say that the absent witness will testify to the proposed state of facts. *People* v. *Vermilyea*, 7 Cow., 369.

When an adjournment is a discontinuance of the action.] The general rule is that an irregular or an illegal adjournment is a discontinuance of the action. The cases relating to this point are very numerous, and some of them will be noticed hereafter, by way of illustrating what constitutes such irregularity. It is proper in this place to correct an erroneous statement which is frequently made, and it is also sometimes found in the books. That statement is, that an irregular adjournment will render void any judgment which may be subsequently rendered against the party objecting, or non-appearing. This statement is not correct, for the judgment in such cases is merely erroneous, and therefore reversible upon an appeal, but it is not void, nor can it be impeached in any manner except by an appeal. *Horton* v. *Auchmoody*, 7 Wend., 200; *Hard* v. *Shipman*, 6 Barb., 621; *Humphrey* v. *Persons*, 23 Barb., 314; *Stanton* v. *Schell*, 3 Sandf., 323; *D'Ivernois* v. *Leavitt*, 8 Abb., 60.

The principle is this, when the justice has once acquired jurisdiction of the subject matter and of the person, he is authorized to proceed with the action, and, though subsequent errors committed by him may render his judgment erroneous, and therefore reversible on an appeal, yet no such judgment will be held to be utterly void. *Ib.* And the justice and the constable who enforce

such erroneous judgment will be protected from an action for any acts done before a reversal of the judgment. *Ib.* As illustrative of judgments which are erroneous, but not void, it has been held that a second adjournment in favor of a plaintiff is erroneous. *Horton* v. *Auchmoody*, 7 Wend., 200; *Proudfit* v. *Henman*, 8 Johns., 391; *Payne* v. *Wheeler*, 15 Johns., 492; *Dunham* v. *Heyden*, 7 Johns., 381.

So of a second adjournment by a justice on his own motion, when objection was made. *Gamage* v. *Law*, 2 Johns., 192; *Kilmore* v. *Sudam*, 7 Johns., 529. So where a justice held open a cause for a long time after the trial of the action had been commenced. *Green* v. *Angel*, 13 Johns., 469; *Story* v. *Bishop*, 4 E. D. Smith, 423; *Aberhall* v. *Roach*, 11 How., 95; *S. C.*, 3 E. D. Smith, 345; *Redfield* v. *Florence*, 2 E. D. Smith, 339. So an adjournment in favor of a defendant, without proof or security, when that course is objected to by the plaintiff, is erroneous. *Peck* v. *Andrews*, 32 Barb., 445. So an adjournment by the justice in the absence of the parties is erroneous, notwithstanding the parties agreed to such an adjournment in the absence of the justice, provided the parties do not both appear at the subsequent trial. *Kimball* v. *Mack*, 10 Wend., 497; *Weeks* v. *Lyon*, 18 Barb., 530; *Deland* v. *Richardson*, 4 Denio, 95; *Wiest* v. *Critsinger*, 4 Johns., 117. So where the plaintiff does not appear on the return day, or an adjourned day, the cause cannot be adjourned, but must be dismissed. *Bailey* v. *Delaplaine*, 1 Sandf., 11; *Norris* v. *Bleakley*, 3 Abb., 107; *S. C.*, 1 Hilt., 90; *Sprague* v. *Shed*, 9 Johns., 140; *Green* v. *Angel*, 13 Johns., 469. So, although a justice may adjourn a cause when a defendant does not appear on the return day of process, yet he cannot hold the cause open indefinitely. He should adjourn to a day certain, and if he does not, but holds the cause open indefinitely for four days, and then renders judgment against a defendant in his absence, the judgment will be erroneous. *Wilcox* v. *Clement*, 4 Denio, 160. So, when a commission is issued by a justice for the purpose of taking the evidence of an absent witness, the cause ought to be adjourned to a day certain, and it is irregular to hold open the cause indefinitely for the return day of such commission. *Allen* v. *Edwards*, 3 Hill, 499.

It does not follow as of course, however, that every erroneous adjournment will be sufficient cause for a reversal of the judgment. Every person may renounce any benefit which the law has conferred upon him. *Buel* v. *Trustees of Lockport*, 3 Comst., 197; *Baker* v. *Braman*, 6 Hill, 47; *Conkling* v. *King*, 6 Seld., 446; Broom's Leg. Max., 444, 547. And, therefore, if the party who might have alleged error in the proceedings, chooses to appear voluntarily in the action at a subsequent trial thereof, and to proceed therein without objection, such acts will be a waiver of the irregularity, and the judgment will be regular and valid. See the foregoing cases. But a defendant may appear and offer to proceed with the cause conditionally, but not otherwise, and in that case the condition must be complied with, or there will be

no waiver of the previous irregularity. *Weeks* v. *Lyon*, 18 Barb., 530. The party who procures an irregular adjournment cannot allege that as a ground of error, because no one is permitted to take advantage of his own wrongful acts. *Peck* v. *McAlpine*, 3 Caines, 166.

So where an adjournment was irregularly granted, but the defendant subsequently confessed judgment, this was held to be a waiver of the error. *Hill* v. *Downer*, 11 Johns., 461. There may be a waiver of any irregularity which may occur in the proceedings in an action. And this waiver may be express or implied, or it may result from the acts of the parties. And it is a general rule that a voluntary appearance and participation in the proceedings in an action without objection, after an irregularity committed, will be a waiver of the error and will render the subsequent judgment valid. And it will not make any difference in what manner the party was induced to proceed in the action, if there was no fraud in procuring his attendance, and if he appeared and proceeded in the action voluntarily. And, therefore, the appearance will be regular and the waiver complete, whether such party appeared at the request of the opposite party, or on that of the justice, or voluntarily on his own motion.

PART VI.

EVIDENCE.

CHAPTER I.

GENERAL PRINCIPLES.

SECTION I.

PRELIMINARY VIEW.

THAT which is legally offered by the litigant parties to induce a jury to decide for or against the party alleging such facts, as contradistinguished from all comment and argument on the subject, falls within the description of evidence. When such evidence is sufficient to produce a conviction of the truth of the fact to be established, it amounts to proof.

But the parties to an action are not permitted to adduce every description of evidence which, according to their own notions, may be supposed to elucidate the matter in dispute; if such a latitude were permitted, evidence might frequently be brought forward, which would lead rather to error than to truth, the attention of the court or jury might be diverted by the introduction of irrelevant or immaterial evidence, and the investigation extended to a most inconvenient length. In order to guard against these evils, the law has provided certain rules for limiting and regulating the admissibility of evidence. Some of these rules are statutory enactments, but the great majority of them are judicial decisions, which are founded upon convenience and the promotion of justice.

When evidence is offered by either party, on the trial of a cause, it is the province of the justice to decide as to its admissibility, and with this question a jury have nothing whatever to do. It is their duty to weigh and pass upon such evidence as shall be submitted to them, under the decision of the court.

A trial by jury is much favored by many persons, and it has some advantages which are calculated to commend it to public favor, especially in actions for torts, or those in which questions of fraud are involved. It is obvious that the experience which would best enable those whose duty it is to decide on matters of fact, arising out of the concerns and dealings of society, to discharge that duty, must be that which results, and which can only result, from an intimate intercourse with society, and an actual knowledge of the habits and dealings of mankind; and that the reasoning faculties best adapted to apply such knowledge and experience to the best advantage in the investigation of a doubt-

ful state of facts, are the natural powers of strong and vigorous minds, unencumbered and unfettered by the technical and artificial rules by which permanent tribunals would be apt to regulate their decisions.

For the finding of a verdict, in every issue, it is essential, in the first place, to know what facts, when proved, will satisfy the issue in point of law; and secondly, to inquire whether such facts have been proved. There are cases in which both questions are submitted to the jury on the trial of actions in justices' courts. But when the question submitted to them is merely a question of fact, and the court decides the questions of law, the office of the jury is then confined to the questions of fact, and their duty is to ascertain the existence of facts, by means of the judgment which they form of the credibility of witnesses, and by the inferences which they make from the circumstances submitted to their consideration. For the due discharge of this important function, they are supposed to be peculiarly well qualified by their experience of the conduct, affairs and dealings of mankind, and the manners and customs of society. In this respect, and to this extent, the law confides implicitly in their knowledge, experience, discretion and integrity. In relation to proofs, the law provides that the jury shall not be misled or deceived by irrelevant or illegal evidence, by providing rules for its exclusion; and having done this, the rest is left to the conscience and discretion of the jury. And so strongly is this rule enforced, that it is the settled practice of the courts not to interfere with the finding of a jury upon a question of fact, unless the verdict is manifestly a perverse one, or is the result of fraud or misconduct of some kind, or is clearly contrary to the evidence.

The means which the law employs for investigating a past transaction are those which are resorted to by mankind for similar, but extra-judicial purposes. These are the best, usually the only, means of inquiry, and it is for this reason that a jury forms a tribunal so well qualified to judge of mere matters of fact; for, subject to certain exceptions, they decide a cause upon the evidence by the aid of experience and reason, as they would do on any extra-judicial occasion. With these general principles the law can interfere in two ways only: either by excluding or restraining mere natural evidence by the application of artificial tests of truth, or by annexing an artificial effect to evidence, beyond that which it would otherwise possess. Hence it is that the great principles of evidence may be reduced to three classes, comprising:

1st. The principles of evidence which depend on ordinary experience and natural reason, independently of any artificial rules of law.

2d. The artificial principles of law, which operate to the exclusion of natural evidence, by prescribing tests of admissibility, and which may properly be called the excluding principles of law.

3d. The principles of law which either create artificial modes of evidence, or annex an artificial effect to mere natural evidence.

In the first place, it rarely if ever happens that a jury, or other tribunal, whose business it is to decide upon a matter of fact, can do so by means of their own actual observation. It is obvious that when inquiry is to be made into the circumstances of a past transaction, before a jury, information must be derived, for the most part, from the same source, and must be judged of and estimated, to a great extent, by the same rules that would be resorted to and applied by an individual whose business or whose interest it was, in the course of human events, to institute such an inquiry. What, then, are the means to which a person interested in such an inquiry into a past transaction would naturally resort? He would, in the first place, ascertain what witnesses were present at the transaction, and would obtain all the information which they could supply. If none were present, or none could be found from whom he could obtain immediate intelligence, he would procure information from others, who, although they had not actual personal knowledge of the fact, had yet derived information on the subject, either directly or indirectly, from others who possessed or had acquired and communicated such their knowledge, either orally or in writing. Again, in the absence of other information on the subject, he would endeavor carefully to ascertain the circumstances which accompanied the transaction and had such a connection with it as enabled him to draw his own conclusions on the subject of inquiry.

In short, when knowledge cannot be acquired, by means of actual and personal observation, there are but two modes by which the existence of a by-gone fact can be ascertained.

1st. By information derived, either immediately or mediately, from those who had actual knowledge of the fact; or,

2d. By means of inferences or conclusions drawn from other facts connected with the principal fact which can be sufficiently established.

In the first case, the inference is founded on a principle of faith in human veracity, sanctioned by experience. In the second, the conclusion is one derived by the aids of experience and reason from the connection between the facts which are known and those which are unknown. In each case, the inference is made by virtue of previous experience of the connection between the known and the disputed facts, although the grounds of such inference in the two cases materially differ. All evidence thus derived, whether immediately or mediately, from such as have had, or are supposed to have had, actual knowledge of the fact, may not improperly be termed *direct* evidence; whilst that which is derived merely from collateral circumstances may be termed *indirect* or inferential evidence. It is obvious that the *means* of indirect proof must usually be supplied by direct proof; for no inference can be drawn from any collateral facts until those facts have themselves been first satisfactorily established, either by actual observation, or information derived from others who have derived their knowledge from such observation.

Such, then, being the ordinary sources of evidence, what are the *excluding* principles which restrain the admission of evidence? As juries must decide by the aid of the same general principles of belief on which any individual would act who was desirous of satisfying himself by inquiry as to the truth of any particular fact, and as any individual inquirer would not think it necessary to limit himself to any particular rules, why should the evidence to be submitted to a jury be limited or affected by any technical rules?

The answer is, that the law interferes for two purposes: first, in order to provide more certain tests of truth than can be provided, or, indeed, than are necessary, in the ordinary course of affairs, and thereby exclude all weaker evidence to which such tests are inapplicable, and which, if generally admitted, would be more likely to mislead than to answer the purposes of truth; and, in the next place, to annex an artificial effect to particular evidence, which would not otherwise belong to it, on grounds of general policy and convenience.

The great principle on which the law proceeds in laying down rules of an exclusive operation is, not to alter the value and effect of evidence in the investigation of truth; that would be absurd, especially where the tribunal invested with the power of decision consists of jurors selected from the great body of the people, who, being unskilled in technical rules and unaccustomed to judicial habits, must necessarily decide by the aid of their own experience of things and the natural power of their reason, by principles on which they would act in the affairs of ordinary life; on the contrary, one great object of the law is to aid the natural powers of decision, by adding to the weight and cogency of the evidence on which a jury is to act.

An other great object is, to prevent the reception of evidence which, in its general operation, would injure the cause of truth, by its tendency to distract the attention of a jury, or even to mislead them.

The necessity for resorting to superior tests of truths, the effect of which is to exclude evidence not warranted by those tests, is founded on the apprehension that the evidence on which an individual in the ordinary transactions of life might safely rely, could not, without the additional sanction of such tests, be safely relied upon, or even admitted, in judicial investigations. For, in the first place, in the ordinary business of life, neither so many temptations occur, nor are so many opportunities afforded for practicing deceit, as in the course of judicial investigations, where property, reputation, liberty, even life itself, are so frequently at stake; in the common business of life, each individual uses his own discretion with whom he shall deal and to whom he shall trust; he has not only the sanction of general reputation and character for the confidence which he reposes, but slight circumstances, and even vague reports, are sufficient to awake his suspicion and distrust, and place him on his guard; and where

doubt has been excited, he may suspend his judgment till, by extended and repeated inquiries, doubt is removed. In judicial inquiries it is far otherwise; the character of a witness cannot easily be subjected to minute investigation; the nature of the proceeding usually excludes the benefit which might result from an extended and protracted inquiry, and a jury are under the necessity of forming their conclusions on a very limited and imperfect knowledge of the real character of the witnesses on whose testimony they are called on to decide.

It has been truly observed, that there is a general tendency among mankind to speak the truth, for it is easier to state the truth than to invent; the former requires simply an exertion of the memory, whilst to give false assertions the semblance of truth is a work of difficulty. It is equally apparent that the suspicion of mankind would usually depend on their ordinary experience of human veracity; if truth were always spoken, no one would ever suspect an other of falsity, but if he were frequently deceived, he would frequently suspect. Hence it is that jurors, sitting in judgment, would usually be inclined to repose a higher degree of confidence in ordinary testimony than would justly be due to it in the absence of peculiar guards against deceit; for as the temptations to deceive by false evidence in judicial inquiries are far greater than those which occur in the course of the ordinary transactions of life, they would be apt to place the same reliance on the testimony offered to them as jurors, to which they would have trusted in ordinary cases, and would consequently, in many instances, overvalue such evidence. The law, therefore, wisely requires that the evidence should be of the purest and most satisfactory kind which the circumstances admit of, and that it should be warranted by the most weighty and solemn sanctions.

Evidence may be conveniently divided into two classes: 1st. *Direct*, which consists in the testimony, whether *immediately* or *mediately*, derived from those who had actual knowledge of the principal or disputed fact; or, 2d. *Indirect*, or inferential evidence, where an inference is made as to the truth of the disputed fact, not by means of the actual knowledge which any witness had of the fact, but from collateral facts ascertained by competent means.

Direct or testimonial evidence, again, is either *immediate*, that is, where a witness states his own actual knowledge of the fact, or *mediate*, where the information is communicated, not immediately by the party who had actual knowledge of the fact, but from him through the intermediate testimony of one or more witnesses.

Competent evidence is such evidence as the law adjudges to be admissible when offered by either party. *Incompetent* evidence is such as is rejected by the law as inadmissible. Competency may relate to the person of the witness offered, or it may relate to the character of the evidence itself. Some persons are by law incompetent to be sworn, and therefore they cannot give competent evi-

dence. Again, the law in some cases excludes certain kinds of evidence, and requires some particular character of evidence to render it either admissible or available, as in the case of the statute of frauds, which requires certain agreements to be in writing. Where that statute requires a written agreement, proof of a parol agreement would be incompetent evidence.

So when a contract is reduced to writing, the writing itself is the *competent* evidence of its contents, while parol evidence thereof would be incompetent evidence.

Credible evidence is such evidence as is worthy of belief. In determining what credit is due to a witness, or to particular kinds of evidence, much is left to the discretion of a jury, who must decide that question upon all the circumstances before them.

A witness may be *competent*, and therefore admissible as a witness, while his statements may be utterly unworthy of credit on account of his character. In such a case his evidence is competent, but it is not credible.

Evidence is *relevant* when it bears upon any of the issues to be tried, or when it bears upon any question which is to be determined upon the evidence. Evidence is *irrelevant* when it does not bear upon any such issue or questiou. Evidence may be relevant and therefore admissible, and yet it may be of very little value or importance to the cause.

Cumulative evidence is such as augments or increases in quantity and kind. If six witnesses have sworn in a similar manner in relation to a particular transaction, it would be cumulative evidence to call several others to the same point.

Conclusive evidence is such as does not admit of explanation or contradiction. It is evidence, which of itself, whether contradicted or uncontradicted, explained or unexplained, is sufficient to determine the matter at issue. A record, unless impeached for fraud, is an instance of conclusive evidence.

Satisfactory evidence, is that amount of proof, which ordinarily satisfies an unprejudiced mind, beyond reasonable doubt. If evidence is admissible, its sufficiency is always a question for the jury, or a justice when he sits in their place.

SECTION II.

MATTERS JUDICIALLY NOTICED, WITHOUT PROOF.

There are some things of which every court takes judicial notice without evidence to prove their existence or their extent or validity. Courts are bound to take notice of the existence of all general statutes. *Browne* v. *Scofield*, 8 Barb., 239; *Methodist Church* v. *Pickett*, 5 E. P. Smith, 482; *People* v. *Herkimer*, 4 Cow., 345. And of the rules of the common law, and the decisions of the superior courts, without any proof whatever upon the subject.

Courts also take notice of the territorial extent of the jurisdiction and sovereignty exercised *de facto*, by their own government, and of the local divisions of their country into states, provinces, counties, cities, towns, local parishes and the like, so far as the

political government is concerned or affected. *People* v. *Breese*, 7 Cow., 429; *Chapman* v. *Wilber*, 6 Hill, 475; *Bronson* v. *Gleason*, 7 Barb., 472. And of the relative positions of such local divisions, but not of their precise boundaries, farther than may be described in public statutes, but courts do not take judicial notice that particular places are, or are not, within particular counties. *Brunt* v. *Thompson*, 2 Ad. & E. N. S., 789. They will also recognize judicially who are public officers, or officers of the court, such as attorneys, *People* v. *Nevins*, 1 Hill, 154; or sheriffs, or county or town clerks, or county judges and other public officers who are elected or appointed, and act under a general statute or law. Judicial notice is also taken of the common and ordinary modes of transacting commercial business, *Bronson* v. *Wiman*, 10 Barb., 406; *S. C.*, 4 Seld., 182; and that certain rivers are public highways. *Browne* v. *Scofield*, 8 Barb., 239. But our courts do not take judicial notice of foreign laws, which must be proved like other facts. *Thompson* v. *Ketcham*, 8 Johns., 189; *Francis* v. *Ocean Ins. Co.*, 6 Cow., 404, 429; *Lincoln* v. *Battelle*, 6 Wend., 475; *Dollfus* v. *Frosch*, 1 Denio, 367; *Monroe* v. *Douglass*, 1 Seld., 447. Nor do they take judicial notice of the laws of other states, if they differ from the common law. *Hosford* v. *Nichols*, 1 Paige, 220; *Holmes* v. *Broughton*, 10 Wend., 75. Nor of the regulations of the canal commissioners; *Palmer* v. *Aldridge*, 16 Barb., 131; nor of the by-laws of corporate bodies; *Harker* v. *Mayor*, *&c.*, 17 Wend., 199; nor of matters which happen to be known to the presiding judge. *Wheeler* v. *Webster*, 1 E. D. Smith, 1; *Wilkie* v. *Bolster*, 3 Id., 327. But the court may notice the ordinary duration of human life as a scientific fact. *Johnson* v. *Hudson River R. R.*, 6 Duer, 634. So courts will of themselves notice the meaning of English words, terms of art, legal weights and measures, money and the ordinary admeasurement of time.

SECTION III.

COMPETENCY OF WITNESSES.

The common law formerly excluded many persons from being witnesses who are now rendered competent by statute. The changes which have been made in this state, by statute, in relation to evidence, inclines to the side of extending the competency of witnesses leaving their credibility to the jury, or to the court in their place. The practical effect of which is to permit many witnesses to be sworn now who were formerly excluded, and then allowing a jury to pass upon their credibility and giving their evidence such weight as they may deem proper. But, it does not follow that a jury should give every witness equal credit, although the statute has rendered them equally competent to be sworn and testify. There is no part of a juror's duty which is more important than that in relation to the estimate which is to be placed upon the credibility of witnesses and the value which should be given to their evidence. The law does not permit any witness to testify unless it is under the obligation of an oath in

some form. And for this reason all persons who are incapable of comprehending the nature and obligation of an oath cannot be admitted as a witness. The defect may be permanent or it may be temporary, but while the incapacity exists the witness is incompetent.

Idiots, lunatics or intoxicated persons are not competent, if their condition is such that they do not comprehend the nature of an oath. *Livingston* v. *Kiersted*, 10 Johns., 362.

A justice ought not to permit a witness, who is in a state of gross intoxication, to be either sworn or examined; and in such a case, the justice is to decide the matter on his own view of the witness and his condition. *Hartford* v. *Palmer*, 16 Johns., 143. In the case just cited, the justice had refused to swear such a witness, and his decision was affirmed by the supreme court, who said, in relation to the capacity of such a witness: "This principle, necessarily, excludes persons from testifying, who are besotted with intoxication at the time they are offered as witnesses; for it is a temporary derangement of the mind; and it is impossible for such men to have a memory of events, of which they may have had knowledge, as to be able to present them, fairly and faithfully, to those who are to decide upon contested facts. A present and existing intoxication, to a considerable degree, utterly disqualifies the person so affected, to narrate facts and events in a way at all to be relied on. It would, we think, be profaning the sanctity of an oath, to tender it to a man who had no present sense of the obligations it imposed. Indeed, it would be a scandal to the administration of justice to allow, for a moment, the rights of individuals to be jeopardized by the testimony of any man laboring under the beastly sin of drunkenness. * * * * We cannot withhold our approbation of the firmness the magistrate has evinced on this occasion, in refusing to administer an oath to a witness thus circumstanced."

Deaf and dumb persons are sometimes said to be presumed incompetent, and that the burden of showing them competent devolves upon the person who offers them as witnesses. A deaf and dumb witness may be examined by means of signs made with the fingers, yet it is a better mode to let him write his answers, if he is capable of doing so. *Morrison* v. *Lennard*, 3 Carr. & Payne, 127. So, the witness may be examined by a sworn interpreter, if that course is advisable.

There is no precise age at which children are competent. Children of seven, eight or nine years of age are frequently sworn; and there is so wide a difference in the capacity of children, that many of them are more intelligent at nine years of age, than others are at ten or twelve. Children of fourteen are presumed to be comptent, and those who are younger than that will be sworn, if they are really competent. When a child is intelligent, the court will permit him to be sworn as a witness, leaving the value of his evidence to the jury. When a child under fourteen years of age is offered as a witness, the justice should examine

him, so as to ascertain whether he is competent, provided such a request is made by the opposite party. *People* v. *McNair*, 21 Wend., 608. If the child is naturally intelligent, but does not fully understand the nature of an oath, the justice may instruct him, by informing him of the moral obligations and of the legal consequences of false swearing. This may done at the trial, before swearing the witness.

"No person sentenced upon a conviction for felony, shall be competent to testify in any cause, matter or proceeding, civil or criminal, unless he be pardoned by the governor or by the legislature, except in the cases specially provided by law; but no sentence upon a conviction for any offense, other than a felony, shall disqualify or render any person incompetent to be sworn or to testify in any cause, matter or proceeding, civil or criminal." 3 R. S., 988, § 33, 5th ed. A conviction for petit larceny, as a first offense, does not render the witness incompetent under this statute, since petit larceny is not a felony. *Shay* v. *People*, 8 E. P. Smith, 317; *Carpenter* v. *Nixon*, 5 Hill, 260; *Lake* v. *People*, 1 Park., 495. Such a conviction may be used, however, to impeach his credit. *Ib.* A full pardon will restore the competency of the witness, unless the conviction was for perjury, in which case a pardon does not restore competency, nor can it be restored by any thing less than a reversal of the judgment. *Houghtaling* v. *Kelderhouse*, 1 Park., 241. A party who objects to the competency of a witness, on account of his conviction for a felony, must prove such conviction by a copy of the record, and it cannot be shown by parol evidence. *Hilts* v. *Colvin*, 14 Johns., 182; *People* v. *Herrick*, 13 Johns., 82.

Under the former law, few rules exercised a more extensive influence in excluding witnesses than an interest in the event of the suit. The old rule, however, no longer exists. "No person offered as a witness shall be excluded by reason of his interest in the event of the action." Code, § 398.

But the change in the law in relation to the *competency* of the witness, does not in any manner affect the principle as to his *credibility.* The change which was made by the legislature in this respect was founded upon the assumption that a jury or a justice sitting in their place, would prove entirely competent to carefully weigh the evidence of an interested witness, and then give it due credit and nothing more. An interested witness may be strictly honest, and may not swerve in the slightest degree from the truth, but the experience of the past has conclusively shown that there are many persons whose statements as a witness should be received with great caution if they are interested in the result of the action. This is evident from the fact that the old law excluded them altogether.

Husbands and wives are not permitted to be witnesses for or against each other. They are not excluded on the ground of interest, but from a principle of public policy. *Hasbrouck* v. *Vandervoort*, 5 Seld., 153; *S. C.*, 4 Sandf., 596; *Erwin* v. *Smaller*, 2

Sandf., 340; *Pillow* v. *Bushnell*, 5 Barb., 156. But the witness must be in fact the wife of the party or she is competent. A kept mistress is competent and may be called as a witness although she may have passed by his name, and appeared to the world as his wife. *Batthews* v. *Galindo*, 4 Bing., 610. When a wife would not be a competent witness if the husband were sued alone, merely making her a party to the action will not render her competent. *Macondray* v. *Wardle*, 26 Barb., 612; *Pillow* v. *Bushnell*, 5 Barb., 156. But when a husband and wife are properly joined as co-plaintiffs, or as co-defendants, each is competent as a witness in his own behalf, or for each other. *Marsh* v. *Potter*, 30 Barb., 506; *Shoemaker* v. *McKee*, 19 How., 86; *Schaffner* v. *Reuter*, 37 Barb., 44. When a husband or wife is incompetent as a witness, the declarations or admissions of either of them are inadmissible as evidence against the other. *Lay Grae* v. *Peterson*, 2 Sandf., 338.

An attorney or counselor is a competent witness in favor of the party in whose behalf he is acting. *Robinson* v. *Dauchy*, 3 Barb., 21; *Little* v. *McKeon*, 1 Sandf., 607. But in the case just cited the court used the following language as to the propriety of such a practice: "As to the effect of this practice upon the character of the bar, we think the evil will work its own cure. Attorneys, as well as counselors, of standing and character, will never, except in extreme cases, present themselves before a jury as witnesses in their own causes on litigated questions, and in such cases only because of some unforeseen necessity. Those gentlemen of the bar, who habitually suffer themselves to be used as witnesses for their clients soon become marked both by their associates and the courts, and forfeit in character more than will ever be compensated to them by success in such clients' controversies." *Ib.*, page 609.

A juror is always a competent witness for either party. Either of the parties to an action may call the opposite party as a witness. Code, § 390. So, in most cases either party may be a witness in his own favor. Code, § 399.

No person is rendered incompetent as a witness on account of his opinions on matters of religious belief. N. Y. State Const. of 1846, Art. 1, § 3. But notwithstanding the constitution makes all persons *competent* witnesses, whether they are believers in a Supreme Being, or are atheists or infidels, yet a party against whom a witness is called may interrogate him on his cross-examination as to his opinions on matters of religious belief, and may show by him, if he can, that he does not believe in the existence of a God who will punish false swearing. *Stanbro* v. *Hopkins*, 28 Barb., 265. And if he entertains such a belief the jury may take that fact into account in estimating the credit which should be given to the witness. *Ib.*

Objections to the competency of a witness ought to be taken before he is sworn in chief, especially if the ground of objection is known at that time. In such a case, if no objection is taken

before the examination of the witness, his evidence will be considered as admitted by consent.

There are several statutes which render persons competent witnesses in cases where they would be rejected by the common law. But most of these statutes related to cases in which the person was incompetent by reason of his interest in the event of the action. And the Code has rendered those special statutes useless, since no person can now be excluded on the ground of interest. There are some statutes, however, which are still important, because they change the common law rules of evidence in an important point of view. At common law no person could be compelled to give evidence against himself in either a civil or a criminal action. But, by several statutes, a witness may be compelled to testify as a witness in actions in which the recovery is in the nature of a penalty. Thus, where the defense of usury is interposed, the lender of the money may be compelled to testify as to the usury. 3 R. S., 74, § 11, 5th ed.; Laws 1837, ch., 430, § 2. As the law now stands there are few instances in which a witness is incompetent. But, the change in the law in that respect, does not in any manner interfere with those rules which relate to the *credibility* of witnesses. The mere fact that the field of competency has been so greatly extended ought to excite a proper caution on the part of jurors in relation to the credit of persons thus rendered competent to be sworn. And in most cases the jury will be likely to form a correct estimate of the characters, motives and reliability of the persons who are called as witnesses.

SECTION IV.

ADMISSIONS.

In all litigations the law regards the deliberate admissions of a party to the action. The value and the importance of an admission, however, is much influenced by the circumstances under which it was made.

Where the parties mutually agree upon a statement of facts and submit the legal questions arising thereon to the court for adjudication, the admissions will be conclusive for that purpose. So, facts admitted by the pleadings are to be taken as true. A fact thus admitted need not be proved. *Walrod* v. *Bennett*, 6 Barb., 145; and no evidence is admissible to contradict an admission thus made upon the record. *Crosbie* v. *Leary*, 6 Bosw., 313; *Walrod* v. *Bennett*, 6 Barb., 145; *Bridge* v. *Payson*, 5 Sandf., 210. So strictly is this rule enforced, that a verdict and judgment contrary to an admission in the pleadings will be reversed. *Ib.* An illustration or two will be sufficient to show when a fact is conclusively admitted by the pleadings. Suppose an action to be brought upon a promissory note, which is set out in the complaint, with the necessary allegations, showing a right of action against the defendant, and that the only defense interposed is payment, or a set-off. In such a case the making of the note for value is conclusively admitted. It need not be proved, and no evidence

in contradiction of such facts is admissible. Again, suppose that a demurrer is interposed to a complaint or an answer, upon the ground that the facts stated do not state a cause of action or a ground of defense. In such a case the demurrer admits the truth of all the material allegations, which are well pleaded. An admission made in the pleadings need not be an express one. Where no denial is interposed, but an affirmative defense is set up, the truth of the facts alleged in the complaint will be admitted. So, where a denial is partial, the facts not denied will stand admitted.

There is an other class of admissions which it is important to notice. If all the facts in the case are put in issue by the pleadings, the law will require each party to establish his side of the case by sufficient proofs. This, however, is not always done by calling witnesses. It sometimes happens that each party is willing to concede or admit the truth of many of the facts of the case, for the purpose of expediting the trial, or for some other object. If these facts are voluntarily and deliberately stated and admitted in open court, for the purposes of the trial, they are not only competent, but conclusive evidence of the truth of the facts so admitted. The same rule applies where a single fact is admitted by either party.

It is a general rule, that the admissions of a party to the action are evidence against him. The exceptions to the rule will be hereafter noticed. The statements which a party has made under oath as a witness are competent evidence against him as an admission. *Tooker* v. *Gormer*, 2 Hilt., 71; *Pickard* v. *Collins*, 23 Barb., 444. Such evidence may be given, for the purpose of showing that the party swore on a former trial to statements which he contradicts on a subsequent trial. *Pickard* v. *Collins*, 23 Barb., 444. And the evidence given on the former trial may be proved by any person who heard it. *Ib.* Though the party himself cannot be compelled to state what he swore on the former trial, since it might aid in a prosecution against him for perjury. *Ib.* What a person has voluntarily sworn to as a witness is evidence against him, even though the questions answered were improper, and he might have refused to answer them. *Smith* v. *Beadnell*, 1 Camp. N. P., 30. But if a party declines to answer such a question, and he is compelled to answer it by the court, the answer so given cannot be subsequently given in evidence against him in an other action as an admission. *Regina* v. *Garbett*, 2 Car. & Kir. N. P., 474.

There are some cases in which a party is bound by the statements of a third person. Where a party is applied to for information in relation to an uncertain or a disputed matter, and he refers the applicant to a third person, the answers of such third person will be competent evidence against the party making such reference. *Williams* v. *Innes*, 1 Camp. N. P., 364, 366, note; *Hood* v. *Reeves*, 3 Carr. & Payne, 532. But such declarations are not evidence unless they are strictly within the subject matter in

relation to which the reference is made. *Duval* v. *Covenhoven*, 4 Wend., 561.

The admissions of a wife are not evidence against her husband merely by reason of the marriage relation. But she may act as his agent, and her admissions will then be admissible in the same manner as the admissions of any other agent. Whether she is authorized to act as his agent, and what the extent of the agency may be, are questions of fact to be settled by evidence. An express agency is not frequently created, but is established from the circumstances attending the transaction.

Where a husband permits his wife to act as his agent in any particular business, he adopts her acts and admissions in reference to such business, and he is bound by them. *Riley* v. *Suydam*, 4 Barb., 222. *Hopkins* v. *Mollinieux*, 4 Wend., 465.

The wife of a toll-gatherer for a plank road will be deemed his agent in his absence; and if she takes too much toll, he will be liable to the penalty imposed by statute. *Marselis* v. *Seaman*, 21 Barb., 319. If a wife executes a mortgage upon the personal property of her husband, and in his presence, if he makes no objection, he will be as effectually bound by her acts as though done by himself. *Edgerton* v. *Thomas*, 5 Seld., 40.

If a wife acts as agent for her husband in managing his farm, renting lands, purchasing tools, stock, &c., and she purchases such property and gives her own note, it will be a question of fact for a jury whether the husband is not liable as principal. *Gates* v. *Brower*, 5 Seld., 205; and see *Plimmer* v. *Sells*, 3 Nev. & Man., 422.

Where goods were sold to a wife who then resided at some distance from her husband, who occasionally visited her, he was held to be bound by a letter of hers promising payment, so as to take the case out of the statute of limitations. *Gregory* v. *Parker*, 1 Camp. N. P., 394; *Palethorp* v. *Furnish*, 2 Esp. N. P., 511, note.

So, where a wife served in her husband's shop, and carried on the business of it in his absence, her admissions, which were made on an application for payment for goods before delivered at the shop, were held receivable in evidence against her husband. *Clifford* v. *Burton*, 1 Bing., 199; *Petty* v. *Anderson*, 3 Bing., 170; and see *Cotes* v. *Davis*, 1 Camp. N. P., 485.

The plaintiff's wife loaned money to the defendant, and in an action by the husband to recover the amount, the wife's admissions to third persons that the money had been repaid, was held competent evidence. *McLean* v. *Jagger*, 13 How., 494, Orange Co. Court, DURYEA, J.

A wife loaned money for her husband upon an agreement which was alleged to be usurious, because, by the terms of the loan, a cow was to be taken by the borrower at a price above its real value. To prove the value of the cow, and that it was less than thirty dollars, the declarations of the wife were offered, although they were not made until some time after the loan was

effected; these declarations were held inadmissible. *Ripley* v. *Mason*, Hill & Denio, 66.

In an action against a husband for damages because his dog had bitten a child, the declarations of the defendant's wife, as to the manner in which the injury occurred, and as to the character of the dog, are not admissible evidence against the husband. *Logue* v. *Link*, 4 E. D. Smith, 63.

An admission made by an attorney or counselor on a trial, is evidence against the party represented by him, if it is done for the purpose of obviating the necessity of proving some fact on the trial, or for convenience as to some matter of practice. *Chambers* v. *Mason*, 5 J. Scott N. S., 59; *Haller* v. *Worman*, 9 J. Scott N. S., 892. But, if the client is not present at the trial, the admission cannot be used in any other action than the one in which it was made. And see *Colledge* v. *Horn*, 3 Bing., 119.

The declarations, representations or admissions of an agent, which are made while acting within the scope of his authority, and in the discharge of his duties as agent, are admissible as evidence against his principal. *Hunter* v. *Hudson River Iron & Machine Co.*, 20 Barb., 494; *Kasson* v. *Mills*, 8 How., 377; *Milburn* v. *Belloni*, 34 Barb., 607; *Nelson* v. *Cowing*, 6 Hill, 336. Such admissions or declarations of an agent are received in evidence against the principal, not as admissions or declarations merely, but as a part of the transaction. *Thallhimer* v. *Brinckerhoff*, 4 Wend., 394.

All declarations or admissions which are not made within the scope of the agent's authority, nor while in the transaction of the business of the agency, are inadmissible; and this is especially true, when the admission is made after the termination of the agency, or after the transaction by the agent is closed. *Fogg* v. *Child*, 13 Barb., 246; *Isles* v. *Tucker*, 5 Duer, 393; *Budlong* v. *Van Nostrand*, 24 Barb., 25; *Webb* v. *Alexander*, 7 Wend., 281. Before the declarations of an agent are admissible, his agency must be established, and this cannot be proved by general reputation. *Perkins* v. *Stebbins*, 29 Barb., 523.

A deputy sheriff is regarded as the agent of the sheriff. His declarations, made within the scope of his authority, and while the process is in his hands and in the due course of execution, bind his principal, because the admissions are then a part of the *res gestæ*. *Stewart* v. *Wells*, 6 Barb., 79; *Mott* v. *Kip*, 10 Johns., 478. But the statements of a deputy which are not made in the performance of an official act, are not admissible evidence against the sheriff. *Barker* v. *Binninger*, 4 Kern., 271.

In an action against a ship owner as a carrier, for an injury to goods which happened while on board his vessel and in course of transportation, the declarations of the master of the vessel as to the cause and manner of the injury, are admissible evidence against the carrier, if such declarations were made before the master had discharged his duty by delivering the goods according to the bill of lading. *Price* v. *Powell*, 3 Comst., 322.

Though the admissions of a party to the record are generally receivable in evidence against the person who made them, yet, where there are several parties on the same side, the admissions of one party are not admitted to affect the others, who may happen to be joined with him, unless there is some joint interest or privity in design between them.

The declarations of one of several persons who were joint and several makers of a promissory note have been admitted against all the parties, for the purpose of repelling the defense of usury, when such declarations were made after the making of the note. *Barrick* v. *Austin*, 21 Barb., 241. But one of several joint and several makers of a note cannot bind the others by making payments upon it before an action is barred by the statute of limitations. *Shoemaker* v. *Benedict*, 1 Kern., 176; *Barger* v. *Durvin*, 22 Barb., 68. The rule is the same where the payment or new promise is made after the statute has attached. *Van Keuren* v. *Parmelee*, 2 Comst., 523. The admissions of one of several joint debtors is clearly evidence as against the party who makes them. As a general rule, the admission of one defendant will not affect another co-defendant, if the action is for a tort. *De Benedetti* v. *Mauchin*, 1 Hilt., 213; *Stoddard* v. *Holmes*, 1 Cow., 245. But such declaration is competent evidence against the person who made it. *Ib.*

Partners have a joint interest, and there are many cases in which an admission by one partner is evidence against all the members of the firm. But, before an admission can be received in evidence in such a case, the existence of the partnership must be established. The admissions or declarations of a person may be given in evidence against him, to show that he is a partner in a firm. But the declarations of one person that an other person is a partner, are not legal evidence as to the latter; they are evidence against those only who make them. *Kirby* v. *Hewitt*, 26 Barb., 607; *Davidson* v. *Hutchins*, 1 Hilt., 123; *McPherson* v. *Rathbone*, 7 Wend., 216; *Whitney* v. *Ferris*, 10 Johns., 66. When a partnership is established, the acts and admissions of either of the partners as to the partnership business is evidence against all, if such admission is made during the existence of the partnership. *Walden* v. *Sherburne*, 15 Johns., 409.

But, after a dissolution of the partnership, neither partner can make an admission which is binding upon his former partner. *Baker* v. *Stackpoole*, 9 Cow., 420; *Bank of Vergennes* v. *Cameron*, 7 Barb., 144. In such a case, one partner cannot give a note, in the name of the firm, for a partnership debt, which will be binding on the other partners. *Mitchell* v. *Ostrom*, 2 Hill, 520; *Lusk* v. *Smith*, 8 Barb., 570. Nor can one partner, in such a case, give a note in renewal of one made by the firm during its existence. *National Bank* v. *Norton*, 1 Hill, 572. Though one partner cannot bind his copartner by a note, after the dissolution of the partnership, yet he may liquidate a previous account. By doing so, he does not create a debt; that was previously in existence.

McPherson v. *Rathbone,* 11 Wend., 96, 99; *Murray* v. *Mumford,* 6 Cow., 441.

It is a general rule, founded upon principles of justice, in regard to the relation of principal and surety, that the surety ought not to be affected by an admission made by his principal; although he may be affected by declarations or statements made by the principal, when they are connected with the business in respect of which the surety becomes bound, and are made by the principal at the time of transacting that business. *Dunn* v. *Slee,* Holt, 399, 401. Thus, where a person had become surety, by a bond, for the faithful conduct of a clerk, it was held, in an action upon the bond, that an admission by the clerk, made after he was discharged, of various sums which he had embezzled, was not receivable in evidence against the surety. *Smith* v. *Whittingham,* 6 Carr. & Payne, 78. So, in an action upon a guaranty to pay for goods sold and delivered to a third person, what such third person has admitted respecting the delivery of the goods is not evidence to charge the person giving the guaranty. *Evans* v. *Beattie,* 5 Esp. N. P., 26.

Entries made by a deceased person, in the course of duty, or by which he has charged himself with the receipt of money, being admissible as against all the world, are, of course, evidence against a person who has become his surety that he would keep his accounts faithfully. *Goss* v. *Watlington,* 3 Brod. & Bing., 132; *Whitnash* v. *George,* 8 Barn. & Cress., 556; *Middleton* v. *Melton,* 10 Barn. & Cress., 317. But, where one is a mere surety for the payment of a debt, without any agreement, express or implied, to be bound by a suit between the principal parties, he is, at common law, no more affected by its event, if against him, than a mere stranger. *Thomas* v. *Hubbell,* 1 E. P. Smith, 405; *Jackson* v. *Griswold,* 4 Hill, 522.

It has been held, in some cases, that where a surety confides to the principal the power of making a contract, he confides to him the power of furnishing evidence of the contract; and that, if the contract is by parol, subsequent declarations of the principal are admissible in evidence against the surety, though they are not conclusive. And, where a husband and wife agreed, by articles, to live separate, and C., as trustee and surety for the wife, covenanted to pay the husband a sum of money, upon his delivering to the wife a carriage and horses for her separate use, it was held, in an action by the husband for the money, that the wife's admissions of the receipt by her of the carriage and horses, were admissible. *Fenner* v. *Lewis,* 10 Johns., 38. So, where A. guaranteed the performance of any contract that B. might make with C., the declarations and admissions of B. were held admissible against A., to prove the contract. *Meade* v. *McDowell,* 5 Binn., 195.

The admissions or declarations of persons who formerly owned personal property or choses in action, are frequently offered in evidence. Where personal property has been sold, the admissions

or declarations of the former owner are not admissible against his vendee, as to the title to the property sold. *Worrall* v. *Parmelee*, 1 Comst., 519. And the rule is the same, although such declarations were made before the sale of the property. *Hurd* v. *West*, 7 Cow., 752; *Whitaker* v. *Brown*, 8 Wend., 490.

The declarations made by the payee of a negotiable promissory note, while he owns and holds it, are not admissible in evidence against one to whom it is subsequently transferred for value, even though the transfer is made after maturity. *Paige* v. *Cagwin*, 7 Hill, 361; *Whitaker* v. *Brown*, 8 Wend., 490. The rule is the same, although the payee is dead at the time his declarations are offered in evidence. *Beach* v. *Wise*, 1 Hill, 612.

So the declarations which are made by the owner of a chose in action are not admissible to affect the rights of one who derives title from him. *Stark* v. *Boswell*, 6 Hill, 405.

So, in an action by the indorsee against the maker of a note, which was alleged to have been sold under a usurious contract, the declarations of the payee who transferred the note, are not admissible in evidence to show the usurious transfer, notwithstanding the payee was dead at the time of offering such evidence. *Kent* v. *Walton*, 7 Wend., 256.

A note belonged to a bank until the time of its failure, and after that time it was transferred to the plaintiff, but in what manner and for what consideration did not appear at the trial. An action was brought against the maker and the indorser by such plaintiff, and the defendants offered to show, by entries in the bank book, that the note was paid, and this was held to be admissible in evidence as against such plaintiff. *Jermain* v. *Denniston*, 2 Seld., 276.

The declarations of an intestate, in relation to the title to personal property, are evidence against his administrator; but they are not competent evidence against other parties who claim title under the deceased. *Brown* v. *Mailler*, 2 Kern., 118; *Woodruff* v. *Cook*, 25 Barb., 505. An assignee of a chose in action, for value paid therefor, cannot be affected in his title by the declarations or admissions of his assignor. *Tousley* v. *Barry*, 2 E. P. Smith, 497; *Smith* v. *Schanck*, 18 Barb., 344.

If the transfer is merely colorable, and the plaintiff is shown not to have paid value for it, the declarations of the assignors are admissible in evidence against the person so holding. *Brisbane* v. *Pratt*, 4 Denio, 63; *James* v. *Chalmers*, 2 Seld., 209, 215.

The declarations of an assignor, who has made an assignment for the benefit of his creditors, are not admissible for the purpose of impeaching the assignment for fraud, when the declarations are made at a time subsequent to the execution of the assignment. *Ogden* v. *Peters*, 15 Barb., 560; *Hanna* v. *Curtis*, 1 Barb. Ch., 263. Nor when previously made. *Jones* v. *Methodist Church*, 21 Barb., 161; *Cuyler* v. *McCartney*, 33 Barb., 165; *Booth* v. *Sweezey*, 4 Seld., 276, 278. But if the assignor remains in possession of the assigned property, his declarations as to the object of making

the assignment, while so in possession, are receivable in evidence as against the assignor and his creditors who claim under the assignment. *Adams* v. *Davidson*, 6 Seld., 309.

An offer made by a party, whether verbal or in writing, and expressly stated to be made without prejudice, to pay money by way of compromise, and with a view to buy peace, is not evidence of a debt or of a legal liability, by way of admission. *Cory* v. *Bretton*, 4 Carr. & Payne, 462; *Healey* v. *Thatcher*, 8 Carr. & Payne, 388. So where what is said is spoken with a view of effecting a compromise and for no other purpose, it will not be admissible as evidence, though there is no express declaration that what is said is to be without prejudice; if that was the intention of the party, it is sufficient. *Jardine* v. *Sheridan*, 2 Car. & Kir. N. P., 24. The ground of rejecting such evidence is, that confidential overtures ought to be protected; and that the law favors settlements and compromises instead of litigation. An offer of compromise is a mere proposition to give or accept something for the purpose of an amicable adjustment of the difficulties in question, and so long as the offer is unaccepted, it is but a mere proposition, and the law excludes all such propositions as evidence.

A common case is where a plaintiff claims a certain sum, as, for instance, $100, and the defendant offers to pay $25, for the purpose of settling the claim; this offer neither admits nor ascertains the debt, but is a mere proposition to give a certain sum to be rid of the trouble and expense of an action, and, therefore, the offer is not evidence.

It is never the intention of the law to shut out the truth, but to repel any inference which may arise from a proposition made, not with a design to admit the existence of a fact, but merely to buy one's peace. If an admission, however, is made *because it is a fact*, the evidence to prove it is competent, whatever motive may have prompted to the declaration.

The illustration already given shows this sufficiently. But if the party admits a particular item in an account, or any other fact, meaning to make the admission as being true, this is good evidence, although the object of the conversation was to compromise an existing controversy. *Hartford Bridge Co.* v. *Granger*, 4 Conn., 142; *Marvin* v. *Richmond*, 3 Denio, 58; *Murray* v. *Coster*, 4 Cow., 635, opinion; *Waldridge* v. *Kennison*, 1 Esp. N. P., 143; *Turner* v. *Railton*, 2 Esp. N. P., 474.

Where a letter has been written "without prejudice," the answer to it, though not guarded in the same manner, will not be admitted. *Paddock* v. *Forrester*, 3 Scott N. R., 734. So if a letter is written "without prejudice," no part of it can be given in evidence. *Healey* v. *Thatcher*, 8 Carr. & Payne, 388. An admission must be voluntary to be admissible, and where an answer was given by a person as a witness under an order or decision of the court requiring him to answer a question, although objected to by the witness, his answer so given was held to be inadmissible

as evidence against him of an admission. *Regina* v. *Garbett*, 2 Car. & Kir. N. P., 474.

Admissions are sometimes implied from the assumed language, character or conduct of a party. In such cases the existence and truth of the fact to be proved is sometimes assumed in the expressions which are given in evidence. The expressions in such cases are received as an admission of the fact, though they were used for some other purpose, and though the admission is only implied; and, as an admission, they are allowed to supersede the necessity of producing more explicit evidence. An agent is employed to sell goods, and pays over the proceeds to his employer, and a demand is made by the latter for the money arising upon the sale of certain property, a declaration by the agent, in answer to such demand, that he had paid over all the money, is an implied admission of the sale and dispenses with proof of that fact.

So, when a demand is made for property, if there is a refusal which is put upon a specific ground, it is an implied admission that such ground is the true one. *Tuttle* v. *Gladding*, 2 E. D. Smith, 157; *Winter* v. *Coit*, 3 Seld., 288; *Livingston* v. *Stoessel*, 3 Bosw., 19; *Dunlap* v. *Hunting*, 2 Denio, 643; *Weeks* v. *Goode*, 6 J. Scott, N. S., 367. And such admission is so far conclusive that the party must maintain the claim then made or fail in his defense, if sued for the refusal to make the delivery claimed. *Ib.* The entry of a charge to a particular person in a book of account, or the making out of a bill of parcels in his name is an admission that they were furnished on his credit. *Storr* v. *Scott*, 6 Carr. & Payne, 241.

In some cases, it is allowable to give evidence by written or verbal statements made, or of acts done by others, and then to show how the party who heard or read the statements or saw the acts done, was affected by them, for the purpose of using his conduct, expressions or demeanor as evidence against him, by way of admission. The evidence in such cases is altogether presumptive in its quality and character.

There are many instances in which it is a person's duty to speak out upon a subject if he desires to preserve his rights.

If a person offers to sell the personal property of A., in his presence and hearing, the latter is bound to disclose his ownership, or the purchaser will get a good title. So, where an account is made out and presented to an individual, it is his duty to dispute or deny it, if false, or to point out the inaccuracies, if any exist. As a general rule, where an account, showing a balance, is duly rendered, the person to whom it is rendered is bound, within a reasonable time, to examine it, and object, if he disputes its accuracy. An omission to do so, will be an implied admission of its correctness. *Lockwood* v. *Thorne*, 1 Kern., 170, reversing same case in 12 Barb., 487; *Beers* v. *Reynolds*, 12 Barb., 288; *S. C.*, 1 Kern., 97. The omission to object, does not render the admission conclusive; it merely raises a presumption that it is correct, which may be rebutted by evidence, showing any circum-

stances that tend to a contrary inference. *Lockwood* v. *Thorne*, 4 E. P. Smith, 285, reversing same case in 24 Barb., 391; and see *Williams* v. *Glenny*, 2 E. P. Smith, 389; and see Vol. I, 719.

Admissions may also be implied from the acquiescence of the party. But acquiescence, to have the effect of an admission, must exhibit some act of the mind, and amount to voluntary demeanor or conduct of the party. And, whether it is acquiescence in the conduct or in the language of others, it must plainly appear that such conduct was fully known, or the language fully understood by the party, before any inference can be drawn from his passiveness or silence. The circumstances, too, must be not only such as afforded him an opportunity to act or to speak, but such also as would properly and naturally call for some action or reply, from men similarly situated. A party is not to be affected by statements made in his presence, under circumstances which do not properly allow a reply. In legal investigations, there is a regularity of proceeding which does not permit a party to interpose a denial how and when he pleases, as he would in a common conversation. And, in such cases, the same inferences are not to be drawn from his silence or his conduct, as would otherwise be done. *Melen* v. *Andrews*, 1 Mood. & Malk., 336; *Rex* v. *Appleby*, 3 Stark., 33. But, if the party does answer or make a reply, that may be given in evidence as an admission. *Jones* v. *Morrell*, 1 Car. & Kir., 266. So, a statement which is made in the plaintiff's hearing, although not in his presence, is admissible in evidence, if it is otherwise receivable. *Neile* v. *Jakle*, 2 Car. & Kir., 709. A defendant who puts in evidence a correspondence, consisting of several letters between himself and the plaintiff, has a right to give in evidence a letter written by him to the plaintiff, in reply to the plaintiff's last letter, which bore date on the day before the defendant's letter. *Roe* v. *Day*, 7 Carr. & Payne, 705. Great care should be exercised in receiving and acting upon admissions which are implied from a supposed acquiescence in the statements of other persons; and they ought never to be received at all, unless the evidence is of direct declarations of that kind which naturally call for contradiction; some assertion made to the party with respect to his right, which, by his silence, he acquiesces in.

A distinction is made between declarations made by a party and those made by a stranger. An omission to reply to the latter is not an implied admission of the truth of the statement, since the refusal to reply may be on account of the impertinence of the person who made it, and who is best rebuked by silence. *Child* v. *Grace*, 2 Carr. & Payne, 193. If a reply is made, that may be given in evidence. *Ib.* A statement made in the presence of a party to the action, becomes evidence, as showing that the party, on hearing such a statement, did not deny its truth. But such an acquiescence is worth very little, indeed, where the party hearing it has no means of personally knowing the truth or falsehood of the statement. *Hayslep* v. *Gymer*, 1 Ad. & E., 162, 165.

The declarations of a defendant are not evidence in his own favor, unless the plaintiff, by giving in evidence a part of his statements, or facts raising some presumption from his apparent silence, has made the declarations admissible as a part of the conversation, or as a reply to the circumstances out of which such presumption arises. *Crosbie* v. *Leary*, 6 Bosw., 313.

With respect to verbal admissions, it may be observed that they ought to be received and acted upon as evidence with great caution. It may be a correct principle, that the statement of a person to the prejudice of his own interest, is so far entitled to consideration as to be admissible in evidence against him. Still, the repetition of oral statements is always subject to great imperfections. The party from whom they proceed may have been misinformed, or may not have correctly expressed his meaning, or he may have spoken lightly and without consideration; even his meaning, if correctly expressed, may have been misunderstood, or a slight alteration of the words, without any design of intentional misrepresentation, may entirely vary the effect of his statement; and, where a witness is corrupt, a slight change in the language may make a material difference between the admission really made, and that stated by the witness. *Law* v. *Merrills*, 6 Wend., 277; 1 Phil. Ev., 479, 4th Am. ed.; *Garrison* v. *Akin*, 2 Barb., 25, 27. *Post*, 531, 532.

It is an elementary principle, that the admissions and confessions of parties are admissible in evidence when pertinent to the issue to be tried. They are not by any means conclusive, and not necessarily even *prima facie* evidence of the facts to which they relate. They may be controlled and overborne by evidence of a higher character and more commanding weight; but when they relate to a matter material to the issue, they should be received, and the effect to be given to them is wholly with the jury. If it appears from the declarations themselves, or from evidence *aliunde*, that the party had no personal knowledge of the facts as to which the admission is made, then but little importance is to be attached to them. *Stephens* v. *Vroman*, 18 Barb., 250, 257.

There is no limitation upon the right of a party to introduce evidence to contradict the truth of his own admissions, where such admissions were retrospective, and not operating by way of an estoppel. *Carland* v. *Day*, 4 E. D. Smith, 251; *Ellis* v. *Willard*, 5 Seld., 529; *Young* v. *Bushnell*, 8 Bosw., 1.

Where an admission is voluntarily and deliberately made, and it is satisfactorily proved, it may be strong evidence against the party making it.

On the subject of admissions, it may be laid down as a first principle, that the whole of the statement containing the admission is to be received together. This is necessary, in order to enable the court and jury to judge of the true extent of the admission, which, when taken entire, will often have a different import from that which a partial account might convey. *Thompson* v. *Austen*, 2 Dowl. & Ryl., 358.

Where, taking the admission together, the branch making against the party is completely avoided, qualified or explained away by an other branch, and there is nothing beside, either intrinsic or extrinsic, in the latter branch to render it questionable, the first is neutralized; and the whole admission is considered as not weighing any thing against the party. In such cases, if there is no other evidence in the case, the plaintiff is not entitled to recover, and if he does the judgment will be reversed, as in a ease in which the plaintiff said: "I have bought the goods, but I have paid for them." *Smith* v. *Jones*, 15 Johns., 229. So where the defendant said: "I have received a dollar from the plaintiff, but it was my due." *Carver* v. *Tracy*, 3 Johns., 427. So where the defendant admitted that the plaintiff had attended her as a physician, but she also alleged that she had not employed him, and that she was under the age of twenty-one years." *Wailing* v. *Toll*, 9 Johns., 141. And so of a case in which the defendant admitted that he shot the plaintiff's dog, but alleged that it was done because he attacked him in the highway in the nighttime." *Credit* v. *Brown*, 10 Johns., 365. So of an admission that goods were purchased, but alleging that they were purchased on time which had not expired at the time of bringing the action. *Perego* v. *Purdy*, 1 Hilt., 269. So where a party admitted that he had given a note for a stove, but he alleged that the stove was warranted, and that the warranty was broken because the stove was not good, but had broken. *Kelsey* v. *Bush*, 2 Hill, 440.

In the cases just cited, the plaintiffs relied on the admissions of the defendant to make a case; but the entire admission was held insufficient to authorize a recovery, and the judgments were all reversed. If, however, there are any other facts in the case which destroy the effect of that part of the admission which discharges the party, there may be a recovery.

If that part of the admission discharging the party is improbable, or it is discredited by the other evidence in the case, the jury may disregard the excuse, and the plaintiff may recover. *Barnes* v. *Allen*, 30 Barb., 663; *Bearss* v. *Copley*, 6 Seld., 93; and see *Nesbit* v. *Stringer*, 2 Duer, 26; *Dorlon* v. *Douglass*, 6 Barb., 451.

When one party to an action calls the opposite party as a witness, and proves facts by him which favor the party calling him, the witness may also give evidence which goes to discharge the liability so created; but the jury are at liberty to judge of the value which is to be placed upon the matter in excuse. *Roberts* v. *Gee*, 15 Barb., 449.

The rule which requires that the whole of an admission may be given in evidence, is not an unlimited one, as to the facts which may then be called for. If an admission is called for and proved against a party, he is entitled to ask for all that was said at the same time, or on the same occasion, in relation to the admission called for, or the same subject of inquiry. But the rule is not extended so far as to permit a party to call for all that was

said in the same conversation, if a part of it related to an other and a distinct matter from that inquired about by the party calling for such admission. *Garey* v. *Nicholson*, 24 Wend., 350; *Dorlon* v. *Douglass*, 6 Barb., 451; *Rouse* v. *Whited*, 25 Barb., 279; *Rouse* v. *Whited*, 11 E. P. Smith, 170; *Prince* v. *Samo*, 7 Ad. & Ell., 627.

The object of permitting the entire admission to be given, is to enable the party against whom a part of it is given to have the whole of it shown so as to explain, qualify or discharge any liability which would appear to exist from a partial statement of the matter. If the other parts of the conversation relate to a different and distinct subject matter, it would not serve the purpose of an explanation, qualification or discharge, and the reason of the rule which allows the whole admission ceases, so far as it relates to the matter foreign to the admission called for.

Where the liability of a defendant is sought to be proved by his verbal declarations or admissions to a witness, in several different interviews, all the conversations between him and the witness, bearing upon the subject of inquiry, must be submitted to the consideration of the jury. *Nesbit* v. *Stringer*, 2 Duer, 26. So, in an action against the defendant for the recovery of the rent of premises occupied by a third person, where evidence has been given of a conversation, on a specified day, between the landlord and the defendant, tending to establish a hiring of the premises by the defendant, and an agreement that such third person might occupy them, and that the defendant would pay the rent, it will be error to exclude evidence of other cotemporaneous conversations between the landlord and the defendant, upon the same subject. *Halsey* v. *Jarvis*, 7 Bosw., 461. Such evidence cannot properly be excluded merely because the conversations and verbal agreement offered to be proved, were not had and made on the precise day on which it is stated that the conversation already stated was had. *Ib.* So, if part of a pleading is read as an admission, the whole pleading must be taken together, the same as any other admission. *Gildersleeve* v. *Mahony*, 5 Duer, 383. Where the plaintiff proves a demand of the defendant and his refusal to pay over money in his hands, the defendant has a right to show by the same witness what reasons were assigned for the refusal. *Bennett* v. *Burch*, 1 Denio, 141. In such a case the reasons for the refusal are an essential part of the admission. But the rule is otherwise when a long series of facts is sought to be made evidence in this manner, on the ground that they are an answer to the demand. *Walrod* v. *Ball*, 9 Barb., 271. If any part of the reasons are admissible, the offer to prove them should be limited to such of them as are admissible. *Ib.*

A party cannot give his own declarations in evidence, in his own favor, by calling for the entire conversation which occurred at a given time, merely because the other side has inquired as to a part of the conversation; the examination must be confined to the matters inquired about by the other side, and not extended

to different statements, though made at the same time, and in the same conversation. *Lynch* v. *McBeth*, 7 How., 113.

An admission must be so specific and clear as to leave no room for doubt as to the identity of the matter referred to. And where the evidence to prove the making of a promissory note, purporting to be signed by the defendant, and payable to the bearer, was that the plaintiff's agent called on the defendant with the alleged note in his pocket, but which he did not exhibit, and told him he had a note for that amount against him, which he wanted the payment of for the plaintiff; and the defendant said he had given such a note, and would pay it if the plaintiff would make a small deduction, and indulge him as to time, it was held that the note produced on the trial was not identified with that to which the admission referred, and that the proof was insufficient. *Palmer* v. *Manning*, 4 Denio, 131; *Shaver* v. *Ehle*, 16 Johns., 201. In an other case of an action by the indorsee against the maker of a promissory note, the plaintiff proved that the indorsement of the payee was genuine, and that a copy of the note had been shown to the defendant, who admitted that he had signed such a note, and this was held sufficient proof of the identity of the note and of the maker's signature. *Pentz* v. *Winterbottom*, 5 Denio, 51.

A party to a cause, who is proved to have made admissions, may defeat their effect, by showing that they were made under a mistake of law, provided the other party has not been induced to change his condition in consequence. *Newton* v. *Liddiard*, 12 Ad. & Ell. N. S., 925; *Newton* v. *Belcher*, Id., 921; *Heane* v. *Rogers*, 9 Barn. & Cress., 377.

The subject of admissions at the trial has been already noticed. *Ante*, 372. There is an other class of judicial admissions which arise from the acts of the party. Payment of money into court by the defendant operates as an admission for several purposes. It admits that the amount paid into court is due to the plaintiff, *Logue* v. *Gillick*, 1 E. D. Smith, 398; *Seaton* v. *Benedict*, 5 Bing., 28; that it is for the cause of action stated in the complaint, *Bennett* v. *Francis*, 2 Bos. & Pul., 550; that the plaintiff is entitled to claim it in the character in which he sues, *Lipscombe* v. *Holmes*, 2 Camp., 441; that the contract set forth is correctly described, and was duly executed, *Gutteridge* v. *Smith*, 2 H. Bla., 374; *Randall* v. *Lynch*, 2 Camp., 352, 357; that the instrument sued on was properly stamped, *Israel* v. *Benjamin*, 3 Camp., 40; that the contract has been broken in the manner and to the extent alleged in the complaint, *Dyer* v. *Ashton*, 1 Barn. & Cress., 3; and where goods are sold by sample, it admits that the goods delivered agreed with the sample. *Leggett* v. *Cooper*, 2 Stark., 103.

The general rule is, that the payment of money into court admits every fact which it would be necessary for the plaintiff to prove, to entitle him to recover the amount so paid in. *Dyer* v. *Ashton*, 1 Barn. & Cress., 3. But it does not admit any thing beyond that.

In all actions for a tort, whether in trespass, trover, replevin,

or in other actions, it is a general rule that the admissions of one defendant are not admissible against his co-defendant, even when the wrongful act was committed by them jointly. *De Benedetti* v. *Mauchin*, 1 Hilt., 213; *Daniels* v. *Potter*, 4 Carr. & Payne, 262; *S. C.*, 1 Mood. & Malk., 502. The only exception to the rule is, where it is shown that there was a conspiracy or a concerted plan to commit the wrongful act, and where that is shown by evidence independent of the admissions of one defendant against his co-defendant, the declarations of either defendant, which are made with reference to the common plan, and in pursuance of it, are admissible as evidence against all. *Ib.; People* v. *Parish*, 4 Denio, 153; *Lee* v. *Bennett*, How. App. Cases, 187. But such admissions are evidence against the party making them, and may be admitted in evidence against him, although he may be sued jointly with other defendants. *De Benedetti* v. *Mauchin*, 1 Hilt., 213. But, even when a common plan or a conspiracy is shown to have been made by several defendants, the admissions of one defendant will not be evidence against the others, if made after the completion of the act, or in reference to a matter which is not a part of the common plan. *Lynes* v. *State* (7 George) or 36 Miss., 617; *State* v. *Ross* (8 Jones), 29 Mis., 32; *Clinton* v. *Estes*, 20 Ark., 216; *State* v. *Thibeau* (1 Shaw), 30 Vt., 100. They must be part of the *res gestæ*, to render them admissible against all of the defendants. *Ib.; Patton* v. *Ohio*, 6 Ohio, N. S., 467, 471.

There are many cases in which declarations, when standing alone, are inadmissible as evidence, though they become admissible because they accompany some act, or are a part of some transaction, and are, therefore, admissible in explanation of it. The general rule is, that declarations, to become a part of the *res gestæ*, must accompany the act which they are supposed to characterize, and must so harmonize as to be obviously one transaction. *Moore* v. *Meacham*, 6 Seld., 207, 210. Declarations, made right at the *conclusion* of a transaction, but not afterwards, are admissible as a part of the *res gestæ*, as much so as though made during the progress of it. *Kimball* v. *Huntington*, 10 Wend., 677. When it is material to show for what purpose a note was sent to a bank, a letter, accompanying the note, explaining that object, is admissible, as a part of the *res gestæ*. *Bank of Monroe* v. *Culver*, 2 Hill, 531.

The declarations of an agent, while acting within the scope of his authority, and in the discharge of his duty, in making a contract or doing some other act, are evidence against his principal, because part of the *res gestæ*. *Budlong* v. *Van Nostrand*, 24 Barb., 25; *Thallheimer* v. *Brinckerhoff*, 6 Cow., 90; 4 Wend., 394; *ante*, 374. If made after that time, they are not competent evidence. *Ib.*

In an action for a breach of promise of marriage, evidence of the plaintiff's declarations, accompanying her preparations for the wedding, are admissible for the purpose of showing her assent,

after the promise of the defendant is shown by other evidence. *Wilcox* v. *Green*, 23 Barb., 639.

On a question of fraud, in relation to the sale of personal property, when the acts of the parties may be shown, the declarations which accompany those acts are equally admissible. *Crary* v. *Sprague*, 12 Wend., 41, 44.

When declarations are admissible as a part of the *res gestæ*, they are admissible in favor of the party making them, as much as in favor of the opposite party. The books contain a great number of cases illustrative of this rule, but the principle is one which is easy of application if it is carefully kept in mind; and the cases already cited are sufficient to show the extent and application of it.

SECTION V.

ESTOPPEL.

An estoppel is an impediment or bar, by which a man is precluded in law from alleging or denying a fact, in consequence of his own previous act, allegation or denial to the contrary. Estoppels may be created by record, by deed, or by matter *in pais*. This subject will be fully discussed elsewhere. See Estoppel.

SECTION VI.

PRESUMPTIONS.

The term presumption has been variously defined by legal writers. It is said to be "The result of a process of reasoning from one fact to an other, or from one or more facts to others; an inference. A conclusion, judgment or belief, as to the truth of some proposed matter of fact, arrived at and formed by a process of inference from other facts." Burr. Circ. Evid., 910.

An inference as to the existence of a fact not actually known, arising from its necessary or usual connection with others which are known. Stark. Evid., 742. A probable inference which our common sense draws from circumstances usually occurring in such cases. 1 Phil. Evid., 599, 4th Am. ed. A probable consequence drawn from facts, as to the truth of a fact alleged, but of which there is no direct proof. Wills Circ. Evid., 17.

An inference, affirmative or disaffirmative, of the existence of a disputed fact, drawn by a judicial tribunal, by a process of probable reasoning from some one or more matters of fact either admitted in the cause or otherwise satisfactorily established. Best on Presump., 12.

In the course of legal investigations there are two kinds of presumption which require attention, one is a presumption of fact, the other a presumption of law.

Presumptions of fact are questions for a jury, or the justice in their place, for determining the existence of certain disputed facts, upon the evidence introduced in the case. Presumptions of law are merely the application of legal rules to ascertained facts.

To determine whether a presumption is one of law, or one of fact, it is merely necessary to ascertain what kind of inference is to be drawn, whether it is one of fact or one of law. If upon certain evidence given it is important to ascertain the existence of some other fact, or the truth or falsity of some allegation of fact, the presumption is one of fact. If, on the contrary, no inference of additional facts is necessary in order to make a decision, then the presumption is one of law.

A few illustrations are all that will be given of the numerous cases upon the subject. And first as to presumptions of law.

General sanity is presumed, because that is ordinarily the condition of the mind. *Gardner* v. *Gardner*, 22 Wend., 526; *Brown* v. *Torrey*, 24 Barb., 583. A person's motives are presumed to be good, and that he is honest in his transactions, in the absence of evidence showing fraud or improper motives. *Fleming* v. *Slocum*, 18 Johns., 403; *Lewis* v. *Palmer*, Hill & Denio, 68; *Bank of Silver Creek* v. *Talcott*, 22 Barb., 552.

A man is presumed to intend those necessary consequences which result from his voluntary or deliberate acts. *Van Pelt* v. *McGraw*, 4 Comst., 110. And acts which are innocent and lawful in themselves may become wrongful and fraudulent, when done without a just regard to the rights of others. *Ib.* The law will not presume that a person is a wrongdoer. And where a sheriff or constable levies an execution against A. on the property of B., there is no presumption that the plaintiff, in the execution, directed the levy, which can support an action against him. *Averill* v. *Williams*, 1 Denio, 501; *S. C.*, 4 Denio, 295.

The law presumes that a public officer has properly discharged his official duties. *Hartwell* v. *Root*, 19 Johns., 345; *Smith* v. *Hall*, 22 Barb., 656.

Giving a promissory note raises a presumption that there is nothing due to the maker at that time from the person to whom the note is given. *De Freest* v. *Bloomingdale*, 5 Denio, 304; *Lake* v. *Tysen*, 2 Seld., 461; *Duguid* v. *Ogilvie*, 3 E. D. Smith, 527. This presumption may be rebutted, by showing that the note was given for a mere temporary loan, without any settlement. *Ib.* Possession of personal property is *prima facie* evidence of title to it. *Fish* v. *Skut*, 21 Barb., 333. *Prima facie*, a person receiving money is entitled to it, and he does not become a debtor to the person delivering it. Some evidence in explanation of the transaction is necessary to establish a liability by the receipt of the money. *Sweet* v. *Barney*, 24 Barb., 533, 538; *Welch* v. *Seaborn*, 1 Stark., 474. But slight circumstances will make the matter a question of fact for a jury. *Bogert* v. *Morse*, 1 Comst., 377; *S. C.*, 4 Denio, 108.

Where letters are directed to a particular person on business, and answers are received in due course of mail, a fair inference arises that the answers were written by the person from whom they purport to come. *Bush* v. *Miller*, 13 Barb., 481; *Cunning-*

ham v. *Hudson River Bank*, 21 Wend., 557, 559; *Ovenston* v. *Wilson*, 2 Car. & Kir., 1.

A written instrument is presumed to have been executed and delivered at the time it bears date. *Bell* v. *Davis*, 8 Barb., 210; *Seymour* v. *Van Slyck*, 8 Wend., 403.

The mere fact that the body of an instrument or of an indorsement is not in the handwriting of the signer, raises no presumption that it was not in its present state when the signature was made. *Small* v. *Sloan*, 1 Bosw., 352.

The possession of an unmutilated railroad passage ticket, is presumptive evidence that the holder has paid the regular price for it, and is entitled to be transported according to its terms, and that the ticket has not been used for that purpose. *Pier* v. *Finch*, 24 Barb., 514.

A receipt for rent arising at a subsequent period, is presumptive evidence that all rent, previously accruing, had been paid. *Decker* v. *Livingston*, 15 Johns., 479. But proof that an employer has regular pay days, on which his workmen are accustomed to receive their wages, and that the plaintiff has been seen to receive payments on those days, is not sufficient evidence that he has been paid for work which was done since the time when it is shown that the last payment was made to him. *Irvine* v. *Wortendyke*, 2 E. D. Smith, 374.

The common law of a neighboring state will be presumed to be like our own, in the absence of any proof upon the subject. *Robinson* v. *Dauchy*, 3 Barb., 20; *Holmes* v. *Broughton*, 10 Wend., 75. Foreign laws must be proved, like any other facts in a case. *Cole* v. *Stone*, Hill & Denio, 360. 2 Hill 201 29 Barb 325

In relation to presumptions of fact, there are not so many reported cases, for such questions are purely questions for a jury, and there are few cases in which their decision upon such matters is not final. This class of presumptions embraces all the connections and relations between the facts proved and the hypothesis stated and defended, whether they are mechanical and physical, or of a purely moral nature. It is that mental operation which is exercised in the ordinary affairs of life, namely, the process of ascertaining the existence of one fact when the existence of an other is shown, without resort to the aid of any rule of law.

There are few presumptions, then, absolutely conclusive, so as to prevent a person from rebutting them by proper evidence.

Records, deeds, and estoppels *in pais*, are generally conclusive. But, as a general rule, a presumption merely stands for proof until the contrary of the presumption is shown by evidence. When the law raises a presumption from a given state of facts, that presumption will be sufficient proof, if it is not rebutted. Occasionally, there are conflicting presumptions. The law presumes the continuance of life, as well as that a party is innocent of crime. In one case, a woman married a second husband within twelve months after her first husband was last heard of; and it was held, that the presumption in favor of innocence should pre-

vail, by supposing that the first husband was dead at the time of the second marriage. *Rex* v. *Inhab. of Twyning*, 2 Barn. & Ald., 386.

But where a husband married a second wife, and it was shown that the first wife had written a letter to him, which was dated twenty-five days before that time, the court held that there could be no presumption of the death of the first wife. *Rex* v. *Inhabs. of Harborne*, 2 Ad. & E., 540.

If it is shown that certain persons were partners two or three years before the time of the trial, it will be presumed, in the absence of evidence to show a change or dissolution of the partnership, that it still continues. *Cooper* v. *Dedrick*, 22 Barb., 516.

When a general custom is shown to exist in a particular trade or business, parties engaged in the business are presumed to contract with reference to the custom, unless it is otherwise expressly agreed. *Dalton* v. *Daniels*, 2 Hilt., 472; *Barton* v. *McKelway*, 2 New Jersey R., 165.

But a usage of trade cannot be set up either to contravene an established rule of law, or to vary the terms of an express contract. *Ib.*

The subject of circumstantial evidence will receive attention in an other place.

SECTION VII.

HEARSAY.

When a witness, in the course of stating what has come under the cognizance of his own senses, concerning a matter in dispute, states the language of others, which he has heard, or produces papers which he identifies as being written by particular individuals, he offers what is called *hearsay* evidence. This evidence may sometimes be the very matter in dispute, or something from which a pertinent inference, relative to the matter in dispute, may be drawn; or, on the other hand, it may consist of a verbal or written narrative of facts, received by the witness from some other person, which he delivers at second hand to the court. This term, *hearsay* evidence, is used with reference both to that which is written and to that which is spoken. But, in its legal sense, it is confined to that kind of evidence (whether spoken or written) which does not derive its credibility solely from the credit due to the witness himself, but rests also, in part, on the veracity and competency of some other person from whom the witness may have received his information. It may be here stated that the general rule is, and it is a rule of very extensive influence, that hearsay evidence is not receivable.

The most satisfactory evidence which can be afforded, is the evidence of our own senses. But, in judicial investigations, the court and jury cannot have that kind of evidence, since they must decide upon the evidence adduced at the trial.

The great bulk of the proof which is made in the trial of actions is the testimony of witnesses, orally delivered. And, as a

test of truth, it is found indispensable to the due administration of justice, that every living witness should be subjected to the ordeal of a cross-examination, that it may appear what were his powers of perception, his opportunities for observation, his attentiveness in observing, the strength of his recollection, and his disposition to speak the truth. But testimony which is derived from the relation of third persons, even when the informant is known, cannot be subjected to this test, nor is the statement under oath, and, besides, it is frequently impossible to ascertain through whom, or how many persons, the narration has been transmitted from the original witnesses of the fact. There are several exceptions to the rule which excludes hearsay evidence. But those cases in which it is received are of that character which sufficiently guards against frauds; and, in most of them, the rejection of the evidence would work a greater mischief than could result from its reception. There are some cases in which this kind of evidence is treated as original evidence.

In cases where it is material to inquire into the demeanor, the conduct and mental feelings of an individual at a particular period, the expressions used by the individual at the period in question, are in their nature, original evidence; for they are the thing itself which is inquired into, as far as outward behavior is important; and as evidence of existing inward sentiments, they are unlike a statement of past occurrences, for they derive their credit from being usually identified with, and naturally resulting from, particular corresponding feelings. Accordingly, in actions for criminal conversation, where it is material to inquire into the terms upon which the husband and wife lived together, before the connection of the wife with the defendant, it is usual to give evidence of what the husband and wife have said to, or of each other, in order to show their mutual demeanor and conduct, and whether they were living together upon better or worse terms. *Trelawney* v. *Coleman*, 2 Starkie, 191; *S. C.*, 1 Barn. & Ald., 90; *Winter* v. *Wroot*, 1 Mood. & Rob., 404; *Willis* v. *Bernard*, 8 Bing., 376; *Elsam* v. *Faucett*, 2 Esp., 562. So in an action for enticing away the plaintiff's wife, and for harboring her, the character and conduct of the plaintiff may be shown, and the declarations of the wife may be proved, expressive of her wishes in relation to her living with the plaintiff as his wife; and in all such cases the intent with which the defendant has acted is a material point of inquiry. *Bennett* v. *Smith*, 21 Barb., 439; *Schuneman* v. *Palmer*, 4 Barb., 225.

The expressions of a person afflicted with bodily pain from a personal injury, or from illness, relative to his health and sensations, are admissible evidence in connection with other evidence, showing his condition, such expressions being ordinarily the natural consequences and the outward indication of co-existing sufferings. *Caldwell* v. *Murphy*, 1 Kern., 416; *Aveson* v. *Kinniard*, 6 East, 188.

Verbal and written declarations are often said to be admissible,

as constituting a part of the *res gestæ*. As such they are most properly admissible when they accompany some act, the nature and object or motives of which are the subject of inquiry. In such cases, words are receivable as original evidence, on the ground that what is said at the time affords legitimate, if not the best means of ascertaining the character of such equivocal acts as admit of explanation from those indications of the mind which language affords; for where words or writings accompany an act, or where they indicate the state of a person's feelings or bodily sufferings, they derive their credit from the surrounding circumstances, and not from the bare expressions of the declarant. And the language of persons at the time of their doing a particular act, in the same manner as their demeanor or gesture, is more likely to be a true disclosure of what was really passing in their minds, than their subsequent statements as to their intention, even if such statements would not be excluded on other grounds. In an action against the indorsers of a note, answers made by a person applied to as maker, at the place designated by the maker as his place of business, admitting himself to be the maker, are admissible as a part of the *res gestæ*, and are presumptive evidence that the person of whom the demand was made was the maker. *Hunt* v. *Maybee*, 3 Seld., 266.

An officer's return to process is generally conclusive as against the officer, and he will not be permitted to question its truth. But such returns are also evidence in favor of the officers who made them. If a constable is sued in trespass, trover, or replevin for levying upon goods, his return is *prima facie* evidence of his levy upon it as an officer. *Cornell* v. *Cook*, 7 Cow., 310; *Earl* v. *Camp*, 16 Wend., 562, 569; *Spoor* v. *Holland*, 8 Wend., 445. In actions against officers, their returns, regular on their face, will generally be *prima facie* evidence for them. *Putnam* v. *Man*, 3 Wend., 202.

In ordinary cases hearsay evidence is excluded, even though stated under oath, and in a judicial proceeding, for the party against whom it is offered has not enjoyed the right and the advantages of cross-examination. And the evidence is rejected, although it is certain that no better evidence is to be had, and although the rejection of the evidence will be to exclude all the evidence possessed by the party offering it. *Rex* v. *Nuneham*, 1 East, 373; *Rex* v. *Frystone*, 2 East, 54. So affidavits taken *ex parte* are not admissible as evidence on the trial of an action. Vol. I, 53, § 96. *Clute* v. *Fitch*, 25 Barb., 428.

Besides the cases which have been noticed, in which certain evidence was treated as original, instead of hearsay evidence, there are several important exceptions to the general rule, which will require to be observed in practice.

Exception 1st. In matters of public or general interest, hearsay evidence is sometimes admissible. And, therefore, it is received for the purpose of showing that a particular person holds a specified office, or a public employment as an officer. This evidence

is usually accompanied by evidence, showing that the person who claims to be such officer, has performed such acts as the office or employment authorizes him to perform. In an action brought by an overseer of the poor to recover a penalty, the character in which he sues may be proved by reputation. *Blatchley* v. *Moser*, 15 Wend., 215. So such evidence is sufficient to show that the plaintiff is trustee or collector of a school district. *Ring* v. *Grout*, 7 Wend., 341; *McCoy* v. *Curtice*, 9 Wend., 17; or to show that he is a constable. *Adams* v. *Jackson*, 2 Aik., 145; or a justice of the peace. *Snow* v. *Peacock*, 2 Carr. & Payne, 215; *Wilcox* v. *Smith*, 5 Wend., 231. So the same rule applies in actions against persons who have assumed to act as officers, as in the case of an action against one as an overseer of highways, *Dean* v. *Gridley*, 10 Wend., 254, though he will not be liable to an action at the suit of the commissioners of highways for the penalty given by statute for a neglect of duty as overseer, if he has omitted to file his acceptance of the office in the town clerk's office. *Bentley* v. *Phelps*, 27 Barb., 524. In actions against sheriffs, deputy sheriffs, constables, justices of the peace, &c., it is sufficient to prove that they have acted as such without showing their election or appointment. *Potter* v. *Luther*, 3 Johns., 431. So as to actions by or against attorneys or counselors. *Berryman* v. *Wise*, 4 Term, 366.

But, when it is convenient, it is always best to prove all such facts by such evidence as leaves no question as to its admissibility or its sufficiency, by showing the election or appointment &c.

Hearsay evidence is not admissible for the purpose of showing who was a freight agent of a railroad corporation at a particular time. *Spade* v. *Hudson River Railroad Co.*, 16 Barb., 383.

So it is a general rule, that a paper executed by a third person cannot be admitted as evidence of the truth of the facts it recites, when his declarations, as to the same matter, would not be admissible, because they were hearsay evidence. *Garrigue* v. *Loescher*, 3 Bosw., 578.

Exception 2d. In matters of pedigree, the statements of deceased persons are allowed in many cases, subject, however, to various limitations and qualifications. Such evidence, when allowed, is admitted upon the principle that it is the natural effusion of a party who must know the truth, and who speaks upon an occasion where he stands in an even position, without any temptation to exceed or to fall short of the truth. Matters of pedigree consist of general evidence as to descent or relationship, or as to particular facts, such as marriages, births, or deaths, and of the time when such events occurred, either absolutely, or relatively to each other. Declarations of the family or kindred are admissible to show who was a member of the family, or the particular relationship of the person, as son, daughter, cousin, and the like. So, particular facts may be proved in the same way, as, the ages of persons, the dates of marriages or births, &c.

But the place of birth of a child cannot be shown by the declarations of a deceased parent. *Rex* v. *Erith*, 8 East, 539; *Regina* v. *Rishworth*, 2 Ad. & E. N. S., 476.

Entries in the family bible or register are evidence, if made by the father or under his direction, and he is dead.

But when such entries are recent, and the father is present in court, or can be produced there, or when the entries are made by the mother, after the father's death, and she is present in court, or can be produced, such entries will be rejected. *Leggett* v. *Boyd*, 3 Wend., 376, 379.

The declarations of deceased parents are admissible in the same manner as entries in the bible or register.

But declarations of other persons, to be admissible, as to pedigree, should be made by one who was connected with the family by consanguinity or affinity, or who derived his information from persons so connected with the family, or who has some personal knowledge of the facts of which he speaks.

Where a deceased physician had attended the birth of a person whose age was a subject of inquiry, and it was shown that he was in practice for many years before such birth, and for several years afterwards; that he made an entry in his register of all such cases as he attended; that in his register was an entry of the birth of this person, at a time specified in the register; that such register also contained entries of the birth of a sister and brother of such person, at a subsequent time, it was held that the register was competent evidence of the time of the birth of such person. *Arms* v. *Middleton*, 23 Barb., 571.

But such entries or declarations are rejected when the person who made them is alive and within reach of the process of the court, and he himself can be produced as a witness.

Exception 3d. An exception to the general rule is made in cases relating to ancient possessions; but no such questions arise in a justices' court, and the rules need not be discussed in this work.

Exception 4th. Dying declarations are sometimes received in evidence in criminal cases.

But they are not admissible on the trial of civil actions. *Wilson* v. *Boerem*, 15 Johns., 286; *Gray* v. *Goodrich*, 7 Johns., 95; *Jackson* v. *Betts*, 6 Cow., 377; *S. C.*, 6 Wend., 173.

Exception 5th. Declaration against interest by persons since deceased.] It is a well settled rule, that declarations of persons, since deceased, whether the declarations were verbal or written, are admissible in those cases in which the persons making them are presumed to be cognizant of the subject matter of the declarations, and where their declarations apparently operate against their own interest, whether pecuniary or proprietary. It is presumed, when declarations are made under such circumstances, that they are entitled to credit, because the regard which men pay to their own interest may be safely considered as a sufficient guaranty against their prejudicing themselves by any erroneous statement; and the assumed tendency of the declara-

tions, precludes the possibility of any fraudulent statement. Indeed, the apprehension of fraud in such cases is, in a great measure, removed, without reference to the fact of the declarations being against interest, when it is considered that declarations are not receivable during the lifetime of the authors of them; and that it is always competent for the party against whom they are produced, to point out any sinister motive for making them.

The declarations of a living person, however, are not admissible, however much they may be against his interest, unless he is a party to the action, or is the real party in interest, though not nominally so on the record. *Spargo* v. *Brown*, 9 Barn. & Cress., 935; *Phillips* v. *Cole*, 10 Ad. & E., 106; *Smith* v. *Whittingham*, 6 Carr. & Payne, 78. But the admissions of an assignor are not admissible, even though such assignor is dead. *Ante*, 377. The entries must be such as are really against the party making the entries, not such as are merely apparent, or they will not be admissible.

Exception 6th. Entries in the course of office or business.] There is a rule which allows of written entries, made by deceased persons as evidence, even though not made against their interest, provided that, in addition to a peculiar and personal knowledge of the facts, and the absence of all interest to pervert them, the entries appear to have been made in the ordinary course of official, professional, or other business or duty, and to have been immediately connected with the transacting or discharging of such business or duty, and to be cotemporaneous with the transactions to which they relate. And, under such circumstances, it would appear that, upon general principles, there is no sound distinction between written entries and verbal declarations. The entries which are made in books of account, will be noticed in a subsequent place.

The protest and certificate of a notary public are presumptive evidence of the presentment of a note and non-payment thereof, to charge an indorser, if the notary is dead, notwithstanding the fact that the indorser serves an affidavit, when sued, stating that he did not receive such notice. *McKnight* v. *Lewis*, 5 Barb., 681; and see 3 R. S., 474, §§ 34, 35, 5th ed.

So a memorandum of a cashier is evidence when he is dead, where he was in the habit of making such entries, after giving the proper notices in the name of the notary of the bank. *Nichols* v. *Goldsmith*, 7 Wend., 160.

But whenever entries made in the books of third persons are offered in evidence, it must be shown that such person is dead before the entries are admissible; it is not sufficient that he is out of the jurisdiction of the court, and cannot be found on due inquiry, *Wilbur* v. *Selden*, 6 Cow., 162; and especially is this the rule when the witness is within reach of the process of the court or is present therein at the trial. *Leggett* v. *Boyd*, 3 Wend., 376.

The principle of the rule which receives such entries is limited to those cases only in which the entry was made in the ordinary and regular course of business. And it does not extend to entries which, though made in the course of business, include independent matters, which are not necessary to the performance of the duty by the person who makes the entry. In this respect, the entries now under consideration differ materially from those which have been made against the interest of the party making them, which, it has been seen, are admissible, not only as evidence of the facts which are directly against the interest of the declarant, but also of other independent facts contained in the same entry, and immediately connected with the other facts. The entries must be made, too, in the "usual course of business," by which is meant that the entries are not admissible if made out of the usual course of business.

The entries must also be made cotemporaneously with the occurrence of the events recorded, though this is not the rule as to entries which are made against the interest of the party making them. Verbal declarations are not admissible unless they are shown to be part of the *res gestæ.*

An indorsement which is made by the obligee of a bond, or the payee of a note, for the purpose of avoiding the defense of the statute of limitations, is not admissible as evidence, unless it is shown that the indorsement was made at a time when it was against the interest of the party making it, though if that is shown the evidence is admissible. *Roseboom* v. *Billington*, 17 Johns., 182; *Read* v. *Hurd*, 7 Wend., 408.

Exception 7th. Evidence of a deceased witness.] Where a witness has been sworn and examined by the parties upon the trial of an action, and the witness subsequently dies, his evidence is admissible in a subsequent action between the same parties, when the point in issue is the same as that in the former trial. *Osborn* v. *Bell*, 5 Denio, 370. This kind of evidence, classed among the exceptions to the rule respecting hearsay evidence, is of a different character from any which has been before mentioned, for not only is it free from the objection of being extra-judicial, or of being without oath, but the party also who is to be affected by it had the power of cross-examining the witness, under the same circumstances as on the subsequent trial.

The proof of what the deceased witness swore may be made by any person who heard his testimony, even though he took no minutes of the evidence. *Grimm* v. *Hamel*, 2 Hilt., 434. An attorney or counselor, or other person, who took minutes upon a former trial, and testifies to their accuracy, may state on a subsequent trial what a deceased witness swore to on a former trial, although such attorney, &c., cannot testify from his mere recollection without a reference to his minutes. *Van Buren* v. *Cockburn*, 14 Barb., 118; *Huff* v. *Bennett*, 2 Seld., 337. It is sufficient, if upon such examination of his minutes, he can then swear from

recollection what the evidence was which was given by the deceased witness. *Ib.*

And where a witness has no recollection of what a deceased witness swore, even after looking over his minutes, his minutes are then competent evidence to prove such facts, provided the witness swears that he took down the evidence of the former witness, in the capacity of counsel or attorney, and that he has no doubt of the correctness of his minutes. *Halsey* v. *Sinsebaugh*, 1 E. P. Smith, 485. To make the minutes evidence, when the person who took them does not recollect the evidence, it is not necessary to prove that the precise words of the former witness were taken down. It is sufficient if it appears that the person who took the evidence down in writing intended to take down the precise language of the witness, but could not swear that he gave the precise words, nor that he had taken down every word, though he intended to take down all that was material. *Clark* v. *Vorce*, 15 Wend., 193; *Crawford* v. *Loper*, 25 Barb., 449.

Before the minutes of a person are evidence in such a case, it must appear that after refreshing his recollection, he cannot swear to the evidence given by the deceased witness; such minutes are merely auxiliary, and are never admissible when the person who made them recollects the facts stated in them, whether his recollection is independent of them, or whether it is refreshed by them so as to revive his recollection. *Russell* v. *Hudson River R. R. Co.*, 3 E. P. Smith, 134, 140. The minutes of a person who took down the evidence of a former witness are not evidence of what was testified to, if he cannot swear that he took down the evidence accurately or fully, even though he cannot state the evidence from recollection, after refreshing his memory from such minutes. *Huff* v. *Bennett*, 2 Seld., 337.

It is not necessary to prove the precise words used by a deceased witness. Such a thing is utterly impracticable, and is no more required than it would be to give the manner and tones of voice of such witness. If the substance is fully given, it is all that can be required. *Chaffee* v. *Cox*, 1 Hilt., 79; *Clark* v. *Vorce*, 15 Wend., 193; *S. C.*, 19 Wend., 232, 233; 1 Phil. Ev., 399, note, 4th Am. ed. Before evidence is admissible, for the purpose of showing what a witness testified to on a former trial, it must be shown that he is dead. *Powell* v. *Waters*, 17 Johns., 176; *Wilber* v. *Selden*, 6 Cow., 162.

So the pendency of the former trial must be equally shown, unless the proof is expressly waived, or no objection is taken on that ground, which would be an implied waiver. *Beals* v. *Guernsey*, 8 Johns., 446; *White* v. *Kibling*, 11 Johns., 128.

Exception 8th. Admission of parties.] This matter has been fully discussed already. *Ante*, 371.

SECTION VIII.

BEST EVIDENCE.

The law excludes such evidence of facts as from the nature of the thing supposes still better evidence behind in the party's possession or power. The rule has been expressed in various forms, by different authors. One declares that it requires "the best evidence of which the case in its nature is susceptible." 1 Greenl. Ev., § 82. An other, that it requires "the best attainable evidence." Stark., 641. Others, that it requires the highest evidence of which the nature of the thing is capable. The precise import of the rule cannot be fully and clearly comprehended, without reference to its application in various instances.

The principle of the rule under consideration is founded on the presumption that there is something in the better evidence that is withheld, which would make against the party resorting to inferior evidence. Although in some instances, this presumption may not be very strong, yet the general effect of the rule is to prevent fraud, and to induce parties to bring before a court or jury the kind of evidence which is least calculated to perplex or mislead them.

The present rule is satisfied by the production of the best *attainable* evidence. In requiring the best evidence applicable to each particular fact, it meant that no evidence of a nature merely substitutionary shall be received where the primary evidence is producible. By substitutionary evidence is meant such evidence as implies the existence of primary or more original information.

If a party offers a copy of a deed, bill of exchange, promissory note, or written contract, when he ought to produce the original, and is able to do so, a presumption arises that there is something in the original instrument which would make against such party; and, therefore, the copy, in such a case, is not competent evidence. The rule is general in its application, and, therefore, it would not be sufficient to rebut this presumption, in any particular case, by showing that the copy is correct, for the purpose of admitting such substitutionary evidence. The reason why the best evidence is required is, to prevent frauds, by keeping back the best evidence; and, when the reason of the rule fails, the rule itself ceases. If the original paper is shown to be in the hands of the opposite party, who refuses to produce it, after receiving a proper notice for that purpose; or, if it is shown that the original has been lost or destroyed, without any default on his part, no presumption of fraud can be made, and a copy of the instrument will then be admitted, because a copy is the best evidence which can then be adduced.

The rule does not relate to the measure or quantity of the evidence offered, but to its *quality*, when compared with some other evidence of superior degree. It is not necessary, in point of law, to give the fullest proof that every case may admit of. If there are several eye-witnesses to a particular fact, it may be proved

by the testimony of one or more of them, without calling the others.

The cases in which secondary evidence is excluded, and the best evidence required, is, where oral evidence is offered in the place of written instruments. These instruments may be reduced to three classes: 1st. Those instruments which the law requires to be in writing; 2d. Those contracts which the parties have put into writing; and, 3d. All other writings, the existence of which is disputed, and which are material to the issue.

In the first place, oral evidence cannot be substituted for any instrument which the law requires to be in writing; such as records, public documents, official examinations, deeds of conveyance of lands, wills, other than nuncupative, promises to pay the debt of an other, or to answer for his default, &c., and other writings required by the statute of frauds. Where the law declares that an agreement is not valid unless in writing, an oral contract is void, and cannot be enforced. But if the agreement has been properly executed, and is then accidentally lost or destroyed, it will be valid, and its existence may be proved, like any other lost paper, &c. So, where the certificate of incorporation of a corporate company has been duly executed and filed, but it could not be found, on due search in the proper office, where it was filed, it was held competent to show, by other evidence, that, in truth, a copy was filed; and a sworn copy of the original was held competent evidence. *New York Car Oil Co.* v. *Richmond*, 6 Bosw., 213. Even the admissions of a party will not be competent to prove the contents of a record, or of an instrument which the law requires to be in writing, unless it is in those cases in which the admission is made in open court, at the trial, for the purpose of obviating the production of written evidence. *Welland Canal Co.* v. *Hathaway*, 8 Wend., 480, 486; *Jenner* v. *Joliffe*, 6 Johns., 9; *Hasbrouck* v. *Baker*, 10 Johns., 248. The general rule is, that the oral admissions of a party, made out of court, are evidence against him in those cases only in which an oral contract would be binding, or in which the transaction may legally rest in parol evidence. *Ib.*

And, where an action of trespass was brought against a defendant, on the ground that he had directed an other person to take the plaintiff's property, and it appeared that the only direction which he had given was contained in a military warrant, which he had signed as president of a court martial, it was held that the plaintiff was bound to produce the warrant, and could not prove the direction by oral evidence. *Stebbins* v. *Cooper*, 4 Denio, 191.

In the second place, oral proof cannot be substituted for the written evidence of any contract which the parties have put in writing. Here, the written instrument may be regarded, in some measure, as the ultimate fact to be proved, especially in the cases of negotiable securities; and, in all cases of written contracts, the writing is tacitly agreed upon, by the parties themselves, as the only repository, and the appropriate evidence, of their

agreement. The written contract is not a collateral matter, but is of the very essence of the transaction.

In an action against a constable, for selling property which the plaintiff claimed to own, by virtue of a bill of sale, it was held that the bill of sale must be produced, and that parol evidence of its contents was not admissible. *Dunn* v. *Hewitt*, 2 Denio, 637. And this was held, notwithstanding the fact that it first appeared on cross-examination of the witness proving the sale, that it was reduced to writing. *Ib.* In such a case, the justice is bound to strike out the parol evidence, if a motion is made for that purpose, by the party against whom it has been introduced. *Ib.*

So an agreement for the renting of certain rooms was reduced to writing, and this was held to exclude evidence of prior oral negotiations as to the terms of the letting. *Townsend* v. *Fisher*, 2 Hilt., 47; and see *Niles* v. *Culver*, 8 Barb., 205. If the writing is a mere receipt for the price of property sold, and not a bill of sale, then parol evidence of prior negotiations is admissible. *Filkins* v. *Whyland*, 10 E. P. Smith, 338.

The general rule is applicable to contracts of all kinds, whether relating to the sale or leasing of real estate, the sale or exchange of personal property, or for the rendering of personal services, and the like, where it is essential that the original instrument should be produced. But there are cases in which this is not necessary. And in an action for a wrongful trespass by a stranger, upon premises held by the plaintiff as a tenant, the plaintiff need not produce his lease. Evidence of possession on his part, under a claim of right by a written instrument, is entirely sufficient, as against a wrongdoer. *Walker* v. *Wilson*, 8 Bosw., 586.

The general rule applies also to secondary evidence, so that a copy of a copy is not evidence; although a copy of the original paper might be, in some cases. Where it was important to show that a bill of items had been rendered to the defendant, and also what the items were, the plaintiff offered a copy of his books, from which the bill rendered had been copied, this evidence was objected to, and it was held that the books themselves were the best evidence, and that a copy of the books was not admissible evidence. *Reddington* v. *Gilman*, 1 Bosw., 235, 242. So, parol proof may be given of a lost paper, by giving a copy of it in evidence; but if a copy is made, and the original is lost, the copyist must be produced to prove the copy, if possible, and mere evidence of his handwriting, in making the copy, is not sufficient. *Brewster* v. *Countryman*, 12 Wend., 446.

Where an instrument is partly printed and partly written, and there is a contradiction between the written and printed portions, the written parts will prevail over the printed. *Woodruff* v. *Commercial Ins. Co.*, 2 Hilt., 122, 125; *Weisser* v. *Maitland*, 3 Sandf., 318, 322.

The admission of oral evidence to prove the contents of a paper, without objection, does not prevent the party against whom it is offered, from objecting to its sufficiency. *Hooper* v.

Taylor, 4 E. D. Smith, 486; *Southwick* v. *Hayden*, 7 Cow., 334; nor from moving to strike it out at the close of the trial, before summing up the cause. *Dunn* v. *Hewitt*, 2 Denio, 637; *Heely* v. *Barnes*, 4 Denio, 73; though it has been held, in a late case, that, when improper evidence is deliberately admitted, without objection, which bears upon the issues on a trial, the court has no right to strike it out, even on motion. *Hall* v. *Earnest*, 36 Barb., 585. If, however, the evidence has been received upon some condition, mistake or contingency, a motion may be made to strike it out. *Ib.*

In the third place, oral evidence cannot be substituted for any writing, the existence of which is disputed, and if its production is material either to the issue between the parties, or as to the credit of witnesses, and it is not merely a memorandum of some other fact.

By applying the rule in such cases, the court acquires a knowledge of the whole contents of the instrument, which may have a different effect from the statement of a part. Thus, it is not allowed, on cross-examination, in the statement of a question to a witness, to represent the contents of a letter, and to ask the witness whether he wrote a letter to any person with such contents, or contents to the like effect, without having first shown the letter to the witness, and having asked him if he wrote that letter, because, if it were otherwise, the cross-examining counsel might put the court in possession of a part only of the contents of a paper, when a knowledge of the whole was essential to a right judgment in the cause. If the witness acknowledges the writing of the letter, yet he cannot be questioned as to its contents, but the letter itself must be read. *The Queen's Case*, 2 Brod. & Bing., 287. Two or three lines of a letter may be exhibited to a witness, without exhibiting to him the whole, and the witness may be asked whether he wrote the part exhibited; but if he denies that he wrote such part, he cannot be examined as to the contents of the letter. *Ib.*

There are several exceptions to the rule which requires the best evidence.

Exception 1*st.* Where it is necessary to prove the contents of any record, or of proceedings in a court of justice, or in public books or registers, it is sufficient, in general, to produce an examined copy. This is on a principle of general convenience, and because it is apparent, that if the contents were misrepresented, there would be obvious means of exposing the fraud or error. The manner of proving records will be explained hereafter.

Exception 2*d.* It is not, in general, necessary to prove the appointment of public officers, by producing record evidence of their election or appointment, for this would be attended with general inconvenience; and a strong presumption arises from the exercise of a public office, that the election or appointment is valid. In the case of sheriffs, deputy sheriffs, constables, justices of the peace, and the like, it is sufficient to prove that they acted

in that character, without producing written evidence of an election or appointment. *Ante*, 392.

An affidavit which purports to be sworn to before a proper officer, is *prima facie* sufficient, and, as to third persons, conclusive.

Exception 3d. Where the written communication or agreement between the parties is *collateral* to the question in issue, it need not be produced; as where the writing is a mere proposal, which has not been acted upon; or where a written memorandum was made of the terms of the contract, which was read in the presence of the parties, but never signed, or proposed to be signed; or where, during an employment under a written contract, a separate verbal order is given, and the like cases. So if a written communication is *accompanied* by a verbal one, to the same effect, the latter may be received as independent evidence, though not for the purpose of proving the contents of the writing, nor as a substitute for it. So a payment of money may be proved by oral evidence, although a written receipt was taken; so an oral demand of goods may be proved, although a written demand was made at the same time.

Exception 4th. Proceedings before justices of the peace, in the trial of actions before them, may be proved without the production of their dockets, provided the statutory requirements are observed.

The contents of a justice's docket cannot be proved by oral evidence. The statute has made ample provisions as to the manner of proving them. Vol. I, 69, 70, §§ 175, 176, 177, 178, 179. Before the justice himself, his own docket is evidence, without any proof of its authenticity, or of the official character of the justice. *Smith* v. *Frost*, 5 Hill, 431; *Groff* v. *Griswold*, 1 Denio, 432. So a transcript of his docket, or of other proceedings before himself, is equally evidence before himself, without any other proof of authenticity. Vol. I, 69, § 176.

When the action is tried before some justice other than the one who rendered the judgment, or is tried in some other court, the docket may be proved by a transcript of it, duly certified by the clerk of county in which such justice resides. Vol. I, 69, 70, §§ 177, 178.

The form of a transcript and certificate will be given in a subsequent place.

The object in permitting proof to be made of the docket by a certified transcript was to save justices from the inconvenience of attending in person, as witnesses, to prove their dockets in those cases in which that became important. *Heermans* v. *Williams*, 11 Wend., 636. The statute must be substantially complied with, or the transcript will not be competent evidence. To authenticate the fact, that the justice was such at the time of the rendition of the judgment, the county clerk's certificate is the only competent evidence where a transcript of the docket is used. And where a judgment is a necessary part of a defense, the judgment cannot be proved by the production of a sworn

copy of the docket, even if it is proved by the justice who rendered it, to be a true copy. In such cases the docket is the best evidence, and must be produced, unless the justice is dead or absent. *Pratt* v. *Peckham*, 25 Barb., 195; *Pollock* v. *Hoag*, 4 E. D. Smith, 473; and see *McCarty* v. *Sherman*, 3 Johns., 429. But see *Wilkinson* v. *Vorce*, 41 Barb., 370.

The docket of a justice may be proved by producing it, and proving by the justice that it is his docket, if the proceeding which requires it is had before some other justice or court. Vol. I, 70, § 179. *Boomer* v. *Laine*, 10 Wend., 526.

In case of the death or absence of the justice, his minutes and docket may be proved by producing the originals and proving the handwriting of the justice. Vol. I, 70, § 179. So, in such a case, they may be proved by sworn copies, with proper proof of the handwriting of the justice. *Ib.* The pleadings may be produced and proved by a justice without producing his docket, or a transcript of it, when it is not material to prove any thing more than the contents of the pleadings. *Brotherton* v. *Wright*, 15 Wend., 237. And so, too, the proceedings in an action may be proved without a copy of the judgment, certified by the county clerk. And where a judgment had been rendered by a justice of the peace, upon process served by a person deputized by such justice to serve it, it was held that a copy of the judgment and of the proceedings taken for the recovery thereof, was competent and legal evidence of such proceedings for the appointment of such person to serve the process, and of the rendition of the judgment, when the question arose in a collateral action, provided the copy of the judgment and proceedings was signed with the official signature of the justice; and it was also proved by a witness that the paper was a correct copy of the justice's proceedings and judgment. *Wilkinson* v. *Vorce*, 41 Barb., 370. The same case also holds that such proof is sufficient evidence of the judgment itself, in a collateral action. But see the cases above cited; and see Vol. I, 70, § 178.

The docket is conclusive evidence between the parties to the action; but it is not evidence at all in some cases. If a constable sues to recover his fees for serving the summons in the action, the docket is no evidence to prove what constable served the summons, nor the amount of his fees. *Reynolds* v. *Brown*, 15 Barb., 24; and see *Cornell* v. *Moulton*, 3 Denio, 12; *Wardwell* v. *Patrick*, 1 Bosw., 406; *McGraw* v. *Walker*, 2 Hilt., 404. If the docket is lost, provision is made for proving its contents. Vol. I, 72, § 192.

The statute requires certain proceedings to be entered in the docket of a justice. Vol. I, 68, § 174. It also authorizes him to enter such other proceedings as he may think proper, if they are such as took place before him in the action. Vol. I, 69, § 175. This evidently relates to some proceeding in the cause by the parties, by way of practice on the trial, or preceding it, or as to some agreement made by the parties on the trial. If the parties

agree before the justice, on the trial, that the plaintiff may withdraw his action at any time within four days after it is submitted to the justice, this is a valid agreement; and if it is entered in the justice's docket, that will be competent proof of the fact, and will not be liable to contradiction by parol evidence. *Smith* v. *Compton*, 20 Barb., 262.

Parol evidence is not admissible to contradict a justice's docket. *Ib.; Hard* v. *Shipman*, 6 Barb., 621; *Niles* v. *Totman*, 3 Barb., 594; *McLean* v. *Hugarin*, 13 Johns., 184. Though there is an exception to this rule, and that is when it is offered to be shown that the justice had no jurisdiction to render the alleged judgment. *Ante*, 15, Jurisdistion.

The justice may properly enter into his docket a statement of what matters were actually tried, and also what matters were withdrawn from the consideration of the jury or of the justice, if he deems it proper or material to do so, and they will then become a part of the docket.

. If the justice does not make any such entry, the facts may be proved by any person who knows them from being present at the trial, acting as counsel, or even though he was a mere spectator. *Phillips* v. *Berick*, 16 Johns., 136; *Snider* v. *Croy*, 2 Johns., 227; *Wilder* v. *Case*, 16 Wend., 583.

The minutes of the justice, or those of the attorneys or counsel who tried the cause, are no higher evidence than their oral testimony. The manner of proving the evidence of a former witness has been already explained; and the same rules apply to the proof of other facts which transpired at the trial. *Ante*, 372, 395.

Where a transcript of the docket is wanted as evidence, before some court or justice, other than the one who rendered it, an application should be made to the justice who rendered it, for a certified copy of it. Such justice should then make a literal copy of the entire judgment, as it is entered in his docket, and of all the other matters which he has entered therein as a part of the proceedings in the action. This transcript should then be certified by the justice in the following form:

Form of certificate of transcript.

ALBANY COUNTY, *ss:* I, A. B., the justice before whom the foregoing (or above or within) judgment was rendered, do hereby certify that the foregoing (or above, &c.) transcript is a true copy of my docket, and of the whole thereof, and of all entries made therein by me of the proceedings in said action. Dated January 23, 1865.

A. B., *Justice.*

But, before the transcript, so made, can be read in evidence, a certificate must be procured from the county clerk of the county in which the justice resided, at the time of the rendition of the judgment. Vol. I, 70, § 178; *Maynard* v. *Thompson*, 8 Wend., 393. This certificate should be attached to the transcript, and may be in the following form:

Form of clerk's certificate.

ALBANY COUNTY, *ss:* I, Smith A. Waterman, clerk of the county of Albany, do hereby certify, that A. B., the person who subscribed the within (or foregoing) transcript was, at the date of the judgment therein mentioned, to wit, on the 23d day of January, 1865, a justice of the peace of the town of New Scotland, in said county; and that I am well acquainted with the handwriting of the said A. B., and verily believe that the name A B., subscribed to the said transcript, is his proper and genuine signature.

In witness whereof, I have hereunto set my hand and seal of office, [L. S.] on this 23d day of January, 1865.

SMITH A. WATERMAN.

This seal of the clerk must be the seal of the county clerk's office, but it need not be impressed upon wax or wafer, or any similar substance, it will be sufficient if impressed directly upon the paper, as a part of the certificate. Vol. I, 80, § 19. A transcript thus certified by the county clerk, under his hand and official seal, proves itself, and is admissible upon its production as evidence.

There are numerous papers and documents which may be proved by certified copies; but those will be noticed in a subsequent place.

Exception 5th. Producing papers, &c., on notice.] When a paper is in the hands of the opposite party. and it is important to show its contents on the trial of an action, a notice should be given to that party to produce it; and if he refuses to do so, after the service of a regular and proper notice on him for that purpose, parol evidence may be given of the contents of such paper.

If an important paper is in the hands of the opposite party, it is a general rule that a notice to produce the paper must be given before parol evidence can be given of its contents. There are, however, exceptions to this rule. If the pleadings give a party notice to be prepared to produce a particular paper or instrument at the trial, if necessary to contradict the evidence of his opponent, no notice to produce the paper or instrument is necessary. *Hammond* v. *Hopping*, 13 Wend, 505; *Hardin* v. *Kretsinger*, 17 Johns., 293; *Edwards* v. *Bonneau*, 1 Sandf., 610; *Hays* v. *Riddle*, Id., 248. So the rule is the same when the paper to be proved is a duplicate original; or where the instrument is itself a notice, such as a notice to quit, or notice of the dishonor of a bill or note.

When it is shown that an instrument is wrongfully destroyed by the party who made it, and who wrongfully obtained possession of it, parol evidence may be given of its contents, without any notice to produce it at the trial. *Scott* v. *Pentz*, 5 Sandf., 572.

When it is shown that a paper is lost, without the fault of the party losing it, he may give parol evidence of its contents. *Livingston* v. *Rogers*, 1 Caines' Cases, XXVII; *Read* v. *Brookman*, 3 Term, 151; *New York Car Oil Co.* v. *Richmond*, 6 Bosw., 213.

It is not necessary to allege in the pleadings that a paper is lost to enable a party to give parol evidence of its contents. *Supervisors of Livingston* v. *White*, 30 Barb., 72.

In an action against a county treasurer and the sureties in his bond, it was proved that a bond was executed; that it was delivered to the county treasurer by the witness, as he believed, though he was not positive of the fact; and it was also proved by the county clerk that he had searched for the bond on several occasions, and could not find it in his office; and that he did not recollect of having seen it in his office at all. This was held to be sufficient to admit parol evidence of its contents. *Ib.*

So where proof was made that a search had been made in the county clerk's office for an appeal bond, which had been delivered there by a justice of the peace, and that it could not be found in the place where such bonds were usually kept; and it was also shown that the justice also searched among all his papers and could not find it. This was held to be sufficient proof of loss to admit parol evidence of the contents of the bond. *Teall* v. *Van Wyck*, 10 Barb., 376. A clerk's certificate would be competent evidence of such search, though the proof might be made by any other person who had made such search. *Ib.*

When it is shown that a paper is in the possession of a party out of the state, and that the person who has it in possession refuses peremptorily to produce it, after all legal means for that purpose have been resorted to, and it is not shown that the laws of the state where he is will compel him to produce it, although he is examined as a witness on a commission, this is sufficient to authorize parol evidence of its contents. *Forrest* v. *Forrest*, 6 Duer, 103, 137.

Parol evidence may be given of the contents of a letter, after it is proved to be in the hands of the defendant, and that he has refused to produce it, after the service of a proper notice on him for that purpose. *Sheldon* v. *Wood*, 2 Bosw., 269. In an action by a principal against his agent, for not paying over moneys, parol evidence cannot be given of the contents of a letter sent by the plaintiff to the defendant, demanding payment, without first proving that due notice had been given to produce the letter at the trial. *Weeks* v. *Lyon*, 18 Barb., 530.

It has been held that a party is not required to produce papers at the trial, unless previous notice has been given requiring their production; and the fact that he has the papers in court does not operate to dispense with the notice, unless the nature of the case apprises him that they will be necessary on the trial. *Grimm* v. *Hamel*, 2 Hilt., 434. The object of the notice is not only to obtain the papers or lay the foundation of secondary evidence of their contents, but also to give the party notified an opportunity to procure testimony to support or impeach them, or to show that no such papers as those called for ever existed. *Ib.; Rogers* v. *Van Hoesen*, 12 Johns., 221; *Gorham* v. *Gale*, 7 Cow., 739; 3 Greenleaf's Ev., § 561, note 2, and cases. But when a witness, who is intrusted with a written instrument executed by the parties to the action, admits in court that it is then in his possession, he must produce it; and he cannot excuse himself from producing it on the ground

that he has not been served with a subpœna *duces tecum*, or a notice to produce it. *Boynton* v. *Boynton*, 16 Abb., 87. And when a party requires its production, it is the duty of the court to require such production, for the purpose of determining its materiality as evidence; and a refusal, by the justice, to comply with such request, will be error, even though it may not then appear that the paper is material evidence. *Ib.*

The general rules of practice requiring a written notice to produce papers, has reference to the preliminary preparations for trial. The reason of the rule does not apply to a notice given in the presence and hearing of the court, while the trial is in progress, from day to day; and where, at a previous hearing before a referee, the plaintiff had given the defendant verbal notice to produce certain bills and receipts, or that parol evidence of their contents would be given, this was held to be sufficient notice. *Kerr* v. *McGuire*, 28 How., 28, court of appeals.

The notice, when given, ought to be served personally, whether it is made on the party or his attorney. *Rathbun* v. *Acker*, 18 Barb., 393.

Form of notice to produce paper.

JUSTICE'S COURT.

John Doe
agst.
Richard Roe. } Before A. B., justice.

Sir, please to take notice that you are hereby required to produce on the trial of this action a certain paper writing (or instrument, deed, or bill of exchange), bearing date on or about the first day of June, 1863, made and executed by and between John Doe, on the one part, and Richard Roe, of the other part, by which, &c. (describe, as nearly as possible, the contents of the paper desired); and you are also required to produce, on said trial, all other papers in your custody or under your control, relating to the matters in controversy in this action, or in default thereof, parol or secondary evidence will be given of their contents. Dated January 23, 1865.

JOHN DOE, *Plaintiff.*

To Richard Roe, Esq., *Defendant.*

This notice ought to be served by making a copy of it, and delivering it personally to the defendant a reasonable time before the trial, so that he may have time to search for it if necessary, or so that he may have a reasonable opportunity to obtain his witnesses to testify in relation to the paper when produced.

It is best to serve a written notice, so as to avoid any question as to the sufficiency of the notice, either in form or in substance; for if the notice is a written one, there can be no dispute as to what the notice really was, but merely as to its effect, or as to the time of its service.

The notice ought to describe the paper required in the most particular manner that can be reasonably done, so that the party who is required to produce it may have full information of the paper which he is required to produce. In most cases such a

description can be given as will leave no room for doubt as to the paper desired, nor any reasonable excuse for saying that the notice was not sufficiently specific.

The reference to a paper may be to its date, the names of the parties to it, the nature of the paper, the object for which it was made, the person who witnessed it, or the person for whose benefit it was executed.

The proof of the service of the notice should be made orally on oath before the justice who tries the cause, and not by affidavit, so that the party may be cross-examined. *Willard* v. *Germer*, 1 Sandf., 50. If a party insists that the notice was not served in time, he ought to refuse to produce the paper, and then object to parol evidence of its contents; for if he produces the paper he will waive the objection as to the sufficiency of the notice. *Ib.*

The service of a notice on a party requiring him to produce a paper does not compel him to produce it, like the service of a subpœna, *duces tecum;* the only effect of the notice is to permit the introduction of parol evidence as to the contents of the paper in cases in which due notice has been given to produce it, and a refusal to do so. *Edmonstone* v. *Hartshorn*, 5 E. P. Smith, 9.

If the paper is not in the possession of the party served, nor under his control, the service of the notice will not authorize the introduction of parol evidence of its contents; as in the case of the service of a notice on the plaintiff to produce a letter which was written to his assignor, which was held insufficient. *Chaffee* v. *Cox*, 1 Hilt., 79. The assignor ought to be subpœnaed to produce the paper, in such a case. *Ib.* If he has lost or destroyed it, then parol evidence may be given of its contents. *Ib.*

Two letters were written, one immediately after the other, and were signed by the same person, contained the same words, and addressed to the same person; one was sent to the person addressed, the other retained by the writer; it was held that each was an original or duplicate, and that the one retained might be introduced in evidence, without a notice to produce the other. *Hubbard* v. *Russell*, 24 Barb., 404.

Before a certified copy of a paper is evidence, or before parol evidence can be given of the contents of a paper, it must be shown that there was an original which was duly executed. *Fellows* v. *Hyring*, 23 How., 230; *Metcalf* v. *Van Benthuysen*, 3 Comst., 424. As to the compulsion of an attorney to produce a paper belonging to his client, see Privileged Communications.

The loss of a paper may be shown by the party who owned it, if he lost it; or by any other person who may have lost it or destroyed it. Since the amendment of the law, permitting parties to swear as witnesses for themselves, the statute authorizing parties to prove the loss of papers, becomes of little consequence, and no reference will be made to the cases on that question.

Form of oath.

You do swear that you will answer truly all such questions as may be put to you in relation to the loss or destruction of (describe the paper).

The form may be varied, so as to prove the service of a notice to produce a paper, &c., or as to any matter in which proof is required to be made. After being sworn, the party is examined on his own behalf; and he may then be cross-examined by the opposite party.

This evidence is intended for the justice alone, to enable him to determine whether parol or secondary evidence shall be admitted. The proof of the loss of a paper will be sufficient, whenever it appears that the party has made all due and reasonable search for it, in those places in which it was usually kept, or in which it might reasonably be expected to be found, if such search is unsuccessful.

The question is peculiarly one for the justice, and he will only require such proof as satisfies him that an honest attempt has been made to produce the paper, and a failure to find it after a reasonable and diligent effort for that purpose. The opposite party may be sworn for the purpose of rebutting or explaining the evidence given, to show the loss of a paper, and he will also be liable to cross-examination.

A paper produced, on notice, by the adverse party, must be proved by him who offers it, in like manner as if he had himself produced it, unless the party who produces it is a party to the instrument, or claims a beneficial interest under it.

A notice to produce a paper need not be given but once; and if once regularly given, the party on whom the notice is served will be bound to produce the paper at the trial, notwithstanding the cause may be adjourned several times after such service. *Jackson* v. *Shearman*, 6 Johns., 19. And the notice, properly given in a justice's court, will be sufficient even if the cause is removed to the county court, by appeal, and then tried there. *Wilson* v. *Gale*, 4 Wend., 623; *Reab* v. *Moore*, 19 Johns., 337.

SECTION IX.

SUFFICIENT TO PROVE THE SUBSTANCE OF THE ISSUE.

An other general rule is, that the substance only of the issue needs to be proved. This rule is founded on the principles of good sense and justice. If a party proves the substance of the issue, he has proved a substantial ground of action, and is entitled to his remedy. He will not be obliged to prove immaterial averments, which might be expunged from the record without affecting his right to recover. Such averments serve only to encumber the record; and the proof of them would be as immaterial as the averments themselves.

The old law was quite strict as to a variance between the allegations in the pleadings, and the evidence introduced to prove them. But since the enactment of the Code, variances are comparatively of little importance.

"A variance between the proof on the trial and the allegations in a pleading shall be disregarded as immaterial, unless the court

shall be satisfied that the adverse party has been misled to his prejudice thereby." Code, § 64, sub. 10.

Under the rule introduced by the Code, which has been cited, and under sections 169, 170 and 171 of the Code, a liberal system of practice has been established on this subject, and some of the reported cases will fully illustrate the matter.

The cases decided soon after the enactment of the Code were somewhat like the practice under the old law, and variances were regarded in cases in which they would now be disregarded. In one case the complaint alleged that an injury had resulted to the plaintiff's cow, in consequence of the neglect of the defendant, a railroad corporation, in not putting up *cattle guards;* but the proof showed that the injury arose from a neglect to put up *fences*; and this was held to be a material and fatal variance, for which the judgment below was reversed. *Parker* v. *Rensselaer & Saratoga R. R.*, 16 Barb., 315. In an other case, the action was for the recovery of the price of hay sold; the answer alleged that the hay delivered "was very poor, and of very little value." This allegation was held not to authorize proof that "the hay was good for nothing, and that no use could be made of it whatever." *Deifendorff* v. *Gage*, 7 Barb., 18.

The technical strictness of the two cases just cited, is not now followed, but a much more liberal rule is adopted, both in relation to complaints and answers, and the proof offered in support of them. And first, as to complaints. If the complaint alleges a sale and delivery of goods to the defendant, it will be sufficient to prove that the goods were purchased "by order of the defendant," for a third person, and that the delivery of the goods was made to such third person. *Rogers* v. *Verona*, 1 Bosw., 417.

In an action for trespasses upon lands, the plaintiff may prove acts of trespass within the time alleged in the complaint, and he may also prove acts of trespass committed prior to the time alleged in the complaint, although this could not have been done under the old practice. *Relyea* v. *Beaver*, 34 Barb., 547. The decision does not turn upon the materiality of the variance between the allegations in the complaint and the proof, but the question whether the opposite party has been misled or will be prejudiced by the admission of the testimony. *Ib.*

In an action of trespass for a forcible and wrongful taking of goods from the possession of the plaintiff, he need not allege the ownership of the goods; but if he does allege it, and the answer denies it, the issue will be immaterial, and no proof need be given by the plaintiff to sustain the allegation. *Kissam* v. *Roberts*, 6 Bosw., 154, 163. As against a mere wrongdoer, possession is all that need be alleged or proved. *Ib.* And if the defendant had set up title to the property in a third person, he must, in some manner connect himself with it, to constitute a legal defense to the action. *Ib.*

In an action for the recovery of money due for services rendered, the complaint alleged that a specified sum was due for

services rendered at a time specified; the answer was a general denial. On the trial the plaintiff proved that he worked for the defendant for six months, and that he was to be paid one dollar a day. The evidence also disclosed the fact that there was a written contract in existence, which the defendant offered in evidence, but it was rejected, because it was inadmissible under the pleadings. This was held erroneous, and the question was decided to be one of evidence and not of pleading. *Harris* v. *Story*, 2 E. D. Smith, 363.

So where the complaint claims to recover for work and labor performed, and the complaint is founded upon a special agreement only, which is not proved, the plaintiff will be entitled to recover for services rendered, if the proof authorizes it, if no objection is made as to the variance; and if an objection of that kind is raised, the justice ought to allow an amendment of the complaint. *Irvine* v. *Wortendyke*, 2 E. D. Smith, 374. So if the action is founded upon contract, and the complaint alleges that the defendant received money as an agent and supercargo of the plaintiff, and that he omits or refuses to account and pay over; and the answer alleges that the transaction between the plaintiff and the defendant was a joint adventure; and the court, jury, or referee, find as a fact, that the answer is true, this is not a material variance, since it establishes the substance of the complaint, which is an indebtedness of the defendant to the plaintiff; and, therefore, the plaintiff cannot properly be nonsuited, nor his complaint be dismissed for that reason. *Poirer* v. *Fisher*, 8 Bosw., 258. The fact that the defendant was arrested in the action as an agent, does not make any difference to the rule. *Ib.*

In an action on the case for a false warranty, in the nature of an action for a deceit, it is not necessary to allege or to prove fraud on the part of the seller of the goods; it is sufficient to allege and establish the warranty, and that it is false. *Fowler* v. *Abrams*, 3 E. D. Smith, 1. If an action is brought for the recovery of the price of goods sold and delivered, and the complaint alleges such sale and delivery, it will be sufficient proof to authorize a recovery by the plaintiff, if he establishes by evidence that the defendant took personal property belonging to the plaintiff, and converted it to his own use by selling it and receiving the money therefor. The plaintiff is authorized by law, to waive the tort, and to claim to recover for goods sold and delivered, if he elects to do so. *Harpending* v. *Shoemaker*, 37 Barb., 271. To reject evidence, showing the conversion of the property in such a case, when it is offered by the plaintiff, is erroneous. *Ib.* If, however, the complaint is framed for the recovery of money, in an action upon *contract*, he will not be permitted to recover by proving a cause of action for a *fraud*. *Fisher* v. *Fredenhall*, 21 Barb., 82. But, even in that case, under the recent cases, the justice would be authorized, if not required, to grant an amendment of the complaint, on terms. Though it has been held, in a late case, that where the complaint was framed so as to allege a wrongful

conversion of personal property, it would not be sufficient to establish a mere breach of duty on the part of the defendant, which would be a different cause of action; and the variance was held to be fatal, and not amendable, and a nonsuit was granted. *Moore* v. *McKibbin*, 33 Barb., 246. Such a case is not a mere variance, but an entire failure to prove the cause of action. *Ib.* The complaint need not allege that an instrument sued on is a sealed one, and if it alleges a cause of action upon contract, the proof of a cause of action, by the production of a sealed instrument, is not a variance, nor was it so, even under the old practice. *Smith* v. *Kerr*, 3 Comst., 144; *Mosher* v. *Lawrence*, 4 Denio, 419. Where there is a variance between some of the allegations of a complaint and the proof, and nothing more appears, the court has no power to nonsuit, on the mere ground that such variance, whatever it may be, is material. *Chapman* v. *Carolin*, 3 Bosw., 456. If the variance operates to mislead the defendant, the court must grant an amendment of the complaint, upon such terms as shall be just to the defendant, such as granting an adjournment, if necessary, besides the imposition of such costs as will result from granting the amendment and the adjournment. *Ib.*

When it appears that the defendant was not, and could not have been, misled by a variance between the allegations in the complaint and the evidence introduced, the variance may be disregarded without any amendment. *Craig* v. *Ward*, 36 Barb., 377. But, when all the material allegations in the complaint are denied, and the plaintiff, instead of proving the facts alleged in the complaint, disproves them, he will not be entitled to recover, although he may have established facts which would entitle him to recover in an other action for a distinct cause of action, which was entirely inconsistent with the one set out in the complaint. *Saltus* v. *Genin*, 3 Bosw., 250. In an action to recover for money paid, laid out, &c., by the plaintiff for the defendant, the plaintiff will not be permitted to introduce evidence to charge the defendant as indorser of a promissory note. *Cottrell* v. *Conklin*, 4 Duer, 45. The complaint may be amended so as to admit the proof. *Ib.* The proper time to object to a variance between the allegations in a complaint and a paper offered in evidence, is when such paper is offered. *Mosher* v. *Lawrence*, 4 Denio, 419.

An objection that the case made by the proof on the trial, varies from the allegations in the complaint, must be distinctly made at the trial, in the court below, or it will be waived, and will not be heard on an appeal. *Belknap* v. *Sealey*, 4 Kern., 143; *Barnes* v. *Perine*, 2 Kern., 18.

The rules as to variances between the evidence and the allegations in the answer, are similar to those in relation to complaints.

When the defense set up in the answer differs, in its entire scope and meaning, from the evidence introduced on the trial, the court cannot treat it as a mere variance, and disregard it, nor

direct the answer to be amended so as to conform it to the facts proved. *Texier* v. *Gouin*, 5 Duer, 389.

In the case last cited, the action was brought by the plaintiff as indorsee against one defendant as maker and the other as indorser of a promissory note. The answer admitted the making and indorsement of the note, but set up that it was without consideration; and, also, that it had been transferred to the plaintiff merely as a collateral security, and had been obtained by false representations. On the trial the defendants offered, and were permitted to show payment of the note by the maker, under the objection of the plaintiff; and the defendants had judgment, which was reversed on an appeal on the ground that the evidence was not admissible under the allegations in the answer. But, even in such a case, the court has power to amend the pleadings at the trial, upon such terms as may be just. Code, § 64, sub. 10. The rule now established by the court of appeals is, that, though an answer may set up a defense defectively, even in a matter of substance, the court will not be authorized to reject evidence in proof of the defense at the trial. *White* v. *Spencer*, 4 Kern., 247, 250. If a pleading is defective in substance, it ought to be demurred to, and if this is not done, the party pleading the defective matter will be permitted on the trial to establish such defense fully by evidence, since the opposite party could not be misled in such a case.

A variance between the allegations in the answer and the evidence must be disregarded, unless the evidence varies in its entire scope and meaning from the defense set up. *Cobb* v. *West*, 4 Duer, 38. In the last case cited, the action was for the recovery of money claimed to be due for work and labor performed, and materials furnished, in repairing a building. The defense was a general denial; and a special defense, alleging that the plaintiff agreed with the defendants to support and keep up the building and earth on a specified lot, during the excavations for the cellars for adjoining buildings, &c., and to furnish all the materials and do the labor for the sum of $500, to be paid when the work was completed. The evidence was, that the plaintiff agreed for $200, to keep up the building in good order, and to leave it well supported. It was also proved that the defendants had a right to stop the plaintiff in the work at any time, by paying him for what he had done. It was held that the defense was established, and that the omission of the allegations in the answer as to the right of the defendants to stop the work was immaterial.

If an answer alleges a tender of money, it will be proper and sufficient evidence to show a waiver of the tender, as proof of the averment of the tender itself. *Holmes* v. *Holmes*, 5 Seld., 525. For other illustrations of the cases, as to variances between allegations and proof, see Voorhies' Code, and the notes to sections 169, 170, 171. The cases cited are sufficient to illustrate the liberality which the court indulges, in relation to variances between the evidence and the allegations in the pleadings. As

the practice now stands, there are few cases in which an amendment of the pleadings may not properly be made, for the purpose of obviating the objection, and for the furtherance of justice. The law in relation to amendments will be fully discussed elsewhere.

SECTION X.

BURDEN OF PROOF.

There are several general rules which are of great use in determining whether the plaintiff or the defendant will have to prove the issue on record. One of the most useful of these rules, is that one which requires that the point in issue is to be proved by the party who asserts the affirmative, that is, the affirmative in substance, not in mere form. Upon the party who has to give such proof, is said to rest the burden of proof; or, as it is technically called, the *onus probandi*. One of the surest tests for ascertaining upon which side the affirmative really lies, is, to consider which party would be successful if no evidence at all were given; or, what amounts substantially to the same thing, to examine whether, if the particular allegation to be proved were struck out of the answer or other pleading, there would or would not be a defense to the action, or an answer to the previous pleading. In an action for the recovery of money, alleged to have been lent to the defendant, if the answer contains a general denial of the complaint, the burden of proof will evidently be upon the plaintiff. But, in such a case, if there were no denial of the loan of the money, or of the allegations in the complaint, but the defendant interposed an affirmative defense alone, in which he alleges payment of the money, the burden of proof would be on the defendant to show payment, because the answer admits the loan, and the only question to be tried is, whether it has been repaid, and, on that issue, the defendant holds the affirmative.

There are cases in which both parties hold the affirmative as to the issues to be tried, as, where the plaintiff sues for the recovery of money lent, as in the case supposed, and the defendant interposes a general denial, and also a claim for a set-off. In such a case, the plaintiff would be bound to prove his case; and if he does so, and then rests his case, the defendant will then be required to establish his set-off by evidence, or it will not be allowed.

In determining who is bound to introduce evidence to sustain his side of the case, it is important to recollect that there are cases in which some legal presumption stands for proof until it is rebutted; and that, although the issue may, in form, cast the affirmative on a party, yet this legal presumption is still sufficient proof until the presumption is rebutted by evidence on the other side.

Whenever the law presumes in favor of the affirmative, it lies on the party who denies the fact, to prove the negative. In an action upon a bill of exchange or a promissory note, if the defend-

ant answers that there was no consideration for it, he must prove that fact, for the law presumes a good consideration. *Lacey* v. *Forrester*, 2 C. M. & R., 59.

So, where the negative involves a criminal omission by the party, and, consequently, where the law, upon general principles, presumes his innocence, the affirmative is presumed; and, therefore, when an action was brought against the defendant for putting a dangerous commodity on board of a vessel, as freight, without giving notice thereof to the captain or other person on board, whereby a loss ensued, it was held that the plaintiff was bound to prove that notice was not given. *Williams* v. *East India Co.*, 3 East, 192.

It is sometimes important to a defendant to insist that the burden of proof is upon the plaintiff, as in the cases mentioned, especially if the plaintiff is unprepared to substantiate the allegations by evidence. But the question generally arises upon the question who shall have the right to begin, as it is sometimes termed.

The general rule is, that the party who holds the affirmative of the issue is entitled to introduce his evidence first, and in reply; and he has also the right to open the case and to close the argument in summing up to the court or jury. This is frequently a matter of much importance, and for that reason the rules will be further explained as to the right to begin.

In an action upon a promissory note, if the only defense interposed is usury, the defendant is entitled to begin, as a matter of right, and to refuse it is error. *Huntington* v. *Conkey*, 33 Barb., 218; *Ayrault* v. *Chamberlain*, Id., 229. But in actions in which the claim is for the recovery of unliquidated damages, and the plaintiff has any thing to prove on the question of damages, or otherwise, he is entitled to begin. *Ib.; Fry* v. *Bennett*, 3 Bosw., 200, 233. In an action for the recovery of money, if the only defense is payment, and no evidence is given at the trial, the plaintiff will be entitled to recover nominal damages, but nothing more. *New York Dry Dock Co.* v. *McIntosh*, 5 Hill, 290. In such a case, if the defendant proves the payment of any sum, the plaintiff will then be bound to prove that his demand exceeds the payment, unless that fact appears in some other way. *Boyd* v. *Weeks*, 5 Hill, 393; *S. C.*, 2 Denio, 321.

So, in an action of trover for a watch, if the answer does not deny the value of the watch, that is not an admission that the value is that stated in the complaint; that is a matter which must be proved in such a case, or even in case of a default to answer at all. *Connoss* v. *Meir*, 2 E. D. Smith, 314. The plaintiff is sometimes required to prove a negative, as we have already seen.

There are, however, exceptions to that rule, if the matter to be proved lies especially within the knowledge of the defendant, and where he may show the affirmative very easily.

In an action to recover a penalty for selling spirituous liquors without a license, it will be sufficient for the plaintiff to prove the

sale of such liquors, without proving that the defendant had no license. That evidence is a matter of defense, and the defendant will be bound to show a valid license or he will be liable to the penalty. *Potter* v. *Deyo*, 19 Wend., 361; *Mayor of New York* v. *Mason*, 1 Abb., 344.

In an action against a defendant who sets up a bankrupt's discharge, the plaintiff is bound to prove any matter which he claims invalidates it, since it is presumed to be valid. *Sherwood* v. *Mitchell*, 4 Denio, 435. The defendant would, however, be bound to prove the discharge itself, like any other affirmative matter; but when proved it would be presumed valid.

Whenever the pleadings throw the affirmative of the issue upon the plaintiff, as to any matter of proof, or as to any one of the defendants, where there are several, he will be entitled to open and close the case. But during the course of a trial the burden of proof frequently changes from side to side, according to the state of the evidence.

In an action upon a note, if the answer denies its existence or validity, and then interposes a defense by way of set-off, the burden of proof will be upon the plaintiff, in the first instance. But after the proving of the execution of the note, the burden shifts to the defendant, who must meet the proof offered, if he wishes to rebut it; and if he relies upon his set-off, he must prove it. If he proves the set-off, and also gives evidence as to the execution or validity of the note, the burden of proof again shifts to the plaintiff, who may give evidence in reply to the matter of executing the note, and also in contradiction or by way of avoidance as to the set-off.

This shifting of the burden of proof during the course of the trial has nothing to do with the question as to who shall begin or open and close the case. If it belongs to either party, at the commencement of the trial, the right continues to the close of the case.

SECTION XI.

RELEVANCY OF EVIDENCE.

The object of every trial is to ascertain the truth of the allegations put in issue; and no evidence is admissible which does not tend to prove or disprove such issues. It is not necessary that the evidence should bear directly upon the particular matters in issue, for the evidence offered may be relevant and material otherwise. In an action upon a promissory note, it would be offering evidence directly upon the issue, if a witness were called to prove the execution of the note in his presence; but evidence to impeach the character of that witness would be equally relevant and competent, although the evidence bears collaterally upon the issue. *Newton* v. *Harris*, 2 Seld., 345; *Whiting* v. *Otis*, 1 Bosw., 420.

It is frequently difficult to determine whether proof of a particular fact offered in evidence will or will not become material, and in such cases it is quite usual, in practice, for the court to give

credit to the assertion of the counsel who tenders such evidence, that the fact will turn out to be material. The court, however, is not bound to take that course; and if the evidence is objected to by the other side, the court may require the counsel offering the evidence to show how it will become material, by stating what other facts are proposed to be proved in connection with the offered evidence. If the party is required thus to show how the evidence is material, he will be bound to do so, or the evidence may be properly rejected. *Roy* v. *Targee*, 7 Wend., 359; *First Baptist Church of Brooklyn* v. *Brooklyn Fire Ins. Co.*, 23 How., 448; *Van Buren* v. *Wells*, 19 Wend., 203; *Adsit* v. *Wilson*, 7 How., 64; *Cass* v. *New York & New Haven R. R.*, 1 E. D. Smith, 523. Care ought to be taken in offering to prove propositions. An offer to prove two connected facts, one of which is relevant and one of which is irrelevant, will justify the court in rejecting the entire offer. *Harger* v. *Edmonds*, 4 Barb., 256. So, too, in offering evidence, care ought to be exercised as to the manner of offering it. When an offer is made to prove connected facts or propositions, some of which are admissible and others of them inadmissible, the court may legally reject the entire evidence. *Hosley* v. *Black*, 26 How., 97. In such a case the proper course would be to offer each proposition separately. If evidence is offered and it is excluded, on the ground that it is irrelevant and immaterial at the time of the offer, such exclusion will not be erroneous, nor will the rule be changed by the fact that in the subsequent course of the cause facts are proved which would have rendered the rejected evidence admissible, if offered after such facts were proved. *Heroy* v. *Kerr*, 8 Bosw., 194. In such a case the proper practice is to renew the offer of such excluded evidence after proof has been given which renders it admissible; and if it is then rejected, it will be error. *Ib.*

Evidence which is apparently irrelevant may be shown to be relevant by either referring to matters already proved in the cause, or by a statement of some additional evidence which is offered to be given in connection with the proposed fact. It is always proper to ascertain as certainly as possible that the evidence offered is relevant and material before it is received. But there are times when it is not advisable to apprise the witness about to be examined of the facts expected to be proved by him; or the counsel himself may not be sufficiently advised as to the facts; these or any other sufficient reasons are to be weighed by the justice upon such a question. But, in every case, counsel are bound, if required, to inform the *court* how the evidence is relevant, so that he may act understandingly in relation to the admission of the evidence. This may be done by making the statement in writing and handing it to the court.

Evidence to impeach the character of a witness called by the opposite party is always relevant; so of evidence to sustain the character of a witness which has been thus attacked. *Newton* v. *Harris*, 2 Seld., 345. So, on cross-examination, it may be shown

that the witness is hostile to the party against whom he is called, and that he has made statements indicating such hostility, and if he denies making such statements, he may be contradicted by other witnesses. *Ib.*

Evidence may be admissible as against one of two defendants, but not as to the other; in that case the evidence must be received, but it must be limited in its effect to the defendant against whom it is admissible, and be disregarded by the court and jury as to the other. *Black* v. *Foster*, 28 Barb., 387; *Fox* v. *Jackson*, 8 Barb., 355. An objection to the evidence should not be general in such a case, but should be limited to the evidence improperly offered. *Ib.*

In an action of replevin by a vendor against the general assignee of a fraudulent vendee, it is competent to show that the vendee made fraudulent representations upon which he obtained the goods; and the plaintiff may also show that the vendee obtained goods at other places by similar frauds at about the same time. *Hall* v. *Naylor*, 4 E. P. Smith, 588; *Cary* v. *Hotailing*, 1 Hill, 311, and cases; *King* v. *Phillips*, 8 Bosw., 603.

So, on the sale of goods in which it is alleged that there was a fraud in the sale, it is competent to show that the defrauded party subsequently ratified the sale with full knowledge of all the facts. *Bronson* v. *Wiman*, 4 Seld., 182. And his declarations to that effect are proper evidence. *Ib.*

Evidence to prove that the acceptance of a bill of exchange was obtained by false representations of existing facts is relevant, although there is no offer to show that the misrepresentations were known to the holder of the bill, because such evidence would be sufficient to cast on the holder the burden of proving a valuable consideration. *New York, &c., Bank* v. *Gibson*, 5 Duer, 574.

So, where an action is brought for the recovery of damages for a personal injury occasioned by the negligence of the defendant, and resulting in a loss of services by the plaintiff in his business, evidence showing how much the plaintiff was earning from his business, or realizing from fixed wages, at the time of the injury, is relevant and competent, and therefore admissible. *Grant* v. *City of Brooklyn*, 41 Barb., 381.

In an action against a defendant for a breach of his covenant to do certain acts, it is not competent to show that he was prevented by inevitable accident, nor is evidence of excuse of non-performance thereof, admissible under an answer alleging performance. *Oakley* v. *Morton*, 1 Kern., 26. But, in an action against a carrier for the non-delivery of goods at a distant place, where the plaintiffs failed to give evidence of the market value of the goods at the place of delivery, it was held that the defendant might give in evidence their market value at the place where they were shipped, and the expense of transportation, as a proximate method of ascertaining the damages. *Richmond* v. *Bronson*, 5 Denio, 55.

In an action against a railroad corporation for injuries received in consequence of the negligent manner in which its cars were run, it is relevant to ask a competent witness within what distance such a train as the one in question could be stopped with ordinary brakes, on an ascending grade, running at such a rate of speed that a man could run faster on foot than the train was going at the time. *Mott* v. *Hudson River R. R.*, 8 Bosw., 345.

Evidence which is clearly irrelevant may be excluded by the court on its own motion, even if both parties are willing to receive it. *Corning* v. *Corning*, 2 Seld., 97; *Cooper* v. *Barber*, 24 Wend., 105. No court is bound to waste its time by sitting to hear such evidence. *Ib.* Evidence may be competent to prove the fact proposed, and yet it may be irrelevant, because the fact proposed is itself irrelevant under the issues made by the pleadings. *Purchase* v. *Mattison*, 6 Duer, 587.

But relevant evidence cannot properly be excluded because it was not noticed by counsel in opening the case or defense. *Nearing* v. *Bell*, 5 Hill, 291. Evidence to contradict facts admitted by the pleadings, is neither relevant nor competent.

A party who seeks to reverse a judgment on account of the exclusion of evidence offered by him, must show affirmatively by his exceptions, case or return, that the evidence was relevant at the time when it was offered and excluded. *Van Amringe* v. *Barnett*, 8 Bosw., 358.

SECTION XII.

WRITTEN EVIDENCE.

Written instruments are, first, of a public nature; secondly, of a mixed nature, partly public and partly private; thirdly, of a private nature.

Public documents, again, are either judicial; or, secondly, not judicial; and, with a view to their means of proof, they are either, first, of record; or, secondly, not of record. A complete review of this subject is not consistent with the nature or the plan of this work, and, therefore, nothing but the most common and most useful principles and cases will be noticed.

The manner of proving the statutes or the common law of other states, nations, governments or territories is provided for by the Code, § 426; Vol. I, 35.

The statutes of this state may be read from the printed volumes, properly certified by the secretary of state. 1 R. S., 460, § 19, 5th ed.

A record may be proved, either, first, by mere production, without more; or, secondly, by copy. Copies of records are either exemplifications; or, secondly, copies made by the authorized officer; or, thirdly, sworn copies. An exemplification is under the great seal, or under the seal of a particular court.

The reason of permitting a copy to be given in evidence in such cases, is the inconvenience to the public of removing such documents, which may be wanted in two different places at the

same time. When any record is exemplified the whole must be exemplified, for the construction must be gathered from the whole taken together. The seals of every court of record prove themselves, and are supposed to be known to all persons. There are many cases in which the law makes a copy of a record or paper evidence, when properly certified by the clerk with whom it is deposited. These cases will be noticed in a proper place hereafter.

Not only records, but all public documents which cannot be removed from one place to an other, may be proved by means of a copy proved on oath to have been examined with the original. This is a deviation from the general rule, that the best evidence must always be produced, but it is permitted for the sake of public convenience.

The copy must be one of a complete record, for until it becomes a permanent record it is transferable, and the reason for admitting a copy does not apply. The copy, too, should be of the whole record, or of so much, at least, as concerns the matter in question; and, moreover, it ought to be an exact copy, and, therefore, if it contains abbreviations, and the original is written in words at length, it will not be admissible.

It is a general rule, that whenever the original is of a public nature, a sworn copy is evidence, and that whenever the thing to be proved would require no collateral proof upon its production, it is provable by a copy. But where the document when produced would require support from collateral proof, it has been thought that a copy is not admissible, as in the case of a paper in which it would be necessary to prove the handwriting of a party to such paper.

When admissible, the copy must be proved by one who swears that he has compared it with the original, taken from the proper place of deposit. It was formerly thought sufficient for this purpose, either that the witness should have read the copy whilst an other read the original, or *vice versa*, for it would not be presumed that a person willfully misread the record; but it has since been determined that it is not sufficient that the witness holds the copy, while an other reads the record; there must be a change of hands, or the witness must himself read the copy with the original. *Slane Peerage*, 5 Cl. & F., 24; *Harrison* v. *Borwell*, 10 Sim., 380. It is not necessary, however, that the record should have been read by an officer of the court. *Gyles* v. *Hill*, 1 Camp., 471. But, before a document can be read as a copy of a record, it must be proved that the original either came out of the hands of the officer of the court, or from the proper place of depositing the records of the court of which it purports to be a record, and the contents of the document itself cannot be referred to in support of such proof. *Adamthwaite* v. *Synge*, 1 Stark., 183. A copy is never admissible where the original is produced.

A chattel mortgage may be proved by a copy, certified by the town clerk with whom it is deposited, Vol. I, 175, but it is not

admissible until the existence of the original is proved. *Fellows* v. *Hyring*, 23 How., 230. But see *Bissell* v. *Pearce*, 1 Tiff., 252. The proof of the deeds. mortgages and other instruments which are acknowledged, will be explained elsewhere. See Acknowledgments.

The existence of corporations may be shown by certified copies of the certificate of incorporation, when such copy is duly certified by the clerk or officer with whom the original is deposited. Such incorporations are very numerous, and are daily increasing in number, among which are railroad and steamboat companies. banking associations, turnpikes, plank roads, building associations, gas companies, manufacturing, mining, mechanical or chemical companies, and the like.

Certificates of the incorporation of villages, or transcripts from the record thereof, certified by the county clerk with whom the originals are filed, are presumptive evidence of the facts therein stated. 2 R. S., 719, § 80, 5th ed.

A will, which has been duly proved and admitted to probate, may be proved by the original record, or by an exemplification of it. "Every will so proved, shall have a certificate of such proof indorsed thereon, signed by the surrogate and attested by his seal of office, and may be read in evidence without further proof. The record of such will, made as aforesaid, and the exemplification of such record, by the surrogate in whose custody the same may be, shall be received in evidence, and shall be as effectual, in all cases, as the original would be, if produced and proved, and may, in like manner, be repelled by contrary proof." 3 R. S., 140, § 11, 5th ed.

An exemplification of the record of a will ought to include the proofs; and if it does not include the entire record, including the proofs, it is not admissible in evidence. *Morris* v. *Keyes*, 1 Hill, 540. The record is but *prima facie* evidence of the authenticity of the original. *Ib.* But when the will relates exclusively to personal estate, and it is proved before a surrogate who has jurisdiction of the subject, and he adjudges the will to be duly executed, his decision is conclusive as to the execution thereof, when the. question arises in a collateral action, notwithstanding it is shown that there was but a single subscribing witness to the will. *Vanderpoel* v. *Van Valkenburgh*, 2 Seld., 190, 199.

"Every written instrument, except promissory notes and bills of exchange, and except the last wills of deceased persons, may be proved or acknowledged in the same manner now provided by law for taking the proof or acknowledgment of conveyances of real estate; and the certificate of the proper officer indorsed thereon shall entitle such instrument to be received in evidence on the trial of any action, with the same effect and in the same manner as if such instrument were a conveyance of real estate." 3 R. S., 690, § 101, 5th ed.; Laws of 1833, ch. 271, § 9.

A bond of indemnity given to a sheriff may be proved in this manner. *Campbell* v. *Hayt*, 23 Barb., 555. But when the acknowledgment is taken by a justice of the peace or a commissioner of

deeds, and the instrument is to be used as evidence out of the county in which such justice or commissioner resides, there must be a certificate of the county clerk residing in the county with such justice or commissioner, showing that the latter was an officer authorized to take acknowledgments, or the instrument cannot be received in evidence. *Ib.*; and see *Wood* v. *Weiant*, 1 Comst., 77.

County clerks and town clerks are authorized to make certified copies of many different kinds of papers, and those copies are received in evidence instead of the originals.

"Whenever a certified copy of any affidavit, record, document or other paper is declared by law to be evidence, such copy shall be certified by the clerk or officer in whose custody the same is required by law to be, to have been compared by him with the original, and to be a correct transcript therefrom, and of the whole of such original; and if such officers have any official seal by law, such certificate shall be attested by such seal, and if such certificate be given by the clerk of any county, in his official character as such clerk, it shall be attested by the seal of the county court of the county of which he is clerk." 3 R. S., 687, § 74, 5th ed.

"But the last section shall not be construed to require the affixing of the seal of any court to any certified copy of any rule or order made by such court, or of any paper filed therein, when such copy is used in the same court, or before any officer thereof, nor to require the seal of the supreme court to be affixed to a certified copy of any rule or order of that court, when used in any circuit court." *Ib.*, § 75.

"In all cases where a seal of any court, or of any public officer, shall be authorized or required by law, the same may be affixed by making an impression directly on the paper, which shall be as valid as if made on a wafer or on wax." *Ib.*, § 76.

"In all cases, where the seal of a corporation is authorized or required by law, the same may be affixed by making an impression directly on the paper, which shall be as valid as if made on wafer or on wax. *Ib.*, § 77. Laws, 1848, ch. 197, § 1.

County clerk's certificate of a copy of record, &c.

STATE OF NEW YORK,
FULTON COUNTY CLERK'S OFFICE,
January 24, 1865.

I, Mortimer Wade, clerk of the county of Fulton, do hereby certify, that I have compared the foregoing copy of a (bond, or whatever the instrument may be), and of the indorsements thereupon, with the original records of the same remaining on file in this office (or, with the originals now remaining on file in this office), and that the same are correct transcripts therefrom and of the whole of such originals.

In testimony whereof, I have caused the seal of the county court of [L. S.] said county to be hereunto affixed, this 24th day of January, 1865.

MORTIMER WADE.

Town clerk's certificate of a copy of paper, &c.

STATE OF NEW YORK, }
COUNTY OF FULTON AND TOWN OF BROADALBIN. }

I, Charles Allen, town clerk of the town of Broadalbin aforesaid, do hereby certify that I have compared the foregoing copy of a chattel mortgage (or other paper, describing it by name), and of the indorsements thereon, with the original mortgage (or other paper) now on file in this office, and that the same is a correct transcript of such original chattel mortgage (or other paper) and of the said indorsements, and of the whole of the said originals.

In witness whereof, I have hereunto set my hand, this 24th day of January, 1865. CHARLES ALLEN.

Where the official character of the clerk is not stated in the body of the certificate, as in the preceding forms, the clerk should add his official title to his name. When the certificate shows the officer's character, that will be *prima facie* evidence that he is such officer. *Thurman* v. *Cameron*, 24 Wend., 87. But, if the certificate does not show the official character of the person who signs the certificate, that fact may be shown by other evidence.

The certificate must conform to the requirements of the statute in relation to the matters which are required to appear in it, or it will not be sufficient to authorize the reading of the copy of the certified paper in evidence. See *ante*, 421, § 74. That section requires the certificate to show that the paper certified contains a copy of the whole of the original; it is not enough to state that it is a correct copy.

Where proofs by certified copies of papers are substituted for common law evidence, all the forms directed by the statute, whether preliminary or substantial, must be strictly complied with. *Rogers* v. *Jackson*, 19 Wend., 383, 385.

A justice's official certificate of a judgment is evidence for himself equally with other persons. *Maynard* v. *Thompson*, 8 Wend., 393.

SECTION XIII.

JUDICIAL DOCUMENTS.

Judicial documents may be divided into: *First.* Judgments, decrees and verdicts; *Secondly.* Depositions and inquisitions, taken in the course of legal proceedings; *Thirdly.* Writs, summonses, attachments, warrants, pleadings, complaints and answers, &c., which are incident to legal proceedings. With respect to judgments, decrees and verdicts, may be considered: *First.* Their admissibility and effect; *Secondly.* The means of proving them; *Thirdly.* The mode of answering such evidence.

Judgments, verdicts, &c.] In treating of the admissibility and effect of judgments and verdicts, it is important to consider, in the *first* place, for what purpose a judgment or verdict is offered in evidence; whether with a view to establish the mere fact that such a verdict was given or such a judgment rendered, and those legal consequences which flow from that fact; or, *secondly*, with

a view to a collateral purpose; that is, not to prove the mere fact that such a judgment has been rendered, and so as to let in all the necessary legal consequences of that judgment, but as a medium of proving some fact as found by the verdict, or upon the supposed existence of which the judgment is founded. For, establishing the fact that such a verdict has been given, such a judgment rendered, and all the legal consequences of such a judgment, the judgment itself is invariably not only admissible as the proper legal evidence to prove the fact, but usually conclusive evidence for that purpose; for it must be presumed that the court has made a faithful record of its own proceedings. And, in the next place, the mere fact that such a judgment was given can never be considered as an act done between third persons or strangers, being a thing done by public authority; neither can the legal consequences of such a judgment be so considered; for, where the law gives to a judgment a particular operation, that operation is properly shown and demonstrated by means of the judgment, which is no more a transaction between strangers and third persons than the law which gives it force.

But, with reference to any fact upon whose existence the judgment is founded, the proceeding may or may not be a thing transacted between strangers and third persons, according to the circumstances of the case. For instance, if B., being indicted, is convicted of beating A., the record of the judgment would be incontrovertible evidence of the fact that B. had been so convicted; it would be conclusively presumed that the court had kept a faithful record of its own proceedings. It would also be conclusive, as to all the legal consequences of such conviction. For instance, one of such legal consequences is, that B. shall not be punished a second time for the same offense; and, consequently, the record would be conclusive, when shown to the court, to protect him from a second prosecution for the same offense. So, if B. had been acquitted, and had brought an action against A. for a malicious prosecution, it would have been necessary to prove the fact of acquittal; and here, again, the record would have been conclusive evidence to show that fact. But next suppose, that upon B.'s conviction, A. had brought an action to recover damages for the assault, and had offered to prove the assault by the record of conviction, he would then be offering the judgment, not with the view to prove the mere fact of conviction, or to establish any legal consequence to be derived from it, but for a collateral purpose; that is, to prove the fact upon whose supposed existence the judgment was founded, with respect to such facts; that is, the facts upon which such judgment professes to be founded, and then the judgment may or may not be evidence, according to circumstances, considering the nature of the facts themselves, and the parties.

A record is, in no case, direct and positive evidence of any fact which it recites, as having been found by a jury, or otherwise ascertained; it is in the nature of presumptive evidence only, for

even the jury who found the facts may have acted upon mere presumption, without the aid of any direct evidence. If, therefore, no rule of policy intervened, no verdict could ever establish any more than that the jury, in the particular case, presumed, from some evidence or other, that the fact was true. But public policy requires that limits should be opposed to the continuance of litigation upon the same subject matter, and, therefore, the law will not permit a matter, which has once been solemnly decided by a court of competent jurisdiction, to be again brought into litigation between the same parties or their representatives. Consequently, a judgment between the *same parties*, upon the *same subject matter*, is usually conclusive, as to private rights.

On the other hand, it is an elementary rule of law and a principle of justice, that no man shall be bound by the act or admission of an other to which he was a stranger; and consequently no one ought to be bound, as to a matter of private right, by a judgment or a verdict to which he was not a party, where he could make no defense, from which he could not appeal, and which may have resulted from the negligence of an other, or may even have been obtained by means of fraud and collusion.

Under the old rules of evidence, such a judgment or verdict was rejected as evidence, because it might have been founded upon the evidence of the party who claims a benefit from it, and he would thus receive the advantage which would result from his evidence, when he could not be a witness in the action in which such judgment might be offered as evidence.

This rule no longer exists, since either party may be a witness, and the reason of the rule also ceases. But there is an other rule which operates to exclude such a verdict or judgment, as evidence, on a matter of private right, which is this: a person who could have received no prejudice from the verdict, had it been given the contrary way, shall not derive any benefit from it when it turns out to be in his favor, and because a judgment operates by way of estoppel, and estoppels must be founded upon mutuality.

The admissibility and effect of a verdict or judgment is now to be considered, with a view to the proof of the judgment itself *as a fact* and its *legal consequences.* A judgment which was rendered by a person who had competent authority to do so, is evidence to protect him against all actions for any matter judicially done within the scope of that authority. For his immunity is a legal consequence of his acting in that situation, and the judgment is offered, not to prove the truth of the facts upon which it is founded, since, with a view to such a defense, the truth of those facts is not material, but in order to prove the fact of a judgment rendered by a competent authority, and so to establish the immunity of the judge, which is a legal consequence of the judgment. *Horton* v. *Auchmoody*, 7 Wend., 200; *Robbins* v. *Gorham*, 26 Barb., 586; *S. C.*, 11 E. P. Smith, 588; *Mather* v. *Hood*, 8 Johns., 44; *Weaver* v. *Devendorf*, 3 Denio, 117.

There are other cases in which a judgment is allowed to operate in favor of one who was not a party to the action.

In an action by A. against a sheriff or a constable, for wrongfully and unlawfully taking and selling his goods, the defendant may give in evidence a judgment against A. in favor of B. a third person, and also prove that he, the officer, by virtue of an execution issued upon that judgment, seized the goods in question, because they were the property of A., and liable to be sold on execution. So, in an action by A. against a constable for selling his goods, the officer may show in evidence a judgment rendered against B., and that the property belonged to him, and that such property was sold upon such execution.

A judgment on contract against several partners, is *prima facie* evidence for one of the partners against the others, to prove their liability to contribution. So, in an action against a principal for the negligence of his agent, the recovery in the former action, if there is one, is evidence, in an action by the principal against the agent, not to prove the negligence, but to show the amount which the principal has suffered from such negligence; the negligence, however, must be proved by other evidence than the judgment. So a verdict and judgment in a former cause, between other parties, is admissible, for the purpose of introducing evidence to show that a witness gave evidence, on such former trial, which was directly contrary to what he swears on the present trial.

It has been laid down by great authority, that, in civil actions, the judgment of a court of *concurrent* jurisdiction directly upon the point, is, as a plea or answer, a bar, and as evidence, conclusive between the same parties upon the same matter *directly* in question, in an other court; and that the judgment of a court of *exclusive* jurisdiction is, in like manner, conclusive upon the same matter, coming *incidentally* in question in an other court, between the same parties, for a different purpose. But, that the judgment of a court of concurrent or exclusive jurisdiction is not evidence of any matter which comes collaterally in question, though within their jurisdiction, nor of any matter to be inferred by argument from such judgment.

The principal position amounts to this: that no matter, once litigated and determined by a court of competent authority, shall be brought a second time into controversy between the same parties.

It is essential, then, to consider the five following points, viz.: The identity of the parties; the identity of the matter litigated; the nature and manner of the adjudication; the application of the adjudication to the fact to be proved; and the effect of the judgment.

First, then, as to the identity of the parties. The general rule is, that no one can be bound by a verdict or judgment, unless he was a party to the action, or is in privity with the party, or possesses the power of making himself a party; for, otherwise, he has no power of cross-examining the witnesses, or of adducing

evidence in furtherance of his rights; nor could he challenge jurors, or appeal from the judgment; in short, he is deprived of the means provided by law for ascertaining truth and excluding error, and, consequently, it would be repugnant to the first principles of justice that he should be bound by the result of an inquiry to which he was altogether a stranger.

But one who claims in privity with an other, is in the same situation with the latter, as to any verdict or judgment, either for or against him, whether he claims as privy in blood or estate, or as privy in law. Accordingly, the heir may give in evidence a verdict for his ancestor; and a verdict against the ancestor, binds the heir. But, although a verdict and judgment is evidence for one claiming in privity with him, this must be understood of a claim acquired subsequently to the verdict. If a party, after a verdict and judgment against him, assigns his interest, the assignee is bound by the verdict rendered against such assignor.

In an action upon a promissory note or upon an account, if the defense is payment, and there is evidence given, and a verdict is rendered in favor of the defendant, such verdict will be conclusive against any person to whom the plaintiff subsequently transfers the note or account.

If personal property is sold with a warranty of title, and an action is brought against the vendee by a third person who claims title to it, such vendee should give the vendor notice of the pendency of the action, and request him to defend it; if he defends the action and fails, or if he refuses to defend it, after such notice, and the vendee defends as well as he is able, but unsuccessfully, the verdict will be conclusive against the vendor, in an action by the vendee against him for the failure of the title. *Brewster* v. *Countryman*, 12 Wend., 446. And the vendee is not bound to appeal from the judgment rendered against him in the action by such third person. *Ib.* A record of recovery in a former action is not evidence against any but parties or privies to such former suit.

If the former judgment was recovered against a person who was the servant of the party against whom the record is offered in evidence, it will not be admissible, even though such servant attempted unsuccessfully to defend in that character. *Alexander* v. *Taylor*, 4 Denio, 302.

Secondly, as to the identity of the fact. It is essential not only that the parties should be the same, but that the *same fact* should have been in issue in the former action; for if it was not in issue the court or jury could not have passed upon it; nor could there have been any appeal from the judgment rendered thereon.

A verdict for the *same cause* of action between the same parties is absolutely conclusive. And *the cause of action* is the same, when the same evidence will support both actions, although the actions may happen to be different in form. Thus a judgment in trespass will be a bar to an action of replevin for the same goods. And a verdict in trespass or trover will be a bar to an

action for money had and received for the same goods. For further explanation, see Former recovery, &c.

Thirdly, as to the nature and manner of the adjudication. The judgment, decree, sentence or verdict must be directly upon the precise point; and it is not evidence of any matter which came *collaterally* in question, although it was within the jurisdiction of the court, nor of any matter *incidentally* cognizable, nor of any matter to be inferred by argument from the judgment, as having constituted one of the grounds of the judgment. As to the conclusiveness of a former recovery, or as to the necessity of pleading it, see the title Former recovery, &c.

SECTION XIV.

PRIVATE DOCUMENTS OR WRITINGS.

Private writings and entries may, with a view to their operation in evidence, be distinguished into those: *First.* To which the person against whom they are offered was party or privy. *Second.* Entries made by third persons. And they may be considered, first, with respect, to their nature, admissibility and effect in evidence; and, secondly, with respect to the means of proof. Documents offered in evidence against one who was a party or privy to them, are either under seal or not under seal. All documents to which a person was party or privy, are in general admissible in evidence against him, since they operate as acknowledgments or admissions on his part, or that of an other through whom he claims that the facts contained in them are true, particularly if the admission was against the interest of the party so making it.

All written contracts are made for the express purpose of being afterwards used as evidence of the contract; the only difference between sealed and parol contracts in this respect being this— that the former are more solemnly authenticated, and not so easily revoked. So essential is it that the rights of men should be evidenced by documents of this nature, that the law itself requires, in many instances, the evidences of a deed to notify and establish the particular facts, as in the case of a conveyance of lands, &c.; and in many other cases a written contract or memorandum is essential to the validity of the agreement, as in the case of contracts within the provisions of the statute of frauds, or new promises to revive debts barred by the statute of limitations, &c.

As a general rule, an admission under seal is conclusive upon the obligor, and estops him from asserting or proving to the contrary. Thus if the condition of a bond recites that a particular suit is depending in a particular court, the obligor is estopped from saying that there is no such suit there. So, if the condition of a bond be to perform the covenants in a particular indenture or instrument, he is estopped from saying that there is no such instrument, &c.

But, although where a distinct statement of a particular fact is made in the recital in a bond or other instrument under seal, and

a contract is made with reference thereto, it is not competent to the parties bound by that deed to deny the recital in an action upon it between them; and although the same rule may apply where the instrument is not under seal, yet in an action not founded on the instrument, but wholly collateral to it, the parties are not so bound, even in an action between themselves, but may show the circumstances under which the admission was made, in order to prove that it is not entitled to weight.

Under the rules of pleading established by the Code, matters of defense, by way of estoppel, must be pleaded.

As to entries by third persons against their interest, or as to entries in the usual course of business, or as a part of the *res gestæ*, &c., and where they are evidence against other persons. See *ante*, 376, 394.

SECTION XV.

SUBSCRIBING WITNESSES.

The general rule with respect to the proof of private writings is, that where an instrument is attested, the attesting witness ought to be produced at the trial to prove it. This has been the rule from the earliest times, and it is said to be as fixed, formal and universal as any rule that can be stated in a court of justice. There is one exception to the rule in this state. If a bill of exchange or a promissory note is attested by a subscribing witness, he need not be called, if it can be shown by the admissions of the party that he executed the bill or note. *Hall* v. *Phelps*, 2 Johns., 451. In such a case, however, the admission must clearly identify the note. *Palmer* v. *Manning*, 4 Denio, 131; *Shaver* v. *Ehle*, 16 Johns., 201; *Pentz* v. *Winterbottom*, 5 Denio, 51; *Giberton* v. *Ginochio*, 1 Hilt., 218. In other cases the rule is strictly enforced, and the express admissions of the party, however clearly proved, will not dispense with the evidence of the attesting witness.

The subscribing witness to a bond must be called to prove its execution; and the most deliberate acknowledgment of its execution, if made out of court, will not be sufficient. *Fox* v. *Reil*, 3 Johns., 477. So of written sealed contracts executed by both parties. *Henry* v. *Bishop*, 2 Wend., 575.

The execution of a sealed agreement, which has a subscribing witness, cannot be proved by the evidence of one of the parties, who executed such instrument. *Jones* v. *Underwood*, 28 Barb., 481. The change in the law, which permits parties to be witnesses, has not, in any manner dispensed with the rule requiring subscribing witnesses to prove the execution of the contracts attested by them. *Ib.*; *Hollenback* v. *Fleming*, 6 Hill, 303; *Story* v. *Lovett*, 1 E. D. Smith, 153; *Whyman* v. *Garth*, 8 Exch., 803.

A subscribing witness is one who is called by the parties for the purpose of witnessing the execution of the instrument. It does not follow, that a person is a subscribing witness merely because he was proved to be present at the execution of an agree-

ment. If he is present but is not called as an attesting witness, and does not at that time subscribe his name as a witness, he will not be a subscribing witness, who must necessarily be called, although he may affix his name to the paper as a witness, at a time subsequent to its execution. *Henry* v. *Bishop*, 2 Wend., 575; *Hollenback* v. *Fleming*, 6 Hill, 303, 305. If there are subscribing witnesses, they must be called, even though the instrument can be proved by one who was present and saw it signed, and who executed it, as attorney for one of the parties; and, although such instrument has ever since been in his possession, down to the time of the trial. *Ib.* It is not necessary, however, that a witness should be present at the moment of the execution of an instrument. If he is called in by the parties immediately afterwards, and told that it is their deed or agreement, and requested to subscribe his name as a witness, that will be enough. *Hollenback* v. *Fleming*, 6 Hill, 303, 305.

It is now clearly established, that the mere fact that a written instrument came out of the possession of the adverse party, will not, of itself, dispense with the necessity of proving its execution; yet, there is an important exception to the rule, which is of great practical importance at a trial, and that exception is: that when a party who claims a beneficial interest under a written instrument, and he produces it at the trial, under a notice for that purpose, he is not entitled to insist upon proof of its execution, either by the subscribing witnesses, or in any other manner. *Betts* v. *Badger*, 12 Johns. 223; *Jackson* v. *Kingsley*, 17 Johns. 157. This exceptional rule, that when a party produces under notice an instrument under which he claims an interest, he cannot compel the opposite party to prove the execution, is not, however, of universal application. In the first place, it does not apply where the interest claimed has no reference to the subject matter of the action; nor does it apply where the interest is not of an abiding nature; nor is it applicable to those cases where the party wishing to make the instrument evidence has had it in his own custody, and might, therefore, have been prepared to prove the execution.

Where a party claiming an interest under an instrument refuses to produce it, after notice, in consequence of which refusal the other party is obliged to resort to secondary evidence of the instrument, although it appears from the secondary evidence that there were attesting witnesses, it will not be necessary to call one of them, the instrument will be taken, as against the party claiming under it, to be duly executed. If he had produced the original instrument, the proof of execution would have been dispensed with, and by withholding the instrument, and thereby subjecting the other party to inconvenience, he ought not to be entitled to more favor than if he were to produce it.

Where the evidence of none of the subscribing witnesses to an instrument is producible, proof of the handwriting of a subscribing witness will be received.

Proof of the execution of an instrument by a subscribing witness will be dispensed with, when such witness is dead, or incompent to give evidence on account of insanity, or when he is out of the country, or is beyond the reach of a subpœna which is issued by the court in which the trial is had. *Cook* v. *Husted*, 12 Johns., 188; *Teall* v. *Van Wyck*, 10 Barb., 377; *People* v. *Rowland*, 5 Barb., 449.

If the subscribing witness is incompetent because of infamy, by reason of his conviction of a felony, he need not be called. So, if he is out of the reach of a subpœna, but his evidence could be taken upon a commission, the party is not required to take his evidence in this manner, but may prove the instrument in the same manner as though there were no subscribing witness to it. *Glubb* v. *Edwards*, 2 Mo. & R., 300; *Teall* v. *Van Wyck*, 10 Barb., 377; *People* v. *Rowland*, 5 Barb., 449. And proof of the handwriting of such subscribing witness is enough in such a case. *Ib.*

In like manner proof of the handwriting of attesting witnesses may be received, when they cannot be found after strict and diligent inquiry. But every case upon this subject must depend upon its own peculiar circumstances. The search must be diligent, and made in good faith. Diligent inquiry at the former residence of the witness, and information from his former neighbors as to his removal and place of settlement, if out of the jurisdiction of a subpœna, would be a sufficient excuse, because no party could reasonably be required to go farther in pursuit of a witness under such circumstances. *Van Dyne* v. *Thayre*, 19 Wend., 162, 165. Proof that the subscribing witness himself informed a party that his residence was out of the state, or out of the jurisdiction of the court, is sufficient evidence to dispense with his testimony. *People* v. *Rowland*, 5 Barb., 449.

Absence beyond the jurisdiction of the process of the court, is sufficient; it need not be shown that he is out of the state, or out of the country, when the action is in a justices' court, if he is beyond the reach of a justices' subpœna. *McPherson* v. *Rathbone*, 11 Wend., 96; *Teall* v. *Van Wyck*, 10 Barb., 377.

The search and inquiry for a subscribing witness should be made in proper season; and where the subscribing witnesses to a written contract, on which the plaintiff sued, were the sons of the defendant, and the plaintiff made no attempt to subpœna them until the day before the trial, although such defendant and his sons resided sixteen miles from the place of trial; this was held not to be sufficient diligence to dispense with the subscribing witnesses, notwithstanding it appeared that the defendant had told a falsehood to the subpœnaing party, as to the absence of the witnesses. *Mills* v. *Twist*, 8 Johns., 121. Due diligence, and such as would govern a prudent man in a sincere search after a witness, must form the standard in these cases. Information derived from no body knows whom, or belief taken up upon mere conjecture, is certainly not enough. *Van Dyne* v. *Thayre*, 19 Wend., 162, 165.

If the party who is required to call a subscribing witness, is guilty of collusion in keeping him out of the way, he will have to make a clear case before the attesting witness will be dispensed with. *Clark* v. *Saunderson*, 3 Binn., 195, 198; *Crosby* v. *Percy*, 1 Taunt., 365. So, on the other hand, where it is shown that the witness is kept out of the way by the party against whom his evidence is to be given, this will be taken into the account in determining whether the witness may be dispensed with. *Hill* v. *Phillips*, 5 Carr. & Payne, 356. And, where a plaintiff made diligent efforts, in due season, to subpœna a subscribing witness who was a son of the defendant, and who was kept out of the way of the subpœna by the defendant or his family, the plaintiff was permitted to prove the instrument without calling such subscribing witness. *Ib.;* and see *Burt* v. *Walker*, 4 Barn. & Ald., 697.

An instrument, purporting to be attested by a subscribing witness, may be proved as if there were no subscribing witness, where the name of a fictitious witness is inserted as that of an attesting witness; or where the name of a real person has been written upon the instrument, but not by himself; or where the person who has put his name as attesting witness, did so without the knowledge or consent of the parties; or where the attesting witness, on being called, denies any knowledge of its execution. In such cases, the due execution of the instrument may be shown by proving the handwriting of the party, or by his admissions, &c. So, if the subscribing witness fails to establish the due execution of the instrument, the party calling him may establish the fact by other evidence.

If the witness recognizes his signature, and says that he has no recollection of the fact that it was executed in his presence, but, that, on seeing his signature to it, he has no doubt he saw it executed; this is sufficient proof of the execution. *Hall* v. *Luther*, 13 Wend., 491.

If there are several attesting witnesses, the absence of all must be accounted for before evidence of handwriting can be given. *Jackson* v. *Gager*, 5 Cow., 383; *Jackson* v. *Christman*, 4 Wend., 277. But when the absence of all the attesting witnesses is accounted for, it will be sufficient to prove the handwriting of one of them.

If there are several subscribing witnesses, it is not necessary to call more than one, if he can testify to sufficient facts to make the proof; but if he cannot prove any of the signatures but his own, the other witnesses, if living, and competent to testify, and within reach of a subpœna, must be called, or their absence accounted for. *Jackson* v. *Le Grange*, 19 Johns., 386. Before the execution of the instrument can be established, by proving the signatures of the subscribing witnesses, their absence must be duly accounted for. Where this is done, it will be sufficient to prove the signature of the subscribing witness alone; it is not necessary to prove the handwriting of the party. *People* v. *Row-*

land, 5 Barb., 449; *Sluby* v. *Champlin*, 4 Johns., 461; *Lush* v. *Druse*, 4 Wend., 313. But, where proof of the signature of the party can be made, it is always best to establish that, as well as that of the signature of the attesting witness. *Jackson* v. *Waldron*, 13 Wend., 183, 184, 197, 198.

It is always necessary to establish the *identity* of the party, and to show that the person who executed the instrument is the party to the action, or the person to be charged. Identity of name will generally be *prima facie* evidence that the party to the action is the same person who executed the instrument. But, if it is a long time since the signature was made, or if the name is a very common one, and there are several persons of the same name in the vicinity, some additional evidence of identity must be given.

Where a written instrument is proved by establishing the handwriting of a deceased witness, the opposite party may attack the character of such witness in the same manner as though he were living, and had testified at the trial. *Losee* v. *Losee*, 2 Hill, 609, 612.

SECTION XVI.

HANDWRITING.

The simplest and most obvious proof of handwriting is the testimony of a witness, who saw the paper or signature actually written. But a great variety of cases must continually occur where such a direct kind of evidence cannot possibly be procured. The writing may be secret in its nature; or, no person may have been present at the time; or, if a person was present, he may be dead or unknown. In this deficiency of positive proof, the best evidence which the nature of the case admits, is the information of witnesses acquainted with the supposed writer, who, from seeing him write, have acquired a knowledge of his handwriting; for, in every person's manner of writing, there is a certain distinct, prevailing character, which may be discovered by observation, and when once known, may be afterwards applied as a standard to try any other specimen of writing whose genuineness is disputed. A witness may therefore be asked, whether he has seen a particular person write; and if he answers in the affirmative, he may further be asked whether he believes the paper in dispute to be in his handwriting. This course of examination involves two questions: First, whether the supposed writer is the person of whom the witness speaks; and, secondly, if he is the person, whether he wrote the paper in dispute. The first is a question of identity; the second a question of judgment or a comparison, in the mind of the witness, between the general standard and the writing produced. All evidence of handwriting, except when the witness has seen the document actually written, is in its nature comparison. It is the belief which a witness entertains upon comparing the writing in question with an exemplar in his mind, derived from some previous knowledge. This kind of evidence, like all probable evidence, admits of every possible degree, from the low-

est presumption to the highest moral certainty. It may be so weak as to be utterly unsafe to act upon; or so strong as, in the mind of any reasonable man, to produce conviction. The witness may have been in the constant habit of seeing the person write, day after day, for years together, on common transactions, and in the course of important business. On the other hand, it may be found, on inquiry, that he has seen him write only a few words, many years ago, or perhaps only once; or, the specimens which he saw may have been slight and imperfect, made in a hurry, at distant intervals, or, from some other cause, not the fair average specimens of his general character or style of writing, but deviating from the general form; in which cases, the impression on the mind of the witness would be imperfect, faint and inaccurate. But, whatever degree of weight his testimony may deserve, which is a question exclusively for a jury, or the justice sitting in their place, it is an established rule, that if he has seen the person write, he will be competent to speak to his handwriting, though he may have seen him write only once.

An other method of acquiring a knowledge of handwriting is by means of a written correspondence. If a witness has received letters on subjects of business, which can be proved to have been written by a particular person, or letters of such a nature as makes it probable that they were written by the hand from which they profess to come, he may be admitted to speak to that person's handwriting.

If the identity of the writer of the letters is established, the witness who received them will frequently be able to give more satisfactory evidence, than one who has seen that person in the act of writing; for the latter may have seen him write but seldom, and on occasions not calculated to excite attention; while the other may have had frequent opportunities of reperusing the letters, and the letters themselves having been written on subjects of business, will probably have more consistency, and exhibit a fairer specimen of the general character of handwriting. It is not necessary that the witness should have been a correspondent of the writer, to render him competent to speak to handwriting, if he has seen specimens of his writing upon which he has acted, and which the writer recognized as his, in the course of business.

In the cases which have been mentioned, the proof of handwriting is founded upon a knowledge of its general character. The witness is supposed to have formed a standard in his mind, and with that standard to compare the writing in question. But a witness is not permitted to compare writings in court, and from that comparison, give his opinion as evidence upon the question of the genuineness of the signature in dispute, if the only knowledge he has is founded upon such comparison of hands. *Wilson* v. *Kirkland*, 5 Hill, 182; *People* v. *Spooner*, 1 Denio, 343; *Boyle* v. *Colman*, 13 Barb., 42.

Where a signature is alleged to be a forgery, the defendant cannot give in evidence other instruments executed by him, to

enable the jury to compare the signatures with the one in question. *Van Wyck* v. *McIntosh*, 4 Kern., 439; *Hoyt* v. *Stuart*, 3 Bosw., 447. And if a witness has testified to the genuineness of a signature, he cannot, on cross-examination, for the purpose of impeaching him, be shown other signatures, not evidence, nor in issue in the case, and be asked if they are genuine, with a view to contradicting him, if he is mistaken as to the genuineness of such irrelevant papers. *Ib.* But questions which relate to the appearance of a writing may be asked, as where a witness is asked at the trial whether a promissory note was written with the same ink, including the body of the instrument and the signature; or whether there appears to be an erasure on the note; or whether the erasure was made before or after the body of the note was written; whether either of the edges of the note were cut edges, or the ordinary foolscap edges; and all such questions are proper, because they call for facts which are apparent, and which the party has a right to prove, if material. *Dubois* v. *Baker*, 40 Barb., 557. The proof of such facts is not proof of mere matter of opinion. *Ib.* But if the question, whether the erasure was made before or after the body of the note was written, is a matter of opinion, it is a question upon which a bank cashier is entitled to give an opinion as an expert. *Ib.* And where notes and receipts of a party are in evidence for other purposes of the action, and conceded to be genuine, a witness who is an expert, may state in what respect the character of such notes and receipts differ from the handwriting of an other note, whose genuineness is questioned. *Ib.*

SECTION XVII.

ALTERATION OF WRITTEN INSTRUMENTS.

The law strictly guards the rights of parties, by prohibiting an unauthorized alteration of written instruments. And, if either of the parties to such an instrument makes a material alteration in it after its execution and delivery, such alteration will render the instrument void, although there are two exceptions to the rule: one is, if the alteration was made by the consent of the other party; and the other is, where the alteration itself is an immaterial one, or is one which consists in merely supplying words, which the law would intend in the absence of any written words. Erasures or alterations are sometimes made at or before the executions of an instrument; and at other times they are made afterwards by consent. Where such an altered instrument is offered in evidence, it is sometimes made a question whether any explanation must be made by the party offering it, as to such alteration, before it can be given in evidence. The cases have not been entirely consistent upon this point.

It has been held that when a paper is produced by a party, and it appears upon its face to have been altered by any alteration, erasure, or blemish, the party producing it ought to explain this appearance, by showing that the alteration, &c., was made at or before

the execution of the instrument, or that it was made afterwards by consent, or that it was made by a stranger, or that the alteration was an immaterial one, or that it was accidentally done, or that it was procured to be done by the fraud of the opposite party. In this state, the party who produces an altered instrument, is generally bound to explain the alteration or erasure, if it is in a material point. *Jackson* v. *Osborn*, 2 Wend., 555. And this is especially the rule when the alteration is suspicious, and is beneficial to the holder. *Tillou* v. *Clinton & Essex Ins. Co.*, 7 Barb., 564; *Acker* v. *Ledyard*, 8 Barb., 514.

An alteration in the date of a promissory note, made by an agent of the maker, under a mistaken supposition that he had authority to do so, will not render the note void, where there is no evidence of a fraudulent intent. *Van Brunt* v. *Eoff*, 35 Barb., 501.

In an action upon a guaranty indorsed upon the back of a promissory note, it will be sufficient to prove the signature to such guaranty, and if the defendant claims that he is a mere indorser, and entitled to the rights of such a party, he must prove by some evidence that there was no guaranty written there at the time he wrote his name there, for the law will not presume that the guaranty was written above the name without proper authority. *Small* v. *Sloan*, 1 Bosw., 352.

In *Maybee* v. *Sniffen*, 2 E. D. Smith, 1, 10, the rule is laid down thus, after a careful review of the cases: "The instrument, with all the circumstances of its history, its nature, the appearance of the alteration, the possible or probable motives to the alteration, or against it, and its effect upon the parties respectively, ought to be submitted to the jury; and the *court* cannot presume, from the mere fact that an alteration appears on the face of the instrument (whether under seal or otherwise), that it was made *after* the signing."

The law does not require that an instrument shall be written throughout with the same colored ink; and the fact that two kinds of ink of different colors was used will not of itself, be sufficient to authorize a court to exclude the paper from the jury. *Smith* v. *McGowan*, 3 Barb., 404, 406. So if there is an erasure of one name, and an other is written upon it, that of itself will not invalidate the instrument, though such circumstances may be weighed by the jury, upon the question of alterations, &c. *Ib.*

Where a paper is required by law to be filed in some office, as with the county clerk, and the paper is so filed with the clerk, and is produced by him at the trial, any alteration which may appear will not require explanation, since the clerk will not be presumed to have done it, and no presumption could be indulged against the party because it was not in his possession. *Devoy* v. *Mayor of New York*, 35 Barb., 264. If words are erased, it will be sufficient explanation if it is shown that it was done before the execution of the instrument. *Newell* v. *Salmons*, 22 Barb., 647.

The rules as to alterations of written instruments are the same whether applied to deeds or to other written instruments. If

such an instrument is altered or destroyed by a stranger who had no authority to do so, the rights of the parties will not be affected by his acts. In such cases the existence of the original must be shown, and the alteration or destruction will authorize proof, as in the case of a lost paper, if that kind of proof is necessary. The law in relation to the alteration of instruments, either by consent, or without authority, has already been fully discussed. Vol. I, 901 to 913.

SECTION XVIII.

ACCOUNT BOOKS.

Entries which are made in books of account constitute a very important branch of the rules of evidence. And the value and importance of this species of evidence increase in proportion to the growth of commerce and the business interests of society. It would be entirely impossible to carry on an extensive business as a merchant, or as a tradesman, upon the credit system, without the aid of books of account. And in the course of an extensive business, conducted upon any plan, books of account will be found to be nearly, if not quite, indispensable.

The practice of receiving books of account in evidence has been long established, both in this state and in the other states of the union. And they were first admitted as evidence, too, at a time when the parties could not be witnesses in the action, either for or against themselves. In this state, at that time, the parties were not permitted to add anything to the value of the books as evidence, by swearing to the truth of their contents. Though, in some of the other states, such an oath was permitted. Books of account are clearly evidence which is manufactured by the party, and for his own convenience and interest. They have, therefore, always been received in evidence with caution, and subject to several important qualifications.

The wisdom and the justice of proper safeguards for the protection of the rights of the parties against whom such books are to be used are too evident to need any vindication. There have been able judges who were utterly opposed to receiving such books as evidence in any case, and under any circumstances, even if the most stringent preliminaries were required as the condition of such admission. It was urged that such books were made by interested parties, and that the contents of the books, if received, constituted a species of evidence which might not only be made up for the occasion, but might also be introduced as evidence without oath, which was equivalent to receiving the written declarations of the party in his own favor. The views of such judges, however, did not prevail, and books of account were received in evidence upon the principle that the rejection of such evidence would work a greater injury to a commercial people than could result from the reception of the evidence under the conditions and qualifications which were annexed; and after such preliminary proofs as were, in all cases, required, before such books

could be received. Some of the reasons which have been urged in favor of receiving such books as evidence, are such as it is difficult to answer. In the intercourse of society, some of the business transactions are such that there are almost constant, continued and repeated dealings between its citizens. And in the course of such dealings it would be nearly impossible to reduce all the transactions to writing and to take written admissions of the matter; and so, too, it would be extremely inconvenient to call witnesses in every instance, which, if done, would be leaving important matters to the frail tenure of human memory. So, too, there are dealings between distant parties, and those in which there are no direct contracts, but merely such as arise out of the ordinary course of dealing between them. In all such cases, as well as in numerous others, books of account are not merely convenient, but are indispensable aids in proof of the existence of the transactions themselves.

But, while the law tolerates this kind of evidence for the advancement of the interests of commerce and the furtherance of justice, it does not permit such books to be received as evidence, except under specified restrictions. And, when received, they are not by any means conclusive proof of the facts recited in such books.

It is important to bear in mind that the rules in relation to the admission of books of account as evidence were established long before parties to an action were allowed to be witnesses. And those rules which were thus established remain entirely unchanged by the Code, which permits parties to be witnesses. *Tomlinson* v. *Borst*, 30 Barb., 42. And, notwithstanding the fact that a party may be a witness in his own favor, and may thus be able to establish his case by common law proof, yet he is not obliged to do so, but may introduce his books of account as evidence, as formerly, provided he makes proper preliminary proofs to authorize their reception. *Ib.*

The change in the law which now authorizes parties to be witnesses for themselves, may, in some degree, affect the practice in relation to the introduction of books of account. Where the party who offers his account books to prove his claim is also able to swear to the facts which are the foundation of such claim, because they occurred within his own personal knowledge, and at a recent date, he would scarcely be willing to leave his case standing upon such proof, when he could make the matter clear, as well as certain, by being sworn as a witness. If the books are properly proved in evidence, jurors or courts cannot disregard them, merely because the party does not choose to offer himself as a witness. And, besides this, there may be many reasons, such as the absence of the party from the trial, or his inability to attend, on account of sickness, or from some other cause, which prevents his attendance. But, where the preliminary proofs are quite slender, or where the character of the books has been successfully attacked, if the party is present in court, or might

reasonably have been there, and he had knowledge that such attack would be made, a court or jury would naturally desire and expect to hear the evidence of the owner of the books in relation to the truth of the charges contained in them, provided it appears that he has such personal knowledge which he can impart. Where the preliminary proofs are doubtful, or where the character of the books has been successfully attacked, it becomes important to sustain them by such evidence as the party may possess. In such cases, the question as to the credit of the books is entirely a matter of fact for the jury, or a court sitting in their place; and a clear and satisfactory statement by the party as a witness would not only establish the credit of the books, but his evidence would be independent and competent proof of his claim.

The leading case in this state, in relation to the admissibility of books of account, as evidence, is *Vosburgh* v. *Thayer*, 12 Johns., 461, decided in the year 1815. In that case it was established that such books could be received as evidence, if the owner of the book proved the following facts:

1. That the party had no clerk.
2. That some of the articles charged had been delivered.
3. That the books produced are the account books of the party.
4. He must prove that he keeps fair and honest accounts, and this proof must be made by those persons who have dealt with him and have settled from those books.

The rule which requires proof that a party had no clerk, has not been maintained to the fullest extent; and it is questionable whether the rule itself is not considerably shaken. At any rate, it must appear that there was a person employed by the owner of the books, who was really a clerk, in the proper sense of that term. A clerk, in the ordinary acceptation of the term, when applied to the business of merchandising, or trade and commerce, or as employed by the court, in the case of *Vosburgh* v. *Thayer*, means a person who is employed as an assistant in a shop or store, for the purpose of selling goods and keeping the books of account of his employer. A person who is employed as a foreman in a business where several assistants are also employed, but who never made any entries in the books of the party, is not a clerk, within the meaning of this rule, although as foreman he may have delivered to the other party many of the articles charged against him in such books. *Sickles* v. *Mather*, 20 Wend., 72. The reason why proof was required that the party kept no clerk, was to prevent a resort to such evidence as books of account, until it was shown that the party had no common law proof of the sales. But the case just cited was one in which the foreman was certainly a competent witness, who could have proved the delivery of nearly or quite all the articles charged on the books, and yet the court did not require his production as a witness, because he was not properly a clerk within the ordinary

signification of the term. He was, however, a competent witness, who could have given common law proof of the sales of the property claimed to have been sold. That case, shows, therefore, that the books of a party will not be rejected, merely because he may happen to be able to prove his case by common law evidence. So, too, the case of *Tomlinson* v. *Borst*, which has been cited, also shows that books of account are not to be rejected, because the party is himself a competent witness. These two cases, therefore, establish that the mere existence of common law proof of the sale of property charged in books of account, does not require the production of such witnesses to authorize the admission of the book in evidence; nor does their non-production render the books inadmissible. And the rule as it now stands, if it is to be enforced by the courts, merely requires proof that the person offering the books had no clerk, as that term has been already defined.

The original rule required that proof must be given that the party had no clerk, and that qualification has not been expressly overruled, and therefore it is best to observe it in practice, notwithstanding it is evident that the reason of the rule has been disregarded, by allowing such books as evidence, without calling a party, or his foreman or agent, if he is not strictly a clerk.

Must be matter of book account.] Notwithstanding books of account are admitted as evidence, they are not competent evidence upon every subject for which a party might desire to use them.

A most important rule, in relation to such books, is, that the charges contained in them must relate to such things as are a matter of book account, or they are not competent evidence. To aid trade and commerce, was the object in view when such books were allowed to be used as evidence. And this object ought, therefore, to be kept constantly in view, whenever a question arises as to the admissibility of books of account, for the purpose of proving the indebtedness of a party charged. The sale of goods, wares and merchandise may be proved by such books; but they are not competent evidence for the purpose of proving a loan of money. *Low* v. *Payne*, 4 Comst., 247; *Case* v. *Potter*, 8 Johns., 211; *Vosburgh* v. *Thayer*, 12 Johns., 461; nor for the purpose of proving the payment of money. *Irvine* v. *Wortendyke*, 2 E. D. Smith, 374, 376.

There are, also, numerous other cases, in which one party may have a legal claim against an other, but the existence of which cannot be established by means of books of account as evidence. And, therefore, such books are not competent evidence to prove the existence of a party's claim in such instances as the following: Entries in books of account are not legal evidence to establish a claim made by one town against an other for keeping a pauper, when the claim is founded on the mere fact that the latter town is legally chargeable with the maintenance of such pauper, and no contract is proved between such towns. A cause of

action arising out of a tort, is not a matter of book account. A claim arising upon a bond, a bill of exchange, or a promissory note, or an indebtedness arising upon a special contract, is not a matter of book account. Nor can a party establish a bailment, or an agency in that manner. And so of a special agreement to pay interest, or in relation to a mistake made in a previous settlement, special damages arising on account of the breach of a special contract, are not a matter of account. And so of a claim against a person who is liable as a guarantor for the liabilities of a third person who was primarily liable; or for a claim for rent, for the use and occupation of real estate.

The foregoing instances are sufficient to show the nature of the claims which are not properly matters of book account.

Where a person deposits money in a bank, and the proper officers of such bank make entries of that fact in the bank books, and also in the pass book of such depositor, such entries will be evidence in favor of the depositor, as against the bank. *Jermain* v. *Denniston*, 2 Seld., 276. And if such depositor makes or indorses a note, payable at such bank, while the deposit remains there, and the bank officers make entries in the bank books which show such note paid, such entries will be competent evidence of payment, in favor of the depositor, in any suit which may be subsequently brought upon such note, by any person who has purchased the same after it became due. *Ib.* In the absence of any proof to the contrary, or of suspicion as to the time of making the entries, they will be presumed to have been made at the time they bear date. *Ib.*

The books of account of a bank, however, are not evidence of themselves, as against its depositors or customers, as to the facts contained in such books, if there is no evidence given by the bank to show the truth of the entries made. *White* v. *Ambler*, 4 Seld., 170.

Not evidence of a single charge.] Books of account are not competent evidence in any case where there is but one single claim or charge. The object of allowing books as evidence was to meet the case of furnishing evidence of numerous transactions. So, again, the rule which requires proof of the delivery of some of the items charged could not be complied with except by proving the single item claimed. The rule is the same although there may have been several articles sold, if there was but one single transaction by way of sale. If that is the only dealing between the parties, books of account are not competent evidence to prove such sale. *Corning* v. *Ashley*, 4 Denio, 354.

Must prove some of the items charged.] The courts have inflexibly required an observance of this rule, by requiring proof that there was a delivery of some of the goods claimed to have been sold and delivered, or of the rendition of some of the services charged. It is not sufficient to prove that some goods have been sold and delivered, or that some services have been rendered. The law requires proof that some of the items charged have

been delivered, or that some of the services charged have been rendered.

Where the plaintiff, a physician, claimed to recover for professional services rendered "in April, 1851, and continuing to 1853," and the only proof of his services was, that he attended the defendant's family, as a physician once in the year 1849; it was held that the proof was insufficient to prove any item in the account sued upon. *Morrill* v. *Whitehead*, 4 E. D. Smith, 239. So, in an action to recover upon an account for goods sold and delivered, there must be proof of a delivery of some of the items charged in the account. *Conklin* v. *Stamler*, 8 Abb., 395; *S. C.*, 2 Hilt., 422.

This rule, however, does not require a party to prove the largest possible number of items of his account; and where a mechanic sued to recover for services rendered, and for goods sold and delivered, it was held that proof of two of the items charged was sufficient to render the books competent as evidence. *Linnell* v. *Sutherland*, 11 Wend., 568. It is always prudent to prove such a number of items as shows that there is a regular course of dealing between the parties, if such evidence is conveniently attainable. And, the greater the number of items proved, the more satisfactory will the evidence be that the account books are correct.

In proving the fairness of the books, by those who have dealt with their owner, it must appear that the settlement related to accounts which were kept during the period embraced in the account between the litigating parties, or, at all events, to such accounts as existed before the commencement of the action in which the books are offered. *Foster* v. *Coleman*, 1 E. D. Smith, 85. But it is not necessary that the settlement should have been made before the commencement of such action; it will be sufficient if the settlement was made at any time before the trial. *Ib.*

Manner of keeping books.] The law does not require that books of account should be kept in strict accordance with the most approved systems of bookkeeping. Public convenience, and the attainment of justice, are the great objects desired. Still, there are some rules which ought to be observed for the purpose of securing those very objects. The entries of charges ought to be made in those books of the party which are employed by him for the purpose of entering his daily and usual accounts with such persons as deal with him. And they ought to be made in conformity to the prevalent manner of keeping his books.

In some of the other states of the Union, it has been held, that if the accounts stand insulated, as on the front leaf of the book, and not falling into regular order with other charges, or if they are kept on separate sheets of paper when the party has books of account, they will be rejected.

In this state there are no reported cases upon such questions. Of course all entries must be made into those books which the party keeps as his account books, or they will not be evidence.

But, in the very nature of things, there must be very many informal books which are kept with the strictest integrity, and yet with all the skill which the owner of the books possesses. Books of account ought rarely, if ever, to be rejected merely on account of defects of form, if they comply with the substantial requirements of the law. The principal point for consideration is, whether the party made the entries with honest intentions, and according to the facts as they actually transpired. And, though books informally kept, are not to be commended as examples for imitation, yet, it will be found, that dishonest charges may be discovered in books which are kept with admirable skill, neatness and method.

The truth is, books may be worthy of the most implicit confidence, although very informally kept. And, on the other hand, there may be the grossest frauds, and the most unjust claims, found in books which are kept in strict conformity to the rules which the law prescribes. It is always proper to understand the requirements of the law in relation to books of account, and to apply those legal rules in such a manner as to advance the interests of justice, as well as those of trade and commerce.

The presumption of law is in favor of honesty and fair dealing, and, therefore, there is a fair presumption that books are honestly kept, if there is nothing in their appearance or in the evidence in the case which destroys that presumption. But, if they are not kept in conformity with the rules which the law prescribes, or if it is shown that they are false and fraudulent, they will not be regarded as of any value as evidence.

The rules of exclusion are quite limited in number, if the prerequisites are proved, which entitle books to be read in evidence. And many of the rules laid down, together with the cases cited, relate to the credit which ought to be given to this kind of evidence, rather than to its admissibility as evidence for the consideration of a court or jury.

Common to all classes of business.] As the principle which admits books of account is the convenience of society, so the rule will extend to all persons who fall within the reasons for establishing the principle. And, therefore, books of account are competent evidence in favor of all persons whose business requires the keeping of books. Indeed it would be difficult to determine many cases against the employment of such books, upon the principle that the person keeping them was not entitled to use such books in the way of keeping an account of his business transactions, provided he is engaged in any of the usual avocations of life, in the way of trade or commerce. Such books are common to the merchant, the manufacturer, the mechanic, the professional man, the farmer, the day-laborer, and to numerous other classes of citizens. *Foster* v. *Coleman*, 1 E. D. Smith, 85, 89; *Sickles* v. *Mather*, 20 Wend., 72, 75. The principal charges contained in such books usually relate to the sales of property, or to the rendition of services. When the charges relate to the

sale of property, it must be upon a sale of personal property, for a charge founded upon a sale of real estate would not be a matter of book account. The right to make the charges may arise upon an express contract between the parties, or, in some cases, it may arise by implication of law. If a person purchases articles upon credit, and requests that they shall be charged to his account; or, if he obtains them in person, or by his agent, without paying for them, he authorizes the vendor to charge them in account.

So, too, if a person improperly turns away his wife or children, and refuses to provide them with necessaries, such articles may be supplied to them, and the amount recovered upon an implied assumpsit to pay for them. But before a recovery can be had, there must be clear proof of a liability of the husband or parent to supply such articles, that he has wrongfully neglected to do so, and that the party claiming payment has furnished the articles, which must be such as are necessary or proper to the condition of the parties supplied. The general rule is, that the right to charge must exist at the time of the delivery of the property; and the right must be certain and absolute, and not an uncertain right, dependent upon some contingency for its validity. A contingent or conditional claim may be valid, if it subsequently becomes an absolute one; but that fact does not render it a proper item of charge, as a matter of book account. Charges are frequently and commonly made for services rendered. And the services rendered by an attorney or counselor-at-law, or of a physician or surgeon, are proper items of book account. So of services rendered by the infant son of the plaintiff, or by his apprentice or hired servant. So of charges by a postmaster for postage due, or by a justice of the peace for his fees. So of charges for work done by the month, at a fixed price, and payable at a future day; or for services rendered in making betterments on the defendant's land, if done at his request; or for repairs done to a vessel; or for the use of horses and carriages furnished by the plaintiff to the defendant, at his request. Some of the items above specified carry the rule as to the nature of the claims which may be made a subject of book account to its extreme extent, and perhaps extend it beyond the rule adopted in this state.

Several instances in which claims are not regarded as proper subjects of book account, have already been noticed. *Ante*, 428, 440.

The true distinction between items properly chargeable as a matter of account, and those which are not so, is, to ascertain whether the demand is one which arises in the usual course of trade or commerce, or whether it is a special and independent transaction, not in the ordinary course of trade or commercial dealings. It ought to be such as shows a course of dealing as distinguished from separate and single transactions; for, one of the reasons assigned for allowing books as evidence at all is, that the course of dealing on credit shows the confidence of the

debtor in his creditor by permitting him to make charges. Work, labor or services ought, as a general rule, to be executed before they are chargeable as items of account.

Entries, by whom made.] The entries ought to be made by the party himself; but it is not indispensable that it should be done by the hand of the party owning the books. He may employ an agent to do his writing, if he cannot write. And, in such a case, the entries will be made by himself as legally as though he had made them with his own hand. Books containing entries made in this manner will not be rejected in this state, merely because there is attainable common law proof of the charges, *ante*, 438; unless the person making such entries is strictly a clerk, in which case it would be advisable to call him as a witness.

No clerk.] One of the prerequisites to be established, before books can be received as evidence, is, that the party keeps no clerk. This fact may be proved by the party himself; or, it may be substantiated by any one who knows that fact. Any member of the family, or any near neighbor or intimate acquaintance, or, in short, any person who is familiar with the mode in which the party transacts his business in its daily movements, may show that no clerk is employed about it. A mere foreman, who delivers goods, is not a clerk, within the meaning of this rule. *Sickles* v. *Mather*, 20 Wend., 72. And the rule is the same, even though such foreman makes an entry upon a slate, of the sales which he makes, and the owner of the books subsequently transcribes them into his day books. *Ib.*

Number of witnesses to prove dealings.] It is quite usual to prove the fairness of the books and the manner of dealing, by calling two or three or more witnesses who have dealt with the owner and settled from the books in question. But, in legal strictness, it is not necesssary to call so many persons. A single witness who has dealt with the party, and has settled from the books, will be sufficient proof to render the books *competent*, and, therefore, admissible in evidence. *Beattie* v. *Qua*, 15 Barb., 132; *Morrill* v. *Whitehead*, 4 E. D. Smith, 239, 241.

But the credit of a book is dependent upon its character, and the greater the number of persons who have found its entries accurate and just, the more reliable will such book be as evidence. It is not necessary, nor is it proper or usual, to call a large number of witnesses, but merely to prove by a reasonable number, say two or three, that the books are of fair character. If the character of the books is attacked, then a greater number may be called for the purpose of sustaining it, upon the same principle that the character of a witness is sustained.

Credit for jury.] When a party offers to introduce his books of account as evidence, and he has proved those preliminaries which the law requires, the books will be competent evidence, if the items of the charges are matters of book account. And if due proof is given, so that the books are admissible, and they are received in evidence by the court, such evidence cannot legally

be disregarded by a court or jury, any more than a court or jury can properly disregard the evidence of a witness who is not in any manner impeached. But there are cases in which such books bear suspicious marks upon their face, as where material alterations appear in them, and no explanation is given in relation to it; or where the manner of keeping the account of a particular person differs from that of the general manner of keeping the book; in these and similar cases the credit due to the book is for the jury or a justice sitting in their place. So, too, if the books are fair on their face and the preliminary proofs are entirely sufficient, yet if the character of the book is attacked by showing that some of the entries are false or unfounded; or that false accounts are charged in the books against other persons, who prove the falsity of such charges, the credit of the books is a question of fact which is to be settled in the same manner as the credit of a witness is determined, for the books, are in one sense, a witness.

Credit, how impeached.] Any evidence is proper if it legally shows that the accounts are false and fraudulent. And if that fact is established, the books will be entirely disregarded. So, too, if it is clearly shown that any of the charges are false, and that they were intentionally entered in the books for the purpose of injustice, the jury may disregard the whole book, if they see proper to do so, on the principle that a book which is deliberately and intentionally false in some things is equally false as to all the other items. This need not necessarily be the result, for the jury may, on the entire evidence in the case, allow some of the items and disregard others, if justice and truth will thereby be promoted.

Again, it is competent to show that mistakes exist in the accounts, as charged in the books. And this evidence will go to the credit of the books, as to its reliability for accuracy, although the fairness of the owner, or the motive in making the erroneous charges are not questioned. A witness who makes numerous mistakes in his statements may cause doubts as to his accuracy, although his integrity is unquestioned; and the same rule applies to books of account.

There is a distinction between attacking the credit of books, by showing that they are false and fraudulent, or that numerous mistakes exist in them, and an attack on the general moral character of the owner of the books, for the purpose of inferring that the books are false, if the moral character of the owner is impeached.

Evidence to prove the books false and fraudulent, or erroneous, is admissible. But evidence to prove that the general moral character of the owner of the books is bad, is not admissible, when the object of offering the evidence is to draw the inference, that the books are incompetent, or that they are unworthy of credit, because the moral character of the owner is bad. *Tomlinson* v. *Borst*, 30 Barb., 42, 46; and see *Larue* v. *Rowland*, 7 Barb., 107, 110. Where the question of credibility has been fairly sub-

mitted to a jury, upon competent evidence upon both sides, the decision of the jury as to the credit of the books is final. *Morrill* v. *Whitehead*, 4 E. D. Smith, 239.

Existence of common law proof does not invalidate.] In some of the other states it has been held that books of account are not evidence as to such items as may be proved by attainable common law evidence.

And these decisions proceed upon the principle that books of account are not a necessary means of proof where there is common law proof, which may be introduced. Those decisions are in accordance with the principles of the common law. But that rule is not adopted in this state; and, notwithstanding the fact that the party has a foreman who has delivered the very goods in question. *Sickles* v. *Mather*, 20 Wend., 72; or even in the case of a delivery of the goods by the party himself, who is now a competent witness in this state, yet he need not call his foreman, nor be sworn himself, for his books are competent evidence, notwithstanding his means of common law proof. *Tomlinson* v. *Borst*, 30 Barb., 42, 46; and see *ante*, 438, 439, 444.

Where the party has employed a clerk, who is absent and out of the reach of a subpœna, for the purpose of procuring his attendance as a witness, the cases disagree as to the necessity of procuring his evidence upon a commission. The absence of the clerk from the jurisdiction of the court is held by some of the cases to be sufficient to dispense with calling him as a witness, while other cases deny this rule. If those cases which require the evidence of the witness proceed on the ground that his evidence is common law proof, and that it must for that reason be adduced, it is opposed to the principle adopted in this state, as we have just seen. Of course the death or the insanity of the clerk would dispense with the rule requiring his production as a witness, even in those states in which the strictest rule is adopted.

Evidence of value.] Account books are not merely evidence of the sale and delivery of goods, but they are also competent evidence of the value of the articles charged, or of the personal or professional services which may have been rendered. *Ducoign* v. *Schreppel*, 1 Yeates, 347. But such evidence is not conclusive, and the other party is at liberty to show the actual or true value. In the absence of other proof, the prices charged in the books will be *prima facie* evidence of value, subject to such modifications in that respect as the entire evidence in the case may warrant.

A plaintiff who properly proves his books in evidence, and shows their fairness by those who have dealt and settled with him from them, need not go further and show that the prices charged are usual and reasonable. *Bailey* v. *Barnelly*, 23 Geo., 582.

Entries when made.] Books of account are designed for the registration of transactions as they occur, and not as entries of past events. One of the most essential and valuable qualities

of such books, and one of its superiorities over that of the mere memory of individuals is, that such entries will be accurate, because they cannot forget and that they will not be liable to change by the lapse of time. For these reasons all entries of sales or transactions ought to be made daily and immediately on their occurrence and completion.

The law does not fix any precise instant at which this shall be done, and yet it requires that there shall not be any long delays in the matter, since such delays would let in those very mischiefs which a prompt entry would prevent. For, in the first place, there might be errors by reason of inaccuracy in recollection, and in the next place it would afford opportunities for changing the character of the entries made, by substituting one materially different from the original.

The fact that the entries were not made at the time when they ought to have been, does not destroy the competency of the evidence, but it goes to the credit of the book.

There are instances in which the greatest care does not prevent the occurrence of mistakes by the omission to charge articles which have been sold and delivered. Such errors may be rectified, by making a proper charge, which will not invalidate the book.

So, too, there may be errors in the entries, and these may be properly corrected; but in such a case, the error ought to be shown by evidence, and the correction ought in the same manner to be explained. Alterations and erasures do not destroy the character of the book, if they are properly explained by the evidence in the case; and any objection will go to the credit rather than to the competency of the book. But, if such alterations or erasures are gross and suspicious, and no explanations are given, the credit, if not the competency of the book, will be destroyed.

Ordinary book in daily use.] All entries ought to be made in those books which are kept for ordinary and daily use, in keeping the general accounts of the party. It is by keeping books in that manner, that they derive much of the credit which they obtain. If the general accounts of a party are charged in one book or set of books, while the entries against some individual are made in a separate and distinct book and by itself alone, this fact, of itself, is a suspicious circumstance, requiring explanation. But, more than this, such entries are not competent evidence, because it is in direct violation of that rule which requires all charges to be entered in those books which the party uses for the purpose of keeping his general accounts with his customers. *Ante*, 438.

Accounts entered upon slips of paper or upon separate sheets, distinct from the usual books of account, cannot be received as books of account. It is not necessary that such books should be bound in a substantial manner, nor need they be bound at all. Many individuals, whose dealings are limited, make an account book by folding or stitching together several sheets of paper, instead of procuring a more expensive book. And, if they keep

their general accounts in such a book, that will be sufficient to render the book competent, so far as its form is concerned. But it must, of course, be proved in evidence, in the same manner as ordinary books of account are established.

Original entries.] Books of account derive much of their credit from the fact that they are original entries of events as they transpired. It is not necessary, however, that the first entries should be made in the books themselves. For, nothing is more common than to make mere temporary entries upon a slate, or upon sheets of paper with a pencil, or in an ordinary blotter with a pen and ink, and then to transcribe at night, into the ordinary books, such charges as may have thus been entered during the day. This practice is both convenient and legal. *Sickles* v. *Mather*, 20 Wend., 72. Such memoranda are mere temporary entries, and the transcribed entries are original entries within the meaning of the rule.

Books are usually kept by writing with a pen and ink. But they will be valid, although kept in pencil mark, if they are legible, and if that is the usual mode of keeping the general accounts. *Hill* v. *Scott*, 12 Penn. State R., 168. If a book contains entries which are original, and others not original, it will be valid evidence as to the original entries, even if not so as to the others. *Wollenweber* v. *Ketterlinus*, 17 Penn. State R., 389.

Ledger and daybook.] In an extensive business, a ledger is always a part of a set of books of account. But in a limited business there are many persons whose entire accounts are kept exclusively in the daybook, without the addition of a ledger. And in keeping their daybook such persons frequently keep it in the manner of ledger entries. The name of a person is entered and the items of his account are entered under that name continuously without the intervention of any other name or account. In other words, each item is charged as it occurs, by entering the article with the date of the occurrence or entry into the book.

The names of each of the persons charged in the book are thus entered separately, and the accounts of each person kept separately. Such a method has its advantages in a small business, since the account of each person is readily examined and the items ascertained, without any liability to overlook any of the entries made. While, on the other hand, if the accounts of all persons are entered in order of time, and indiscriminately as to persons, it would be laborious as well as difficult to ascertain the state of each person's accounts if no ledger were kept.

But this system of entering each account separately is objectionable in one point of view. It offers facilities for false entries, and for the perpetration of gross frauds. There may be interpolations, or, indeed, there may be an entire new account written up, without any certain success in detecting it. Books kept in this manner are competent evidence; and when otherwise properly proved, must be admitted in evidence. There is less objection now to this mode of keeping books than formerly, since, as

the law now stands, the party making the book may be compelled to be a witness, and his examination will scarcely fail to elicit the truth as to the manner of keeping the accounts.

Entire set of books must be introduced.] Where there is but a single book of accounts, it will, of course, be complete in itself, either as to charges or credits. But frequently, and perhaps generally, the accounts of parties are contained in several books, each of which may be separate, or each of which may constitute part of a set of books.

If a party gives in evidence entries contained in one of a set of books, he is bound to produce the entire set, or no part of the entries will be evidence, provided the entries offered refer to the other books, or provided such other books contain entries which relate to the entries offered, or if they contain entries affecting the state of the accounts between the parties. *Pendleton* v. *Weed*, 3 E. P. Smith, 72.

Charges in gross.] Books of account are intended to keep a correct statement of the items of an account, with the date, quantity, price, or value of each item. And for that reason, it is a general rule, that entries are improper when made in gross or by the lump. A charge by a mechanic for "190 days' work" was held inadmissible. *Lynch's Adm'r* ads. *Petrie*, 1 Nott & McCord, 130. So a charge by a physician, of thirteen dollars, for medicines and attendance in curing the whooping cough, was rejected. *Hughes* v. *Hampton*, 2 Const. Rep., 745.

This rule, however, is not to be carried to extremes, for there may be instances in which it is proper to group together two or more items. A physician may properly include in one charge the items of medicine furnished as well as the compensation for his visit, on any single occasion. But a merchant's bill must be made out differently. He cannot charge for a bill of goods sold in gross, but must give the date, articles, quantity, value, or other specification requisite to an accurate account.

Mechanics and laborers have sometimes charged several days' labor in one item, as for instance, a week's work at a specified price per day, and then carried out the entire sum as an item. Such charges will be less frequently objected to now, because the party will generally be able to prove the entire items, by being sworn as a witness.

Witness testifying from books.] Where a clerk is employed to make entries in books as a part of his business, his entries may, under some circumstances, become evidence, even when he cannot recollect the transaction so entered.

A witness testified that certain entries and memoranda were made by him; that it was his uniform practice to make such entries at the time of their occurrence, and to make them accurately as to the facts; that he had no doubt as to the accuracy of the entries in question; and that independent of the entries, he had no recollection of the matters mentioned, nor could he recollect them as a matter of memory, even after refreshing his

recollection by an examination of the entries; and it was held that the entries were admissible evidence. *Bank of Monroe* v. *Culver*, 2 Hill, 531.

But such entries cannot be made evidence, on the ground that the witness is absent from the state, or is beyond the jurisdiction of the court, though the rule is otherwise, if such witness is dead. *Brewster* v. *Doane*, 2 Hill, 537.

Copy of books not competent evidence.] That books must be kept by making original entries, has been already seen. *Ante*, 448. And when entries are thus made, the original books must themselves be introduced in evidence. Copies of books of account are not admissible in evidence, if objected to on that ground. *McCormick* v. *Mulvihill*, 1 Hilt., 131. And where books were proved by the production of a transcript of them, which was objected to by the other side, the judgment was reversed. *Ib.* It is of no consequence whether the transcript is accurate or not, nor will it avail any thing to prove the accuracy of such transcript, for in no case is it legal evidence, if duly objected to. *Ib.* But, if such evidence is offered, and it is admitted in the court below without objection, it will not be any ground of objection on appeal, that a copy was used instead of the original books. *Peck* v. *Richmond*, 2 E. D. Smith, 381. And when entries in books of account are read in evidence without objection, such evidence is competent to be submitted to a jury, or to the justice sitting in their place. *Brahe* v. *Kimball*, 5 Sandf., 237.

Books introduced cannot be withdrawn.] Each party is at liberty to prove his books in evidence, or not, as he may choose, under ordinary circumstances. But, if he elects to introduce them as evidence, when they are once admitted, the evidence becomes the property of both parties, and the books cannot be withdrawn, nor the evidence rejected, without the consent of the opposite party. *Clinton* v. *Rowland*, 24 Barb., 634; and see *Vibbard* v. *Staats*, 3 Hill, 144.

Must be received generally.] Books of account, like declarations generally, must be taken together. There would be no justice in permitting a party to introduce his books to prove facts which would aid his side of the cause, and at the same time rejecting such items of the account as would make against him, and in favor of the opposite party. And, therefore, such books cannot be received in evidence when offered conditionally, by offering them to prove certain specified matters, and asking, at the same time, that the opposite side should be prohibited from using the books for the purpose of proving other matters which are equally competent. *Winants* v. *Sherman*, 3 Hill, 74. They must be received altogether, for what they are worth, or not at all. *Ib.*

Whole contents evidence.] The party who introduces his books in evidence, does it subject to the principle that the whole contents of the book are thereby introduced as evidence, so far as they relate to the state of accounts between himself and the opposite party. Books thus introduced may show matters which

charge the opposite side, but if there are credits on the book in favor of the latter such credits must be allowed also. So again, the rule is, that if a party makes the books of his adversary evidence in his favor to prove his credits, he is bound to take the whole account together, and to admit the whole of the debit side of the account; and the rule is the same, whether the books are produced by the plaintiff or the defendant. *Biglow* v. *Sanders*, 22 Barb., 147, 148; *Low* v. *Payne*, 4 Comst., 247.

May waive books and resort to common law proofs.] The law is clearly settled, that a party may omit to prove his books, and that he may substantiate his claims by the common law evidence of witnesses. But, if the opposite side should call for the production of the books, and offer to introduce them as evidence, the non-production would be regarded as a circumstance showing that the books contained evidence in favor of the party so calling for their production. But the call for such books, or a notice to produce them, ought to be a reasonable one, and at a time when compliance would be a reasonable requirement; and, in any case, the non-production of the books will not be ground of allowing any sum to the party calling for such books.

There are cases, however, in which a refusal to produce such books, will justify a court or jury in the indulgence of every reasonable presumption against the claims of such party. In one case, the plaintiff owned one-half, and the defendant one-eighth, of a steamer which was subsequently destroyed by fire. At the time of the loss, there was an insurance in favor of both parties, to the amount of $3,700. The claim was settled with the insurance company for $3,300; of which sum the defendant was to receive $750, for his share. He received the entire amount, and was to account to the plaintiff for the balance. After the vessel was burnt, the plaintiff sold his share of the hulk to the defendant for $550; and, to recover this sum and the balance of the insurance, he brought an action. It appeared that this steamer was used for towing vessels, and that the defendant acted as general agent of her, receiving all the moneys earned, and paying all the current expenses. It was clear that the receipts far exceeded the expenses. The plaintiff acted as captain, and he sometimes certified as to the correctness of bills rendered against the boat, and in some cases gave orders for their payment. Such items constituted the current expenses; and the defendant claimed to be allowed for several such items, allowed to him by way of set-off or counterclaim. But the defendant did not produce the books containing the entire account, nor show the transactions of the boat or her earnings. The referee, who tried the cause, rejected several items thus claimed by the defendant; and, on appeal, the court said:

"Under such circumstances the referee was justified in disregarding all such items, as it is reasonable to infer, from the concealment of the books containing the entire account, that they had been paid out of the receipts of the boat which came to the

hands of the defendant as general agent for the owners." *Schenck* v. *Wilson*, 2 Hilt., 92, 93.

License by person rendering service, &c.] There are many instances in which it is necessary to procure a license before a person can legally carry on a business, or before he can practice in a profession.

But it is not necessary to produce a license, in the first instance, because the law will presume, as between party and party, that a regular license has been procured, since it would be illegal to omit to procure it before doing such business. *McPherson* v. *Cheadell*, 24 Wend., 15; *Smith* v. *Joyce*, 12 Barb., 21.

An attorney may recover for his services without proving that he has taken out a license, because the law will presume that he has complied with the law in that respect. *Pearce* v. *Whale*, 5 Barn. & Cress., 38; and see *Sissons* v. *Dixon*, Id., 758; and see Vol. I, 928 to 930.

SECTION XIX.

PAROL EVIDENCE TO CONTRADICT WRITTEN INSTRUMENT, &C.

When the opinion of a court is desired in relation to the legal construction of a written instrument, nothing more is necessary than to lay that instrument before the court. In such a case the instrument is to be construed by itself alone, and no question arises as to the admissibility of extrinsic evidence for the purpose of contradicting, varying or superseding the instrument.

Where an agreement is reduced to writing, its construction is always a matter of law for the court. *Chapin* v. *Potter*, 1 Hilt., 366. And the rule is the same, even when the instrument has been lost, and parol evidence has been given of its contents. *Berwick* v. *Horsfall*, 4 J. Scott, N. S., 450.

But in a justice's court a jury is permitted, as a general rule, to decide questions of law,as well as those of fact, upon matters relating to the merits, and not as to the admissibility of evidence.

In construing a written instrument the court will understand the words used in their plain, ordinary and proper sense, unless they have generally, in respect to the subject matter, acquired a peculiar sense, distinct from the popular sense of the words; or unless the context evidently points out that they must, in the particular instance, and in order to effectuate the intention of the parties, be understood in some other special and peculiar sense.

An other established rule is that words of common import may be construed out of their ordinary and primary sense, and may have a secondary sense assigned to them, if such appear clearly from the context to have been the intention of the parties.

Words of legal import also, though *prima facie* to be taken as used in their technical sense, and according to their strict acceptation, may have a different sense assigned to them, if the instrument contains a plain demonstration, that the parties used them in a different sense.

What amounts to that plain demonstration must, in each case, depend on the language used, and the circumstances under which it is used; and this is not a question to be determined by reference to reported cases, but by a careful consideration of the language and circumstances in the particular case under discussion.

Courts also endeavor, as far as possible, to give effect to the intention of the parties to written instruments. But it is a well settled rule that the intention of the party is to be ascertained from the meaning of the words in the instrument, and from these words alone, with the aid of such extrinsic evidence as the law permits to be used in order to enable a court to discover the meaning of the terms of the instrument, and to apply them to the particular facts of the case.

General rule.] It is a general and inflexible rule, that whenever written instruments are appointed, either by the requirements of law, or by the compact of the parties, to be repositories and memorials of truth, any other evidence is excluded from being used, either as a substitute for such instruments, or to contradict or alter them. This is a matter both of principle and of policy; of *principle*, because such instruments are, in their own nature and origin, entitled to a much higher degree of credit than parol evidence; of *policy*, because it would be attended with great mischief if those instruments upon which which men's rights depended were liable to be impeached by loose collateral evidence.

It may be stated as a general rule, that oral evidence shall in no case be received as *equivalent* to, or as a *substitute* for, a written instrument, where the latter is required by law, or to give effect to a written instrument, which is *defective* in any particular, which by law is essential to its validity; or to *contradict*, *alter*, or *vary* a written instrument, either appointed by law or by the compact of private parties, to be the appropriate memorial of the particular facts which it recites; for, by doing so, oral testimony would be admitted in usurpation of a species of evidence decidedly superior in degree.

But parol evidence is sometimes admissible to *defeat* a written instrument, on the ground of fraud, mistake, &c., or to *apply* it to its proper subject matter, or to *explain* the meaning of foreign, local, or technical, or family terms, or to *rebut* presumptions arising intrinsically. In these cases, the parol evidence does not usurp the place or arrogate the authority of written evidence, but either shows that the instrument ought not to be allowed to operate at *all*, or is essential to give to the instrument its legal effect.

The extent to which this principle operates, and the rules deducible from it, will be exhibited in the clearest point of view, by reference to the different purposes for which parol testimony can be offered in relation to written instruments. Parol evidence, in general, may be offered for three purposes, in relation to written evidence: *First*, in *opposition* to written evidence, where it is offered with a view to *supersede* the use of written evidence, and

to supply its place, or to *contradict* it, or to *vary* its effect, or wholly to *subvert* such evidence, by showing that it has no legal existence or no legal operation in the particular case; or, *secondly*, it is offered in *aid* of written evidence, in order either to *establish* a particular document, or to *apply* it to its proper subject matter, or to *explain* it, or to rebut some *presumption* which affects it, or as secondary evidence, where the original is unattainable; or, *thirdly*, it is used as *original* and *independent* evidence to prove a particular fact, without regard to written evidence of the fact, not being excluded by any rule of law.

In the first place, parol evidence is never admissible to *supersede* the use of written evidence, where written proof is required by the law. Where the law, for reasons of policy, requires written evidence, to admit oral testimony in its place would be to subvert the rule itself. The same observation applies where the law prescribes a certain form of written evidence; to allow a defect in the instrument to be supplied by oral evidence, would be, *pro tanto*, to dispense with the law. Hence, in general, where the law requires a formal written instrument, if the document offered in evidence be *defective*, so that it cannot operate without collateral aid, the defect cannot be supplied by oral testimony.

In those cases in which the statute of frauds requires a written agreement, and in all other cases in which the law requires an agreement or instrument in writing, it will be sufficient, if the agreement is contained in several different writings, which, by internal reference, can be connected together so as to make one entire instrument, such as is required by the law. But they cannot be connected by mere oral testimony, nor can any defect in the writing be supplied by oral evidence.

The same principle applies in all cases in which parties have, by mutual agreement, reduced the terms and conditions of the contract to writing, which is to be the evidence of their agreement, their admissions, and their intentions.

To admit oral evidence as a substitute for instruments, to which, by reason of their superior authority and permanent qualities, an exclusive authority is given by the parties, would be to substitute the inferior for the superior degree of evidence; conjecture for fact, and presumption for the highest degree of legal authority; loose recollection and uncertainty of memory for the most sure and faithful memorials which human ingenuity can devise or the law adopt; to introduce a dangerous laxity and uncertainty as to all titles to property, which, instead of depending on certain fixed and unalterable memorials, would thus be made to depend upon the frail memories of witnesses, and be perpetually liable to be impeached by fraudulent and corrupt practices.

As oral evidence is inadmissible for the purpose of supplying an omission in an instrument where written evidence is required by law, so it is inadmissible to give any effect to a written instrument which is void in law for inconsistency, repugnancy or ambiguity in its terms; for if a meaning could be assigned, by the aid

of extrinsic evidence, to that which was apparently destitute of meaning, or if the same instrument could be made to operate in different ways, according to the weight of oral evidence, it is plain that its effect would depend, not upon the instrument, but upon the force of the oral evidence, and thus the latter would virtually be substituted for the former.

There is an important distinction between ambiguities, which are *apparent* or *patent* on the face of the instrument, and those which arise in the *application* of an instrument of clear and definite meaning to doubtful subject matter. An ambiguity apparent on reading an instrument, is termed *ambiguitas patens*, or a *patent ambiguity;* that which arises merely upon its application, *ambiguitas latens*, or a *latent ambiguity.* The general rule is, that the latter species of ambiguity may be removed by means of parol evidence; while, on the other hand, such evidence is not admissible to explain an ambiguity apparent on the face of the instrument.

By the term *patent* ambiguity must be understood an ambiguity inherent in the words, and incapable of being dispelled either by any legal rules of construction applied to the instrument itself, or by evidence showing that terms in themselves, unmeaning or unintelligible, are incapable of receiving a known conventional meaning. The great principle on which the rule is founded is, that the *intention* of parties should be construed, not by vague evidence of their *intentions, independently of the expressions* which they have thought fit to use, but by the *expressions themselves.* Now, those expressions which are incapable of any legal construction and interpretation by the rules of art, are either so because they are in themselves unintelligible, or because, being intelligible, they exhibit a plain and obvious uncertainty. In the first instance, the case admits of two varieties; the terms, though at first sight unintelligible, may yet be capable of having a meaning annexed to them by extrinsic evidence, just as if they were written in a foreign language, as when mercantile terms are used, which amongst mercantile men bear a distinct and definite meaning, although others do not comprehend them; the term used may, on the other hand, be capable of no distinct and definite interpretation. Now, it is evident that, to give effect to an instrument, the terms of which, though apparently ambiguous, are yet capable of having a distinct and definite meaning annexed to them, is no violation of the general principle, for in such a case effect is given, not to any loose conjecture as to the intent and meaning of the party, but to the *expressed* meaning; and that, on the other hand, where either the terms used are incapable of any certain or definite meaning, or being in themselves intelligible, exhibit a plain and obvious uncertainty, and are equally capable of different applications, to give an effect to them by extrinsic evidence as to the *intention* of the party, would be to make the supposed intention operate independently of any definite expression of such intention. By *patent* ambiguity,

therefore, must be understood an inherent ambiguity, which cannot be removed either by the ordinary rules of legal construction, or by the application of extrinsic and explanatory evidence, showing that expressions, *prima facie* unintelligible, are yet capable of conveying a certain and definite meaning. According to these principles, parol evidence is never admissible to explain an ambiguity which is not raised by extrinsic facts. And parol evidence ought never to be allowed to create an ambiguity where none exists. *Auburn City Bank* v. *Leonard*, 40 Barb., 119.

As oral evidence is inadmissible, either as a substitute for a written instrument, required by law, or to give effect and operation to such an instrument, when it is defective, it follows *a fortiori*, that it is not admissible to *contradict* or even to *vary*, any instrument to which an exclusive operation is given by law, whether that exclusive quality results from a positive rule of law, or from private compact.

Where the terms of an agreement are reduced to writing, the document itself being constituted by the parties as the expositor of their intentions, is the only instrument of evidence in respect of that agreement, which the law will recognize so long as it exists, for the purposes of evidence. If the parties have contracted by deed, as the obligation under seal imports greater deliberation and more solemnity than a mere written agreement which is not under seal, no evidence, whether oral or written, which is not under seal, can be admitted to contradict or vary it. In this state, however, the consideration of a sealed instrument may be inquired into, under some circumstances. Vol. I, 108.

So, upon the principles already laid down, evidence is inadmissible to show that there was a parol agreement prior to, or contemporary with, the written instrument, and which varies its terms, as, for instance, to show that a note, payable on a day certain, was to be payable upon a contingency only, or upon some other day, or not until the death of the maker.

Where a contract has been reduced to writing, nothing which is not found in the writing can be considered as a part of the contract; and, therefore, it is not competent to *add* to the terms of such contract, by means of parol evidence. In such cases it is to be presumed that the parties, in expressing their intention, have expressed the whole of it, subject to those incidents and consequences which the law annexes to the terms which they have used. So, too, it is to be presumed that the parties have expressed their actual intentions; and, therefore, parol evidence cannot be given to *vary* the terms of the written agreement. Parol evidence is also inadmissible for the purpose of altering the legal operation of an instrument, by evidence of an *intention*, to an effect, which is not expressed in the instrument.

There are cases, however, in which parol evidence is admissible, for the purpose of defeating the effect of a written instrument, and the rule admitting such evidence in these cases does not at all conflict with the principles already discussed.

Where parol evidence is offered, not for the purpose of *adding* to, or *varying*, or *contradicting* the effect of a written instrument of admitted authority; but where, on the contrary, it is offered, in order to *disprove* the legal existence of the paper, or for the purpose of rebutting the *operation* of the instrument, such parol evidence is admissible. In such a case, if the parol evidence is offered, for the purpose of showing that the written instrument was obtained by a fraud, practiced by the party who seeks an advantage under it as against the party who executed it, the parol evidence would not contradict the terms of the written instrument, but would merely show that it is not to be regarded at all as a valid instrument.

This would not be a substitution of mere oral testimony in the place of written evidence, or preferring the weaker to the stronger evidence, but would be merely showing that the written instrument ought not to have any operation whatever; and this fact must nearly always be established by oral evidence. And where the plaintiff's ground of action is, that the defendant induced him to enter into a written contract by means of a fraud, it will be entirely competent to show such fraud by parol evidence of the transaction. *Koop* v. *Handy*, 41 Barb., 454. In such a case, there is no merger of the oral negotiations in the written instrument. *Ib.* And where the cause of action was founded upon a fraud practiced by the defendant in the sale of goods by sample, it was held that parol evidence of fraudulent representations made during the sale were competent evidence, notwithstanding there was a memorandum of the sale in writing, signed by the defendant as vendor, which was silent as to the quality of the article sold. *Ib.;* and see *Filkins* v. *Whyland*, 10 E. P. Smith, 338.

There is a class of cases, too, in which parol evidence is admissible for the purpose of reforming a written contract, even when the effect or result of the evidence is to contradict, vary, or add to, the terms of the written instrument. But justice's courts have no jurisdiction of actions for that purpose. And, even in courts of record, when the evidence is offered, it is not admissible unless the pleadings are framed for the very purpose of reforming such instrument. In such cases the evidence is not offered to contradict a valid existing instrument, but merely to show that, by accident, fraud, surprise or mistake, the instrument in question has never been constituted the actual depository of the intention and meaning of the parties.

Aiding written evidence by parol evidence.] Extrinsic parol evidence is admissible, generally, to *give effect* to a written instrument, by *establishing* its authenticity, or by *applying* it to its proper subject matter, and also as auxiliary to the latter object, for the purpose, in some instances, of *explaining* expressions capable of conveying a definite meaning by virtue of that explanation, and of *annexing customary incidents;* and also, in other instances, for the purpose of removing *presumptions* arising from extrinsic facts which would otherwise obstruct such application. Where an instrument is not

proved by mere production, it must, necessarily, derive its credit and authenticity from extrinsic or parol evidence.

In the next place, it is always, necessarily, a matter of extrinsic evidence to *apply* the terms of an instrument to a particular subject matter, the existence of which is also a matter of proof, by parol evidence. A difficulty in this case sometimes occurs, where, although the terms of the instrument are sufficiently definite and distinct, yet the objects to which it is to be applied are not equally so, and where it is doubtful whether the description applies at all to the particular object pointed out by the evidence, or whether it is not equally applicable to several distinct objects.

The illustration usually given of this rule, is that of a description in a will of a devisee, or of an estate, where it turns out that there are two persons or two estates of the same name and description. The same illustration is equally applicable to a sale of personal property. Thus, if A. should agree, in writing, to sell his horse to B., and there are two persons of the name B., parol evidence is admissible to show which person was intended as purchaser. So, if A. agrees to sell his bay horse to B., and A. has two bay horses at the time of the sale, parol evidence will be proper for the purpose of establishing which horse was sold. In such cases the ambiguity is latent, and it is raised by parol evidence, and therefore it may be explained and applied to its subject by such evidence. And, as an ambiguity arising from too great generality of description may be removed by oral evidence, which restrains and confines, and applies that description to a single object, although on the mere comparison of the terms with several objects, they may be equally applicable to more than one; so it is a rule, that a redundant and superfluous description, which is inapplicable to an object *well ascertained* by previous or subsequent description, will not prevent such application by means of parol evidence.

Upon the same principles, if the description in the instrument applies *partially* to each of two persons, or to two subject matters, but to neither of them entirely, so that a doubt arises which was intended, oral evidence is admissible to remove it. For, as an erroneous and superfluous description will not prevent the application of the description which in part is certain, and as a description equally applicable to two persons or objects may be ascertained and fixed by external evidence, it seems to follow, that where the description, although redundant and partially erroneous, is still limited to two or more persons or objects, to whom it is equally applicable, then the generality may be further limited by means of extrinsic evidence.

Where terms are used which are known and understood by a particular class of persons, in a certain special and peculiar sense, evidence to that effect is admissible for the purpose of *applying* the instrument to its proper subject matter; and the case seems to fall within the same consideration as if the parties, in framing their contract, had made use of a foreign language, which courts are not bound to understand. Such an instrument is not on that

account void; it is certain and definite for all legal purposes, because it can be made so in evidence, through the medium of an interpreter.

Conformably with these principles, the courts have long allowed mercantile instruments to be expounded according to the usage and custom of merchants, who have a style and language peculiar to themselves, of which usage and custom are the legitimate interpreters.

The legitimate object of extrinsic evidence in such cases seems to be to explain terms which are not intelligible to all who may understand the language, but which may, nevertheless, have acquired, by custom and usage, a known definite sense and meaning amongst a particular class of persons, which can be well ascertained by means of the testimony of those who are conversant with the peculiar use of those terms. The witnesses for this purpose may be considered sworn interpreters of the mercantile language in which the contract is written. Beyond this, however, the *principle* does not extend; merchants are not prohibited from annexing what weight and value they please to words and tokens of their own peculiar coinage, as may best suit their own purposes, but they ought not to be permitted to alter and corrupt the sterling language of the country. If they use plain and ordinary terms and expressions, to which an unequivocal meaning belongs, which is intelligible to all, then it seems, that according to the great principle so frequently adverted to, that plain sense and meaning ought not to be altered by evidence of a mercantile understanding and usage. It is clear, indeed, that if a contrary practice were to prevail, and be carried to its full extent, the effect would be to render it impossible to make a special contract in mercantile affairs, and to compel all persons, under all circumstances, to conform to the usages of trade; the written contract would become a dead letter; the question would not be, what is the actual contract, but what is the usage; and the very same terms would denote different contracts as often as mercantile fashions varied. It is clearly settled, that a general usage, the effect of which is to control rules of law, is inadmissible. So of one which contradicts a settled rule of commercial law. On the other hand, there is a great variety of cases in which the courts have permitted evidence to be given, to show the meaning of terms in commerce, and the arts, or of words and phrases peculiar to mercantile pursuits. This is generally spoken of as proof of *usage*, although in many cases it is rather the definition of technical language. *Hone* v. *Mutual Safety Ins. Co.*, 1 Sandf., 137, 150; *Beals* v. *Terry*, 2 Sandf., 127. A few cases may be useful, by way of illustrating when such evidence is admissible and when it is inadmissible.

Where a written sealed lease exists, it is presumed to contain the entire agreement as to the premises, and therefore parol evidence is not admissible to prove a parol agreement which was made before the written one, for the purpose of controlling or

varying the terms of the sealed instrument. *Tibbits* v. *Percy*, 24 Barb., 39.

So, in an action for the foreclosure of a mortgage, given to secure the payment of a bond conditioned for the payment of money on a specified day, parol evidence is not admissible for the purpose of showing that, at the time of the delivery of the bond and mortgage, there was a verbal agreement that the money should not be due until a later day. *Hunt* v. *Bloomer*, 5 Duer, 202.

So, where a written agreement required the delivery of the entire quantity of certain articles sold before payment could be demanded, it was held that parol evidence was inadmissible to show that the parties intended that each parcel should be paid for on its delivery. *Baker* v. *Higgins*, 7 E. P. Smith, 397.

So, the maker of a promissory note, in an action upon it by the payee, is not entitled to show, by parol evidence, that, at a settlement of accounts between the parties, upon which settlement the note was given, the plaintiff agreed to give it up, if he could not find a receipt from the defendant for the payment for some property which the defendant had let him have, the parties differing, at the time of giving the note, whether such property had been paid for. *Brown* v. *Hull*, 1 Denio, 400.

So, where a promissory note was given, upon the release of the payee's interest in his father's estate, upon a parol agreement between the maker and the payee, that if the interests of other heirs of the estate could not be obtained in a specified manner, both the note and the release should be void, and an action was afterwards brought upon the note, it was held, that evidence of such parol agreement was inadmissible. *Ely* v. *Kilborn*, 5 Denio, 514. In such a case, the note and the release constitute a written agreement, and each instrument is the consideration of the other, and a failure of the condition in the parol agreement, would not be a failure in the consideration of either. *Ib.*

So, where a promissory note is given for a specific sum, it cannot be shown by parol evidence that, at the time when the note was given, there was a verbal agreement between the maker and the payee, that an account which the maker held against the payee should be deducted. *Eaves* v. *Henderson*, 17 Wend., 190.

In an action for a breach of warranty, on a sale of goods upon a written contract, parol evidence is not admissible to show that, at the time of the sale, the vendor's agent represented the goods to be of a particular quality. *Harnor* v. *Groves*, 15 C. B., 667. If the action, however, is founded upon a fraud in procuring such sale, parol evidence is admissible to show the fraud, notwithstanding the sale may have been reduced to writing. *Koop* v. *Handy*, 41 Barb., 454. So, if the contract is a mere receipt for the purchase price of goods sold, that will not exclude parol evidence of a warranty on the sale of such goods or property. *Filkins* v. *Whyland*, 10 E. P. Smith, 338; *S. C.*, 24 Barb., 379; *ante*, 533, 534. It has been held that a party who signs a written contract, as principal, will not be permitted to show, by parol evi-

dence, that he was the mere agent of a third person, and thus charge him as principal, when the name of the latter does not appear upon the face of the instrument. *Fenly* v. *Stewart*, 5 Sandf., 101; *Auburn City Bank* v. *Leonard*, 40 Barb., 119. But, in a recent case in the court of appeals, it was held that a subscription by an agent, in his own name, without mentioning the name of the principal, was sufficient to charge the latter; that it was valid under the statute of frauds; and that parol evidence was admissible to show who was the actual principal. *Dykers* v. *Townsend*, 10 E. P. Smith, 57.

A written contract executed between parties, not in performance of a distinct and separate provision of prior negotiations and agreements between them, but covering, in its terms or legal effect, the whole subject matter thereof, extinguishes and supersedes all such prior negotiations and agreements. *Renard* v. *Sampson*, 2 Kern., 561; *Townsend* v. *Fisher*, 2 Hilt., 47; *Price* v. *McGown*, 6 Seld., 465. In such a case, parol evidence of the prior oral negotiations are not admissible in evidence. But where the written instrument is a mere part performance of a prior written contract, there is no presumption, in the absence of all proof on the subject, that the prior contract is merged in the subsequent one. *Morris* v. *Whitcher*, 6 E. P. Smith, 41; *Bellinger* v. *Kitts*, 6 Barb., 274. And whether the stipulations contained in the prior contract are merged in the subsequent one is a question of intention, upon which parol evidence is admissible. *Ib.*

An executory contract, whether verbal or written, for the performance of distinct and separable provisions, is not merged in, or superseded by, a subsequent written contract in execution of a part only of such provisions, where there is no other evidence than the written agreement of an intent that it should be extinguished. *Witbeck* v. *Waine*, 2 E. P. Smith, 532.

While a written or sealed instrument remains in full force, and is still executory and unbroken or unrescinded, parol evidence of a parol prior agreement is not admissible, for the purpose of varying the terms of such written agreement. *Lynch* v. *McBeth*, 7 How., 113; *Nelson* v. *Sharp*, 4 Hill, 584. But where a written contract for the sale of goods is silent as to the time of delivery, it is competent to prove a subsequent oral agreement, distinct from the original contract, fixing the time for delivery. *Orguerre* v. *Luling*, 1 Hilt., 383, and see Vol. I, 902.

There are a few instances, however, in which written, and even sealed instruments, may be varied or modified by parol agreements; and, in such cases, parol evidence may be given to show what the modification was. If a sealed agreement fixes the time for the performance of the contract, there may be a valid parol agreement extending the time of performance. *Flynn* v. *McKeon*, 6 Duer, 203; *Vasseur* v. *Livingston*, 4 Duer, 285; and see Vol. I, 902.

The holder of a promissory note may treat all the makers as principals, and parol evidence is not admissible in such a case, to

show that such is not their character; but as between the makers themselves, parol evidence is admissible to show who are principal debtors and who sureties. *Robison* v. *Lyle*, 10 Barb.. 512; and see *Sisson* v. *Barrett*, 2 Comst., 406; *S. C.*, 6 Barb., 199.

Although parol evidence cannot be admitted, for the purpose of contradicting or varying a written instrument, yet such evidence is admissible to explain the meaning of characters, marks and technical terms used in a particular business, and which are unintelligible to persons not acquainted therewith, where they occur in a written instrument, and the explanation is consistent with its terms. *Dana* v. *Fiedler*, 2 Kern., 40; *S. C.*, 1 E. D. Smith, 463. And where a written contract stipulated for the sale of "one hundred and fifty casks of one ton each, best madder, 12¼," it was held that parol evidence was competent and admissible to prove that among dealers in the article, these figures meant 12¼ cents a pound. *Ib.* So where a certificate of deposit given by a banker, stated that the plaintiff had deposited a specified sum in "Ills. cy.," it was held that parol evidence was admissible, to show that the meaning of these words or letters was "Illinois currency." *Hulbert* v. *Carver*, 37 Barb., 62.

So where grain was deposited in store, and a memorandum or certificate was given, acknowledging the receipt of the grain in store "on freight," it was held, in an action on the certificate, that the defendant might show, by parol evidence, that it was the custom, at the place where the grain was delivered, and had been for forty years, to pay for grain left on freight, after the owner had ordered it to be freighted, and not before; that this custom was known to the plaintiff; and that he himself had been in the habit for many years, of leaving grain at that place, to be freighted upon the same terms. *Outwater* v. *Nelson*, 20 Barb., 29.

So in an action to recover damages for the conversion of a quantity of grain, the following instrument, signed by the defendant, was put in evidence, by the plaintiff: "Received, Oct. 19, 1847, from ——, by D. Cary, ——, 43$\frac{47}{60}$ bushels wheat, at —— per bushel," and the plaintiff also offered parol evidence, to show that the transaction was a bailment instead of a sale of the grain, and the evidence was held admissible, on the ground that the contract itself was so ambiguous as not to import a contract of any description, and that it stood on the same footing as any other receipt, and that it might, therefore, be explained like any other receipt. *Sheldon* v. *Peck*, 13 Barb., 317.

When terms of art are used in a written contract, and they have a definite meaning, known to those engaged in the particular business referred to, parol evidence is admissible to show what that meaning is, when it is not plain on the face of the agreement. *Stroud* v. *Frith*, 11 Barb., 300. And where a master covenanted to teach an apprentice the business of a "cabinet and mahogany door-maker," and an action was brought against the master for not performing his covenant, it was held that he was entitled to show, by parol evidence, that such business included

nothing more than the making of doors of mahogany and ornamental woods. *Ib.* But although parol evidence is admissible, for the purpose of showing the meaning of these terms, it is not admissible for the purpose of showing what the parties agreed to do, except so far as the explanation of the terms has that effect. *Ib.*

Where the language employed in a written contract leaves the meaning of such contract in doubt, evidence of extrinsic facts is admissible to aid in removing the doubt. *Moore* v. *Meacham*, 6 Seld., 208. So, in construing a written instrument, the court may look to antecedent and surrounding facts and circumstances to ascertain its meaning. *Blossom* v. *Griffin*, 3 Kern., 569.

And, where the defendants were doing business, both as forwarders and carriers, and they agreed orally to transport merchandise, which was to be delivered from time to time, and subsequently, on receiving a portion thereof, to be transported pursuant to the oral contract, they executed a written instrument, stating that the property was received "to be forwarded," it was held that parol evidence of the oral agreement was admissible, to aid in determining whether the defendants were liable as carriers, or merely as forwarders, in a case where the goods were consumed by fire while in the defendants' hands. *Ib.*

Parol evidence is always admissible to apply a written contract to the facts, or to show the extrinsic facts to which the contract relates, and its practical execution in reference to such facts. *Spencer* v. *Babcock*, 22 Barb., 326. In a contest between an attaching creditor and a mortgagee of personal property, where the mortgage described the property as "eleven thousand feet of pine lumber, of various thicknesses, now in the shop of the mortgagor," in a specified building, and where it was shown that but one-fifth part of the property was in the building specified, at the time of the execution of the mortgage, it was held that parol evidence was admissible to show that the property mortgaged was a quantity of lumber which the mortgagor had just before purchased; that a part only of it had been delivered, and that the remainder was still in the possession of the vendor. *Galen* v. *Brown*, 8 E. P. Smith, 37; and see Vol. I, 160, 161.

But, although parol evidence is admissible in many cases, to determine and define the subject matter of a contract, when such evidence is explanatory, yet it is never admissible when it is contradictory. *Bell* v. *Holford*, 1 Duer, 58.

Where a warrant, issued by the supervisors of a county for the collection of taxes, is signed by the proper officers, though not describing themselves as supervisors, it may, whenever it is important to do so, be shown by parol evidence that such persons, so signing the warrant, were supervisors. *Sheldon* v. *Van Buskirk*, 2 Comst., 473.

Where there are several causes of action embraced in the same complaint, and the recovery appears to be general, parol evidence is competent to show upon which cause or causes of action spe-

cified, the trial was had and judgment obtained. *Stedman* v. *Patchin*, 34 Barb., 218. Such evidence does not contradict the record, unless the party is permitted to show that the judgment was rendered upon a cause of action not specified in the complaint. *Ib.*

The consideration clause in a deed or other written instrument, is generally open to explanation by parol proof. If a deed recites that the consideration is money, it is competent to show, by parol evidence, that the consideration was not money, but iron of a specified quantity, and valued at a stipulated price. *McCrea* v. *Purmort*, 16 Wend., 460; and see *Adams* v. *Hull*, 2 Denio, 306. So, where a bill of goods is sold, and a bill of sale, expressing a pecuniary consideration, is made out and delivered with the goods, this will not prevent the introduction of parol evidence to show that the consideration was not wholly pecuniary, but consisted in a special agreement instead, and that it has been broken, to the damage of the party seeking to show such fact. *Earle* v. *Crane*, 6 Duer, 564.

So, where a chattel mortgage states the consideration to be $1,000, in money advanced by the mortgagee to the mortgagor, and the consideration is attacked by the mortgagor, or his assignees or creditors, on the ground that no money was advanced, the mortgagee, for the purpose of sustaining his mortgage, may show, by oral evidence, that the real consideration was a note for $1,000, made by the mortgagor and indorsed by the mortgagee, for the purpose of raising that amount of money for the mortgagor's accommodation; that there was a failure to raise the money upon that note, and that two notes, of $500 each, were substituted in its place, upon which the money was obtained, and that the mortgagee has paid such notes. *McKinster* v. *Babcock*, 12 E. P. Smith, 378. And, in such a case, parol evidence is admissible to show that the mortgagee indorsed the two $500 notes, in reliance upon the mortgage as a security therefor, and that it was the object of the mortgage to secure any such substituted liabilities. *Ib.* So, a promissory note or other written promise, given for the payment of money, may be shown to be of no value, and that no action is maintainable thereon, because the consideration is fraudulent, and the fraud may be established by parol evidence. *Stewart* v. *Ahrenfeldt*, 4 Denio, 189. So, where a contract is ambiguous on its face, and it may include or cover either a legal or an illegal consideration, parol evidence is admissible to show the intention of the parties, and whether it was the legal or the illegal consideration that was relied on in the writing. *Brown* v. *Brown*, 34 Barb., 533. The object of the evidence, in such a case, is not to contradict the instrument, but to apply it to the subject intended. *Ib.*

Where a contract is in writing, and it is definite and certain in its terms, it cannot be controlled or modified by parol evidence of commercial usage. *Vail* v. *Rice*, 1 Seld., 155; *Hinton* v. *Locke*, 5 Hill, 437; *Hone* v. *Mut. Safety Ins. Co.*, 1 Sandf., 137; *Beals* v.

Terry, 2 Sandf., 127. And although parol evidence of usage or custom is admissible to explain ambiguous words or phrases in a written instrument, it is never admissible to prove custom or usage, for the purpose of controlling general rules of law, or for contradicting the express agreement of the parties. *Ib.*

So where the terms of a written contract are definite, and free from any ambiguity, parol evidence of the subsequent acts of the parties is not admissible, for the purpose of giving construction to the contract. *Giles* v. *Comstock*, 4 Comst., 271; *Lowber* v. *Le Roy*, 2 Sandf., 202. Where the terms are ambiguous, see *French* v. *Carhart*, 1 Comst., 96; *Chapman* v. *Black*, 4 Bing. N. C., 187.

Where a bill of lading acknowledges the receipt of a cargo of grain from A., A. is competent to show by parol evidence that the grain actually belonged to B., and that A. was merely his agent, having no interest whatever in the grain. *Ide* v. *Sadler*, 18 Barb., 32; and see *Scovill* v. *Griffith*, 2 Kern., 509; *Higby* v. *N. Y. & Harlem R. R.*, 3 Bosw., 497.

Where the evidence in a case shows both a written and a verbal authority to a person to act as attorney, proof of a search for the written power, and of an inability to find it, is sufficient to warrant the introduction of parol proof of its contents. *Bank of North America* v. *Embury*, 33 Barb., 323. So parol proof of notice of the non-payment of a bill, note, or check may be given, although the notice was in writing, and the defendant has not been called on to produce it at the trial; and the rule is the same, whether the notice was given by a public notary or by a private person. *Scott* v. *Betts*, Hill & Denio, 363.

In construing a written contract, the court will, if possible, so read it as to effectuate the intention of the parties rather than to defeat it. *Stratton* v. *Pettit*, 16 C. B., 420. And it will interpret or construe a promise in the sense in which the promisor knew that the promisee understood it. *Barlow* v. *Scott*, 10 E. P. Smith, 40. But, as a general rule, the intention must be collected from the face of the written instrument itself. *Kelley* v. *Upton*, 5 Duer, 336; *Baker* v. *Higgins*, 7 E. P. Smith, 397. And if the plaintiff complains upon an instrument in writing, the defendant cannot, in pleading, rely upon oral matter, which introduces a qualification of the contract sued on, or which shows that it was made subject to a condition which does not appear upon the face of it. *Canham* v. *Barry*, 15 C. B., 597; *Hosley* v. *Beach*, 26 How., 97; and see *ante*, 460, 461.

But it may be shown that the instrument was not to take effect as an agreement until it was approved by some particular person, and that such approval has not been given. *Pym* v. *Campbell*, 6 Ell. & Bla., 370; or it may be shown that the instrument was not to be obligatory on the party sued until an other person signed it above his signature, and that this has not been done. *Miller* v. *Gambie*, 4 Barb., 146; *Ely* v. *Kilborn*, 5 Denio, 514, Vol. I, 438.

Where general words are used in an agreement, they will be so restricted as to subserve the intentions of the parties. *Coddington* v. *Davis*, 3 Denio, 17; *S. C.*, 1 Comst., 186.

And where a written instrument has no date, parol evidence is admissible to show that it was not intended to operate from its delivery, but from a future uncertain period. *Davis* v. *Jones*, 17 C. B., 625. So, too, contracts must always be construed in reference to the subject matter to which they relate, and in the light of the contemporaneous facts and circumstances. And, therefore, extrinsic evidence of the circumstances existing at the time of its execution is always admissible, not for the purpose of contradicting the instrument, but to aid in its interpretation. *Phelps* v. *Bostwick*, 22 Barb., 314. And, so parol evidence is also admissible, to show that a bond for the payment of money, absolute in its terms, was delivered, under an agreement, by which it was to be held by the obligee as a collateral security for the debt of third parties, and that it was to be canceled upon his obtaining payment from them. *Chester* v. *Bank of Kingston*, 2 E. P. Smith, 336.

SECTION XX.

PAROL PROOF AS ORIGINAL AND INDEPENDENT EVIDENCE.

It has already been seen, *ante*, 453, how far parol evidence is admissible to *contradict*, *vary*, or *wholly subvert* a written instrument, as well as how far it is admissible to *establish*, *explain* and *support* written evidence; and it now remains, in the *third* place, to consider in what cases parol extrinsic evidence is admissible, to prove a fact, by virtue of its own weight or authority, notwithstanding the casual existence or use of collateral written evidence to prove or disprove the same fact. What has been already said supplies, indeed, a sufficient test; for it seems that, in general, the mere circumstance that a written instrument exists, which may be made evidence of a particular transaction, does not exclude oral testimony either to prove or disprove the fact, unless that written instrument be by law, or the agreement of the parties, constituted the *authentic* and *sole* medium of proving that fact.

To illustrate, suppose that a valid oral contract is made by two persons, in the presence of witnesses, and suppose, further, that one of those witnesses should reduce to writing the terms of the contract, such writing would not be of a higher nature than the oral evidence of the other witnesses, so as to exclude their oral testimony, because the writing in such a case was not the act of the parties, nor was it agreed that the writing should be the only legal evidence of the terms of the contract.

A written memorandum made in the manner supposed, might be more satisfactory evidence as to its accuracy, especially after the lapse of a long time, but that fact does not affect the *competency* of the oral evidence of the other witnesses, although a court or jury might give greater *credit* to the written evidence in a case

of conflicting evidence between the oral statements and those reduced to writing.

The importance of the subject, however, renders it desirable further to consider, first, in what instances written instruments are of an *exclusive* nature: and secondly, with respect to what *parties* and to what *facts*.

In the first place written evidence has an *exclusive* operation in every instance in which such evidence is required, by virtue of legislative enactments, such as the case of wills, deeds and mortgages of real estate, contracts within the statute of frauds, &c., &c.

In the second place written evidence has an exclusive operation in all those cases in which the parties intentionally and deliberately reduce their agreement or contract to writing, intending that the writing shall be the authentic evidence of the terms and conditions of the agreement. It is not necessary that the parties should expressly agree that the writing shall be the exclusive evidence of the contract. The simple fact, that the agreement is reduced to writing is sufficient, and the law will declare that such writing was intended to be the sole and exclusive evidence of such agreement, and will exclude parol evidence of the terms of such contract.

The rule is the same in all cases in which the acts of a court of justice are the subjects of evidence. Courts of record speak by means of their records only; and even where the transactions of courts which are not, technically speaking, courts of record, are to be proved, if such courts preserve written memorials of their proceedings, those memorials are the only authentic means of proof which the law recognizes.

Those proceedings in justices' courts which the law requires to be entered into the docket of the justice, must be proved by the docket, and not by means of parol evidence. *Ante*, 401 to 404.

A release under seal is conclusive as to the matters stated in it; and parol evidence to contradict the terms or the legal effect of such a release, is not admissible. *Stearns* v. *Tappin*, 5 Duer, 294. In such a case, it cannot be shown by parol that there was not a sufficient legal consideration to sustain the instrument; nor can it be shown that the consideration was a different one from that stated in such release. *Ib.* And the provisions of the Revised Statutes, which permit an inquiry into the consideration of a sealed instrument, has not affected the common law rule that a release under seal extinguishes the debt or claim to which it relates, even when the release recites a mere nominal consideration. *Ib.*

There are some exceptions to the rule which excludes parol evidence for the purpose of contradicting or explaining or varying the terms of written instruments. A writing, which on its face purports to be an absolute bill of sale of chattels, may be shown, by parol evidence, to have been intended as a mere chattel mortgage. Vol. I, 133.

Where an agreement is reduced to writing in duplicate, and each party keeps a copy, if there is a mistake in one of the instruments, it may be shown by parol evidence, by the scrivener who wrote the paper, that he made a mistake in making one of the papers. *McNulty* v. *Prentice*, 25 Barb., 204. In the case just cited, the written instrument was an indenture of apprenticeship, and the question in the case was, in relation to the time for which the apprentice was to serve. In the apprentice's copy, it was stated to be two years, *two* months, and fifteen days; while in the master's copy, it was stated to be two years, *ten* months, and fifteen days. On the trial, the defendant, who was the master, offered to show that the word *two* was inserted instead of *ten* by a clerical error, and was made by a mistake of the person who wrote the papers; and the evidence was held competent. It will be observed, however, that, in this case, it was not strictly a correction by parol evidence alone; for the parol evidence offered was merely to the effect that an other written instrument, executed at the same time, and as a part of this instrument, was the accurate one.

In an action upon a written agreement which was signed by the defendant, he offered to show, by parol evidence, that the agreement was not to be binding upon him until he should consult a third party, and upon condition that such third party should approve of the contract; and it was also offered to show that such third person did not approve of the contract; and this evidence was held to be admissible, because it showed that, in fact, there was no agreement at all between the parties. *Pym* v. *Campbell*, 6 Ell. & Bla., 370.

Receipts, as a general rule, are open to explanation or contradiction, so far as they relate to an admission of the receipt of money or property. It may be shown by parol evidence that there was a mistake made in the receipt, as to the particular moneys mentioned in it, *Ensign* v. *Webster*, 1 Johns. Cas., 145; or, that the receipt was given upon a condition which has not been performed, *House* v. *Low*, 2 Johns., 378; or, to show that provisions were received to sell on commission, instead of a sale, when the receipt expressed that they were received "for account of" the person sending them, *McKinstry* v. *Pearsall*, 3 Johns., 319; or, to show that there was no payment, when a note or other chose in action is received by the person giving such receipt, *Higby* v. *N. Y. and Harlem Railroad Co.*, 3 Bosw., 497; *Tobey* v. *Barber*, 5 Johns., 68; *Putnam* v. *Lewis*, 8 Johns., 389; *Johnson* v. *Weed*, 9 Johns., 310; *Southwick* v. *Hayden*, 7 Cow., 334; or, to show that a sum receipted as money was not paid in money, but in property. *Battle* v. *Rochester City Bank*, 3 Comst., 88. But, where a receipt was given for a quantity of grain, which was "subject to order any day when called for (after a day specified), without charge for storage," it cannot be shown by parol evidence, nor by evidence of usage, that this is a contract of sale, instead of a bailment. *Wadsworth* v. *Allcott*, 2 Seld., 64.

An ordinary receipt is conclusive as to what it recites, if it is not explained or contradicted by parol or other evidence. *Lambert* v. *Seely*, 2 Hilt., 429. So, where the amount of a claim is, in good faith, disputed, and the claimant takes less than the sum demanded, for the purpose of a settlement, and gives a receipt in full, such receipt cannot be contradicted by parol evidence, showing that the full amount was not paid. *Palmerton* v. *Huxford*, 4 Denio, 166; *Neary* v. *Bostwick*, 2 Hilt., 514; *Pierce* v. *Pierce*, 25 Barb., 243. But, where there is no dispute as to the amount due, and a receipt in full is given, when less than the full amount is paid, the receipt may be explained or contradicted by parol evidence. *Foersch* v. *Blackwell*, 14 Barb., 607.

In some instances, a receipt constitutes a part of a contract, as well as the acknowledgment of a sum of money; and in such cases, the contract part of the receipt cannot be contradicted by parol evidence.

Where an injury occurred to the plaintiff by reason of the negligence of the stage driver of the defendant, and the plaintiff gave a receipt to the defendant in the following form: "Received, Brookfield, July 11, 1849, of Wm. D. Knapp, $40, in full, for damages done to us by stage accident of the 13th of June last," it was held, that this was not a mere receipt, explainable or liable to contradiction by parol evidence, but that it was a conclusive bar to an action for damages for such injury. *Coon* v. *Knapp*, 4 Seld., 402; and see *Egleston* v. *Knickerbacker*, 6 Barb., 458.

Bills of lading are explainable, so far as it relates to the condition of the goods received. And if the bill recites that the goods were received "in good order," this does not prevent the carrier from showing, if he can, that the goods were not in good order when received. *Ellis* v. *Willard*, 5 Seld., 529; *Wolfe* v. *Myers*, 3 Sandf., 7. The presumption, however, is, that the goods were in good order, as the receipt admits; and the burden of proof is upon the carrier, to show that the goods were not in good order at the time they came into his hands. *Price* v. *Powell*, 3 Comst., 322.

Where two persons are sureties for a third person, it may be shown in an action between the sureties, that one of them was surety for the other, and that they were not joint sureties. *Ante*, 462; *Barry* v. *Ransom*, 2 Kern., 462; but see *Norton* v. *Coons*, 2 Seld., 33; Vol. I, 377.

So, a mere receipt given for the purchase price of a horse sold, does not prevent the purchaser from showing, by parol evidence, that the horse was sold with a warranty, and that such warranty was broken. This was held in a case in which the receipt was as follows:

"TROY, NOV. 19, '52.

C. B. Filkins,

Bo't of C. Whyland,

1 Horse, ... $150 00

C. WHYLAND."

And it was held that this paper was a mere receipt, and not a contract of sale. *Filkins* v. *Whyland*, 10 E. P. Smith, 338.

Of course if the contract of sale was reduced to writing, it could not be contradicted or varied, even though it also contained a receipt for the purchase price. *Ib.*

There may sometimes be a modification of written unsealed agreements by a subsequent parol agreement. As a general rule, it is clearly and certainly settled, that in an action upon a contract for work and labor stipulated to be performed within a definite time, an extension of the time, or an entire waiver of objections to a delay in performance, may be shown by parol evidence of the declarations, or acts in *pais* of the party, who at the time was entitled to claim the performance. *Vasseur* v. *Livingston*, 4 Duer, 285, 292. And the same rule has been applied to sealed instruments. *Fleming* v. *Gilbert*, 3 Johns., 528; *Smith* v. *Gugerty*, 4 Barb., 615; *Crane* v. *Maynard*, 12 Wend., 408; *Esmond* v. *Van Benschoten*, 12 Barb., 366. So where a written sealed agreement fixes a time for its performance, that time may be extended by a parol agreement. *Flynn* v. *McKeon*, 6 Duer, 203.

So, where sealed articles of agreement for the sale of real estate, did not specify the place at which the conveyances to be executed by the plaintiff should be tendered, it was held competent for the parties, subsequently, to appoint a place by parol, for that purpose. *Franchot* v. *Leach*, 5 Cow., 506; *Esmond* v. *Van Benschoten*, 12 Barb., 366. But, independently of these exceptions, as to extension of time, or the fixing of a place for the performance of a written agreement, the general rule is, that a sealed, executory contract cannot be released or rescinded by a parol agreement, *Delacroix* v. *Bulkley*, 13 Wend., 71; *Dewey* v. *Derby*, 20 Johns., 462; *Erwin* v. *Saunders*, 1 Cow., 249; *Nelson* v. *Sharp*, 4 Hill, 584; and see cases cited in *Hunt* v. *Bloomer*, 5 Duer, 206.

But, after there has been a breach of a sealed contract, the right of action may be waived, or it may be released by a new parol contract relative to the same subject matter, or by any valid parol executed contract. *Ib.; Keeler* v. *Salisbury*, 27 Barb., 485.

And it has been held that an *executed* parol agreement, which is founded upon a sufficient consideration, may operate to discharge the stipulations of a sealed contract. *Townsend* v. *Empire Stone Dressing Co.*, 6 Duer, 208; *Allen* v. *Jaquish*, 21 Wend., 628.

Though a subsequent *executory* agreement, to be operative as a defeasance or a modification of a previously executed sealed agreement, must be under seal, whether executed upon a sufficient consideration or not. *Eddy* v. *Graves*, 23 Wend., 82.

SECTION XXI.

OBJECTIONS TO THE COMPETENCY OF WITNESSES.

The question, who are competent witnesses, has been already discussed. *Ante*, 367. But, although many persons are now com-

petent who, under the former law, were not, there are still some cases in which an objection may be taken to the competency of the person offered as a witness. The time and manner of raising the objection is sometimes a material one. And, besides that, there is a matter of fairness as to this time and manner of objecting.

If the objection arises on account of the extreme youth of the witness, or from his infamy of character because convicted of a felony, it ought, in its natural course, to be taken before the witness is sworn, because the objection assumes that he is *incapable* of being bound by an oath. And the rule may be generally stated, that every objection to the *competency* of a witness ought to be taken in the first instance, and before he is sworn and examined in chief; because, if the rule were otherwise, it would afford an unfair advantage to the objecting party, since he could avail himself of the testimony of the witness if it were favorable, but who would get rid of it by raising the objection, if it turned out to be adverse to him.

In this state, however, if a witness is sworn in chief without objection, and it appears during his examination that he is incompetent, by reason of interest, the objection may be taken after such fact appears. *Seeley* v. *Engell*, 3 Kern., 542. But a party against whom a person is offered as a witness has a right to have the preliminary oath, called the *voir dire*, administered to him, and to examine him in relation to his competency before he is sworn in chief. *Ib.*

It is not a mere matter of discretion with a justice, whether he will administer this preliminary oath to the proposed witness; for, if he refuses to do so, on a proper application, his refusal will be error. *Ib.*

To be sworn on the *voir dire*, simply means that the witness is sworn to speak the truth. The form of the oath indicates the nature of the oath:

Form of the oath.

You do swear that you will answer truly all such questions as shall be put to you, in relation to your interest in the event of this action.

When the oath is administered to any witness, other than the one proposed, vary the form by saying, "in relation to the interest of A. B." (naming the witness).

The question as to the *competency* of a witness is always a question for the justice, and cannot be submitted to the jury. Vol. I, 53, § 98. Both parties may give evidence upon the question; but, if the party objecting calls and examines the proposed witness, neither party can introduce any other evidence upon that question. *Ib.*

It must not be supposed, that because witnesses are *competent* to testify, that therefore the question whether they are interested in the event of the action is a matter of no importance. A witness may be permitted to be examined, but his interest may be such that a jury would scarcely feel at liberty to regard his evi-

dence in the same light they would that of a disinterested witness. And *interest* is as valid an objection to the *credibility* of a witness as ever it was. *Hoyt* v. *Lynch*, 2 Sandf., 328. When a person is offered as a witness, and he is objected to, on the ground that he is the person for whose benefit the action is prosecuted, and evidence to support such objection is offered and given by the party making it, the proposed witness is competent to disprove the allegation that the suit is prosecuted for his benefit. *Requa* v. *Requa*, 8 E. P. Smith, 254.

The subject of evidence having been generally discussed, and some of the principles examined which relate to written evidence, it is now proper to notice the subject of oral evidence, and the manner of introducing such evidence.

Oral proof is generally given by a personal examination of the witness in open court, though such examination is sometimes taken on a commission, or upon an order for that purpose. Oral testimony, it is to be remembered, in natural order precedes written evidence. It is generally more proximate to the fact than written evidence, because it is a direct communication by one who possesses actual knowledge of the fact by his senses, while written evidence in itself requires proof, and must ultimately be derived from the same source with oral evidence; that is, from those who possessed actual knowledge of the facts. The manner of procuring the attendance of witnesses will be elsewhere explained.

SECTION XXII.

OATH TO WITNESSES.

After the attendance of a witness is secured, the law next provides for the attaining of the highest value and importance which can be attached to oral evidence.

And for this purpose, the first great safeguard which the law provides for the ascertainment of truth in ordinary cases, consists in requiring all oral evidence to be given under the sanction of an oath. This imposes the strongest obligation upon the conscience of the witness to declare the whole truth, that can be devised by human wisdom; since a willful violation of the truth exposes him at once to temporal and to eternal punishment.

An oath is a declaration made according to law, before a competent tribunal or officer, to tell the truth; or it is the act of one who, when lawfully required to tell the truth, takes God to witness that what he says is true. It is a religious act by which the party invokes God not only to witness the truth and sincerity of his promise, but also to avenge his imposture or violated faith; or in other words to punish his perjury, if he shall be guilty of it.

The act or ceremony of taking an oath is now usually that of laying the hand upon and kissing the gospels. But this is not strictly necessary, for in place of this the witness is allowed, if he prefers it, to swear by lifting up the right hand, and in some cases without any manual act whatever. As oaths are adminis-

tered at the present day, it is important that the witness should do some *act*, for he generally *says nothing* when sworn.

The whole form of the oath is repeated to him by the person who administers the oath, and the party sworn merely assents to it by kissing the book, or by some other act done.

The entire form is far less impressive than that of the ancient practice, which placed the words of the oath in the party's own mouth, it being repeated in the first person throughout, and sometimes with peculiar solemnity. This form of administering an oath is now observed in some instances, as, for instance, in taking the constitutional oath of office.

The object of every oath is, to bind the conscience of the witness or person sworn, and for that reason, that form of oath and that mode of swearing should be adopted which the witness considers most obligatory.

By the principles of the common law, no particular form is essential to the oath; and therefore every witness is now sworn according to the form which he holds to be the most solemn, and which is sanctified by the usage of the country or of the sect to which he belongs.

The statute has provided what rules shall be observed in the administration of oaths and affirmations, 3 R. S., 692, 5th ed., as follows:

"§ 114. The usual mode of administering oaths now practiced, by the person who swears laying his hand upon and kissing the gospels, shall be observed in all cases in which an oath may be administered according to law, except in the cases hereinafter otherwise provided."

"§ 115. Every person who shall desire it, shall be permitted to swear in the following form: 'You do swear, in the presence of the everliving God;' and, while so swearing, such person may or may not hold up his hand, in his discretion."

"§ 116. Every person who shall declare that he has conscientious scruples against taking any oath, or swearing in any form, shall be permitted to make his solemn declaration or affirmation in the following form: "You do solemnly, sincerely and truly declare and affirm."

"§ 117. Whenever the court, before which any person shall be offered as a witness, shall be satisfied that such person has any peculiar mode of swearing connected with, or in addition to, the laying of his hand upon the gospels and kissing the same, which is more solemn and obligatory in the opinion of such person, the court may, in its discretion, adopt such mode of swearing such person."

"§ 118. Every person believing in any other than the Christian religion, shall be sworn according to the peculiar ceremonies of his religion, if there be any such ceremonies, instead of any of the modes hereinbefore prescribed."

Matters of religious belief do not now render any witness incompetent, however much it may affect his credit. *Ante*, 370.

In whatever form the oath is administered, at the request of the party sworn, he will be as guilty of perjury, both morally and legally, if he swears falsely, as though he had been sworn in the usual manner. 3 R. S., 693, § 122, 5th ed.

Where a witness is offered who is ignorant of the English language, he must be sworn and examined through an interpreter, who must be first sworn.

Form of interpreter's oath.

You do swear that you will accurately and truly interpret between the court, the jury and the witness, A. B., in this action, between John Doe, plaintiff, and Richard Roe, defendant.

When no jury is called, omit the words, "the jury," in the form of the oath. After the interpreter is thus sworn, the oath is administered to the witness, by being repeated by the court to the interpreter, and by the latter to the witness.

The examination of the witness is conducted, by putting the questions to the interpreter, and by his immediately repeating the substance of the question in the language which such witness speaks or understands.

Deaf and dumb persons are examined by means of an interpreter, even in the most important cases. But where such a witness can write, the best mode is to require written answers. *Morrison* v. *Lennard*, 3 Carr. & Payne, 127. The aid of an interpreter is proper in every case in which there cannot be an intelligible communication between the witness and the counsel, court, or jury.

The form in which an oath is administered to a witness, requiring him to tell "the truth, the whole truth, and nothing but the truth," is sometimes singularly understood by witnesses. Some suppose that it imposes no obligation, except to answer as to such matters as are called for by a particular and direct question. Others again suppose that they are to tell every thing which they imagine relates to the matter in litigation, whether the evidence is relevant or not, or even whether it is legally admissible at all or not. Such extreme views are entirely erroneous; and no notice need be taken of the matter were it not so commonly seen in practice. Occasionally a witness insists upon giving his entire version of a matter, merely because he has been sworn to tell the whole truth. Now, if they understood the true object of the oath, there could be no such improper view entertained. The object of the oath is to elicit the entire truth, without suppressions or additions. But such oath is always subject to the qualification, that the witness is to speak of those matters only, which are legally admissible in evidence, under the decisions of the court; and, also, that they are such as are in some manner called for by the party examining the witness.

If a witness is required to narrate all that he knows of a specified transaction, he should proceed to state it fully and accurately. But, if he is informed by the examining party that

certain portions of the transaction are unimportant, or if any portion of the evidence is objected to by the opposite party, he ought not to speak of that, unless directed by the court to do so. And, above all things, a witness ought never to volunteer or foist in statements which he knows are not called for by any question, or proper, as a part of any statement which he is permitted or required to make.

To do such an act knowingly and intentionally is as much moral perjury as any other false swearing. This is evident, from the nature of the oath itself, which requires a witness, 1st. To tell the truth, which means that his entire statements shall be strictly true, both in letter and in spirit. 2d. To tell the whole truth, which means that nothing shall be kept back or concealed, if inquired after by either party, either by means of direct questions, or by requiring a full statement of specified matters; but the oath does not require or permit a witness to testify as to matters of which no inquiry is made in any form. 3d. To tell nothing but the truth, which means that the witness shall not state any thing which is not strictly true; and that he shall not make up or manufacture any statements which are false or unfounded in fact, and give them in evidence as truth; so it also prohibits a witness from stating any matters which he knows are not legal evidence, or which are entirely foreign to the matters called for by his examination.

Occasionally, however, a question may be so vague that the witness is misled by it; or, on the other hand, he may be required to make some general statement, and while doing so may speak of matters not intended to be inquired about. In such cases there is no offense on the part of the witness, since he has acted in good faith in the discharge of a great obligation as a sworn witness. And there is one mode which an honest witness may, and always will pursue, when he fully understands his rights and duties, which is to invariably stop testifying whenever an objection is taken to any of his statements until the court shall decide the question, or direct him to proceed. And he should pursue the same course whenever an objection is taken by either party to any question put by the other.

SECTION XXIII.

MANNER OF TESTIFYING.

The nature of evidence, whether *immediate* and within the actual knowledge of the witness, or *mediate* or hearsay, has been already explained. *Ante*, 365. When a witness is admitted as competent, his evidence must be received; but even in such a case the credibility of the witness is an other question, and is to be determined by those whose duty it is to weigh the entire evidence in the cause. The manner in which a witness testifies frequently has a most important bearing upon the credit which is accorded to his evidence.

Immediate testimony (or that within the knowledge of the witness), is given under the solemn sanction of an oath, in the presence of the public; the jury have the advantage of observing the deportment of the witness, the manner in which he gives his testimony; in particular, whether as one relying on the consistency of truth, he answers promptly and readily, according to the suggestions of his memory, or with hesitation and difficulty, either attempting to evade direct answers, or to gain time to weigh them, in order to avoid contradictions and inconsistency; whether he readily answers all questions indifferently, whether they make in favor of or against the party whose witness he is; or he gives favorable answers on the one side, with willingness and readiness, and on the other with difficulty and reluctance. The attention of such a witness is called directly and immediately to the very facts of which the disclosure is material; his means of knowledge, memory, situation, connection with the parties, and his motives, are subject to the severe and trying test of cross-examination, by means of which fraudulent witnesses are often surprised and detected.

In all these important particulars mediate or hearsay evidence is usually defective, for, although no doubt be entertained that the witness examined heard from an other the statement which he is ready to repeat, yet that other did not make the communication under the sanction of an oath. There are no sufficient means of ascertaining whether he had the opportunity or the capacity for minute and accurate observation; nor of judging as to the tenacity of his memory. His attention in making the communication may not have been sufficiently directed to many of the particular facts, which afterwards appear to be material. He may have omitted many which are important; or, not knowing that any such use would afterwards be made of his declaration, may have expressed himself without that caution and accuracy which he would have deemed to be necessary had he been examined under the sanction of an oath before a public tribunal, having his attention particularly directed to each material fact, and with a full knowledge of the important consequences which might result from his testimony with respect to the property, liberty or lives of others, and the necessity for caution in his answers. In addition to this, he may have been induced to misrepresent facts on the particular occasion, under the influence of indirect motives, which, without the opportunity of cross-examination, it is impossible to trace or even to surmise.

Where the communication is derived through several intermediate witnesses, it is still weaker in degree; there is greater latitude afforded for misunderstanding and mistake, or even designed willful misrepresentation, and it is more difficult to appreciate the veracity of the original witness, the means which he possessed of acquiring information, and the motives by which he was actuated in making the communication. Ordinary experience shows how little credit is due to such mediate testimony,

and how frequently it happens that even the most absurd and improbable reports acquire credit.

SECTION XXIV.

EXAMINATION OF WITNESSES.

When a witness has been regularly sworn he is first examined by the party who produces him, which is called the *direct examination*, after which the other party is at liberty to examine him, which is called a *cross-examination;* and then the party who called him may examine him again, which is a *re-examination.* This is the regular mode of proceeding, and it ordinarily closes the examination of the witness. But, as we shall see hereafter, this strict mode is scarcely ever pursued in actual practice. The office of a direct examination, or examination in chief as it is also termed, is to lay before the court and the jury the whole of the evidence of the witness that is relevant and material. The office of a cross-examination is to search and sift, to correct and supply omissions, and to affect the credit of the witness. The office of a re-examination is to explain, to rectify, and put in order such matters as have been affected by the cross-examination. The examination of a single witness is an illustration of the manner of conducting the examination of all the witnesses in the cause. If the strict rules of examination are followed, the party who produces a witness is bound to ask all material questions on the direct examination, and if this is omitted it cannot be done in reply, for no new question can be put in reply which is not connected with the cross-examination, and which does not tend to explain it.

In one case a learned judge said: "In strict practice, he who has the affirmative ought to introduce all the evidence to make out his side of the issue; then the evidence of the negative side is heard; and finally, the rebutting proof of the affirmative, which closes the examination. In doing this, neither side ought to be permitted to give evidence by piece meal, then to apply for instructions, and again to mend and add to his proof, until, by repeated experiments, he shall make it come up to the opinion of the court. An adherence to these rules, generally, will be found necessary in all courts of original jurisdiction; and, without them, confusion, loss of time, and captious and irritable conduct must follow. We say *generally*, for it will often be found necessary for the presiding court, for good reasons, to depart from them, to attain complete justice; and when they ought or ought not to be varied, must in a great measure be left to the sound discretion and prudence of the court, and a court of error ought never to interfere for such departure, except where injustice is done by it." Per MILLS, J., in *Braydon* v. *Goulman*, 1 Monroe, 115, 117, 118.

The principle is so clearly stated in the foregoing extract, that little need be added.

In a justice's court, where so many causes are tried by the

party in person, or at least with the assistance of some unprofessional person, neither of whom is expected to be familiar with technical rules, it would not be proper to enforce the strict rule to its full extent. But, even in such cases, it would be proper for the justice to inform them of the nature and extent of the rule, and then require a reasonable observance of it. Where the cause is conducted by members of the legal profession, there would be more propriety in enforcing a proper and substantial compliance with the rule. The practice, however, has been so loose in this particular, in justices' courts, that it would be difficult to attempt anything more than a general observance of the principle of the rule. If a disregard of the rule will promote the cause of justice, fair practice, and of truth, then a disregard of it will be proper; while, on the other hand, if a strict enforcement of it will defeat an unfair practice as to the introduction of evidence, or will prevent a willful or useless waste of time, or will in any manner defeat injustice or oppression, then an enforcement of the rule will be a solemn duty on the part of the court. The rule itself must not, however, be misunderstood in one important respect. In no case is either party bound to do more than to prove the issues which are upon him at the time he offers his evidence. He need not anticipate and disprove any matters alleged affirmatively on the opposite side. For instance, suppose the plaintiff sues on a promissory note, and the defendant interposes a general denial, with a notice of set-off for goods, wares, &c., and for work, &c. In such case the plaintiff need only prove his own side of the case by proving a liability on the note. He need not disprove the set-off until after it has been sustained by the evidence of the defense. And this same rule applies to all instances which are similar in principle.

In the examination of a witness in chief, the first rule to be attended to is, that the questions be relevant to the matter in issue. If this is not attended to and observed, the examination will be rambling, tedious and uncertain, and likely to confuse and perplex the jury, from the very circumstance of its comprising irrelevant matter. Besides, the courts have a right to prevent any questions from being put, which do not tend to the proof of some of the issues. *Ante*, 418.

Each party is to decide whether he will offer any witnesses, or whom those witnesses shall be, and the court may then decide as to their competency. But no court has a right to require a witness to be sworn in favor of a party who does not desire to call him. And, therefore, a justice has no legal power to compel a party to be sworn as a witness when he objects to being a witness for himself, and when the opposite party does not call him as a witness. *McCormick* v. *Mulvihill*, 1 Hilt., 131. And when a witness has been duly sworn, the court cannot examine him so as to prevent any right which would exist in an ordinary course of examination. And, therefore, when a defendant, on the trial of a cause, called the plaintiff as a witness, under the 395th section

of the Code, and, in reply to a question put to him by the *court*, the plaintiff testified to new matter, going beyond the point to which he was examined by his adversary; it was held, that the defendant was entitled to offer himself as a witness, for the purpose of answering such new matter. *Myers* v. *McCarthy*, 2 Sandf., 399.

SECTION XXV.

CROSS-EXAMINATION.

Before entering upon a cross-examination, a preliminary question may arise whether the witness has so far given evidence in chief as to entitle the opposite party to cross-examine. If a witness is called by a party merely for the purpose of producing a written instrument belonging to the party, which is to be proved by an other witness, he need not be sworn, and if he is not sworn, he will not be subject to cross-examination.

If a witness is sworn, and gives some evidence, as for instance, to prove an instrument, however formal the proof may be, he is to be considered a witness for all purposes. Or, if a witness is sworn, and would be competent to give evidence for the party calling him, the other party will be entitled, strictly, according to the general rule, to cross-examine him, although he has not been examined in chief. But, if the counsel of one of the parties calls a witness by mistake, and discovers the mistake before he puts a question to him, the witness, though sworn, will not be subject to cross-examination. So, where a witness has been asked only one immaterial question, and his evidence is stopped by the court, the other party has no right to cross-examine him.

After a witness has been examined in chief, the adverse party is at liberty to cross-examine him. The power and opportunity of cross-examination, it will be recollected, is one of the principal tests which the law has devised for the ascertainment of truth; and this is, certainly, a most efficacious test. By this means, the situation of the witness with respect to the parties and the subject of litigation, his interest, his motives, his inclination and prejudices, his means of obtaining correct and certain knowledge of the facts to which he bears testimony, the manner in which he has used these means, his powers of discerning facts in the first instance, and his capacity for retaining and describing them, are fully investigated and ascertained, and submitted to the consideration of the court or jury, who have an opportunity of observing the manner and demeanor of the witness; circumstances which are often of as high importance as the answers themselves. It is not easy for a witness who is subjected to this test, to impose upon the court; for, however artful the fabrication of the falsehood may be, it cannot embrace all the circumstances to which the cross-examination may be extended; the fraud is therefore open to detection, for want of consistency between that which has been invented, and that which the witness must either represent according to the truth, for want of previous preparation, or

misrepresent according to his own immediate invention. In the latter case, the imposition must obviously be very liable to detection; so difficult it is to invent extemporaneously, and with a rapidity equal to that with which a series of questions is proposed, in the face of a court of justice, and in the hearing of a listening and attentive multitude, a fiction consistent with itself and the other evidence in the case.

The purpose of a cross-examination is, either to impugn the credit of a witness, or to get him to explain or give a color to what he has already stated, in his examination in chief; so as to render it less unfavorable to the party cross-examining. You may cross-examine him for the purpose of showing that he has no great respect for the moral obligation of the oath he has taken; or to show that, however he may design to speak the truth, his means of knowledge upon the subject of his evidence were so limited, he may possibly have been deceived in what he asserted in his examination in chief; or to show that he is interested in the event of the action, for, although interest would not disqualify him from testifying, it would be a question whether it affected his credit; or to show that he has been arrested or punished for offenses, or otherwise so degraded that no dependence can with safety be placed upon his testimony; or to impeach his veracity, by showing that he has, at other times, made declarations, by parol or in writing, or done acts inconsistent with the evidence he has given upon his examination. But, in this latter case, you will not be allowed to impeach the testimony of the witness, by proving his former declarations or acts to the contrary, unless you first cross-examine him particularly as to his having made such declarations or done such acts. This subject will be more fully explained hereafter, when treating of impeaching witnesses.

The credibility of a witness is compounded of: his knowledge of the facts he testifies; his disinterestedness; his integrity; his veracity, and his being bound to speak the truth, by such oath as he deems obligatory upon his conscience.

If he be deceived in the facts, no dependence of course can be placed in his testimony, however disinterested he may be, and however unimpeachable his character may be for integrity and veracity.

Where there is a doubt, therefore, whether the evidence given by a witness be not founded in some misconception, it is the duty of the counsel, who cross-examines him, to question as to the sources of his knowledge; his reasons for believing the fact to be as he has stated; his reasons for recollecting it; the circumstances attending its occurrence; whether it was light or dark; whether few or many persons or none at all were present; whether it was late or early in the day; and whether he was near or distant at the time it occurred, and the like; so that the court and jury may be able to judge of the degree of confidence they may repose in the witness' testimony.

But, valuable as the right of cross-examination is, it is some-

times a dangerous instrument in the hands of an unskillful or inexperienced person. If, by an unfortunate or unskillful question put on cross-examination, a fact be extracted or elicited which would not have been evidence upon an examination in chief, it then becomes evidence against the party cross-examining. But a witness is not allowed voluntarily to obtrude inadmissible evidence, and if he does so, it is not to be considered as evidence in the action, and the court and jury should give it no consideration whatever. This is a just and a most important rule; for a fraudulent and subtile witness will sometimes endeavor to baffle and annoy his cross-examiner for the purpose of deterring him from pursuing his course by introducing into his answers matters which are foreign to the question put, and which are unfavorable to the cross-examining party.

With regard to the relevancy to the matters in issue of questions which may be put on cross-examination, it is to be observed, that considerable latitude is allowed in this respect, where the tendency of the questions is to affect the credit of the witness. A witness may be asked questions affecting his own character, and consequently his credit, though such questions have no relation to the matters in issue. But a witness cannot be cross-examined as to any facts which, if admitted, would be collateral and wholly irrelevant to the matters in issue, and which would in no way affect his credit, and still less can he be cross-examined as to such facts, for the purpose of contradicting him by other evidence, and in this manner to discredit his testimony. And if the witness answers such an irrelevant question before it is disallowed or withdrawn, evidence cannot afterwards be admitted to contradict his testimony on the collateral matter. *Plato* v. *Reynolds*, 13 E. P. Smith, 586.

The principle of a rule which excludes an inquiry into such collateral matters is, that it would render an inquiry, which ought to be simple, and confined to the matter in issue, intolerably complicated and prolix, by causing it to branch out into an indefinite number of collateral issues.

Witnesses are frequently cross-examined in relation to writings, such as deeds, contracts, letters, papers and documents, and justices are not a little perplexed as to the rule which ought to be observed in such cases. For that reason a few of the principles which govern in such cases will be here stated. When a witness is cross-examined as to such writings, the examination is conducted with a view either to establish in evidence the *contents* of the writing as *material* to the cause, or to *test* the *memory* or the *credit* of the witness. When the object of the cross-examination is to establish the writing in evidence, the cross-examining counsel has no right to represent or state the contents of the writing in the form of a question, and then ask the witness whether he wrote such a paper or writing to any person, with such contents, or contents to the like effect, without first showing the writing to the witness, and asking him whether he wrote the letter or paper. *The Queen's Case*, 2 Brod. & Bing., 284 to 315. If the paper is

shown to the witness, and he admits that he wrote it, the whole paper will be made evidence when introduced at the proper time. So, again, on cross-examination it is permitted to show a witness a part of a letter, or one or more lines, and not the whole of the letter, and then ask him if he wrote that part of it. *Ib.* But if the witness does not state whether he did or did not write what is shown him, he cannot be cross-examined as to the contents of that letter, because the letter itself is the best evidence. *Ib.*

If the witness admits that he wrote the letter, he cannot be cross-examined as to the contents by means of questions put to him by the cross-examining counsel, but the letter itself must be read to show whether it contains such statements as are embodied in the question. *Ib.*

If the letter or paper is admitted by the witness, it is sometimes a question when it shall be introduced in evidence. The general rule is that it is to be read as the evidence of the cross-examining counsel, as part of his evidence in his turn, after he shall have opened his case; but if the counsel who is cross-examining suggests to the court that he wishes to have the letter or paper read immediately, in order that he may, after the contents of that paper shall have been made known to the court, found certain questions upon such contents, which could not well or effectually be done without reading it, that becomes an excepted case, and, for the convenient administration of justice, it is permitted to be read at the suggestion of counsel, but considering it, however, as a part of the evidence of the counsel proposing it, and subject to all the consequences of having it considered as a part of his evidence. *Ib.*

On cross-examination, counsel are not permitted to ask a witness whether he has made *representations* of a particular nature, and not specifying in his question whether the question refers to representations in writings or in words. *Ib.* In such a case the opposite counsel have a right to interpose and ask the court to direct the cross-examining counsel to ask whether the representation was in writing or in spoken words. *Ib.*

But, it may be properly asked, on cross-examination, whether the witness has *said* such a thing, for that implies that it was words spoken and not written. *Ib.*

The instances in which evidence is rejected, when it is sought to show the contents of a writing, by examining a witness, is founded upon the principle, that the paper is the best evidence of its contents. But it frequently happens that the cross-examination of a witness as to what he has before said or written on the subject of inquiry, is material only as a test to try his memory and his credit.

Such evidence is usually admissible, for no other purpose than to try the credit or the capacity of the witness. What a witness stated on a former occasion may be very material evidence to contradict him, or to impeach his testimony, but can rarely be evidence of the fact stated; and it is a remarkable circumstance,

that the question was never, in the course of inquiry in the case which occasioned so much discussion on the subject, directly raised, whether a cross-examination as to something written by the witness, for the purpose, not of proving any fact in the cause, but simply of trying the credit or ability of the witness, was subject to the same strict rules as governed an examination for proving material facts; and whether the witness might not be cross-examined as to what he had written, without producing the writing, where, although not proved to be lost, it was not in the possession of the examining party. But the question has been decided in the English courts, one of which held, in 1852, that upon a cross-examination, a witness cannot, even for the purpose of discrediting him, be asked as to the contents of a written paper, which is neither produced, nor its absence accounted for. *Macdonnell* v. *Evans*, 2 J. Scott, 930; but see *Hollingham* v. *Head*, 4 J. Scott N. S., 388. In *Bellinger* v. *People*, 8 Wend., 595, a letter in the handwriting of the witness was shown to him, and he was then asked: "Did you not write that letter in answer to a letter charging you with forgery?" And it was held that the question was inadmissible for any purpose, inasmuch as it was an attempt to get at the contents of a written document, which, for anything that appeared, might have been produced.

And in a recent case the court of appeals has put the question at rest, so far as this state is concerned. In *Newcomb* v. *Griswold*, 10 E. P. Smith, 298, a witness was asked, on cross-examination, whether he had not been convicted of petit larceny, which was objected to by the opposite party, on the ground that the record was the best evidence of the matter; and the objection was sustained, and the evidence excluded, which was held to be the proper ruling in the case. And the party may take the objection, even though the witness does not object to answering such question. *Ib.* So, where a question is put to a witness, asking him whether he had made certain specified statements in an affidavit which was not produced, it was held that the evidence was objectionable, on the ground that the affidavit was the best evidence upon that subject. *Ib.*

A party having produced a document for the purposes of cross-examination, is not bound to read it before he comes to his own side of the cause, although he may have shown it to the witness and have cross-examined him upon it; and if a party, on cross-examination, obtains proof of a document, the opposite side, it has been said, has no right to see the paper for the purpose of reëxamining the witness, as to the paper being in the handwriting of the party whose handwriting is sworn to. If the cross-examining counsel merely produces a paper, and asks the witness whether it is in his handwriting, that does not entitle the other side to see it; but if he proceeds to found any question on the document, the opposite counsel has a right to see it; and if, upon a writing being put into the witness' hand for the purpose of cross-examin-

ation, the cross-examination wholly fails, the adverse counsel is not entitled to look at the paper.

And it has been held, that when a witness has been examined as to entries in a book, the adversary cannot cross-examine as to other entries which have not been used, without putting them in as his evidence. Where, upon the examination in chief of a witness, a valid objection has been taken to the admission of illegal or incompetent evidence, a cross-examination as to the same matter, by the objecting party, will not waive the previous valid objection. *Simpson* v. *Watrus*, 3 Hill, 619; *Worrall* v. *Parmelee*, 1 Comst., 519; *Duff* v. *Lyon*, 1 E. D. Smith, 536.

The court possesses ample power to prevent an abuse of the privilege of cross-examination. *Peck* v. *Richmond*, 2 E. D. Smith, 380. *Post*, 632, 633.

Still, as the right of cross-examination is a very valuable one, the courts ought to allow it liberally and indulgently, in every case, unless there is an evident intent to abuse the privilege. In one case the court remarked, "that cross-examination had gone to an unreasonable length; but he had, in general, permitted gentlemen to go as far as they pleased, because, if there was an honest case on the other side, it would do them no good." And a learned writer comments upon the subject as follows: "The benefits of cross-examination are sometimes defeated by the interposition of the court, to require an explanation of the motive and object of the question proposed, or to pronounce judgment upon them immediately; whereas, experience frequently shows, that it is only by an indirect and apparently irrelevant inquiry, that a witness can be brought to divulge the truth which he had prepared himself to conceal; the explanation of the motives and tendency of the question furnishes the witness with a caution that may wholly defeat the object of it, which might have been successfully attained, if the gradual progress from immateriality to materiality was withheld from his observation. The importance of an inquiry may sometimes be strongly felt by an advocate, and upon very reasonable grounds, from his own instructions with respect to the bearing and circumstances of the cause, which the judge, acting only upon the impressions of what has already been disclosed, cannot, by any possibility, anticipate. The full exposition of the motives can only be attained by a premature exposition of the case that is to be brought forward, and even when that can be done without prejudice to the party, the endeavor to satisfy the court would have the common effect of an interruption of the regular course of inquiry, and, instead of assisting the accurate discussion of the question, would, in all probability, terminate in confused and desultory altercation." The right of cross-examining a witness, by inquiring into collateral facts for the purpose of discrediting the witness, is so far a matter of discretion with the court that it may be limited by the circumstances of the case. *Allen* v. *Bodine*, 6 Barb., 383; and see *Fry* v. *Bennett*, 3 Bosw., 201, 239.

The time when a witness shall be cross-examined is also in the discretion of the court. It is usually done immediately after the examination in chief is closed. But it may be delayed by the court to any stage of the cause before the cause is finally submitted. There ought, however, to be some good reason shown, before the ordinary course is abandoned, and the exceptional practice adopted. The general rule is, that the court will require counsel to avail themselves of the opportunity of a cross-examination before the witness leaves the stand, unless for some good reason the court should allow them the privilege, at a subsequent stage of the trial. *Sheffield* v. *Rochester and Syracuse R. R.*, 21 Barb., 339. And, in the case last cited, the plaintiff's counsel publicly inquired of the defendant's counsel, before dismissing the witness from the stand, whether any of the facts testified to by this witness would be controverted on the trial, to which the defendant's counsel replied, that they should introduce no evidence on the points testified to by him. The right to cross-examine the witness was not reserved by the defendant's counsel. At the close of the trial, the defendant's counsel called for the witness for a further examination, but he did not appear, as he had gone home without leave; and the plaintiff's counsel received no intimation that he was wanted until after he had gone. And the court held that the right to further examination by the defendants was lost by their own acts; and that the plaintiff was not bound, under the circumstances, to detain the witness longer than he had done.

If a witness dies after his direct examination, and before the cross-examination, the evidence taken cannot be rejected, but is to be taken as a part of the evidence in the cause. *Forrest* v. *Kissam*, 7 Hill, 463. But, if the opportunity to cross-examine is lost, by reason of the misconduct or fault of the witness, or of the party calling him, his evidence will be struck out of the case. *Ib.*

If a party to the action is a witness, and he refuses to answer proper questions on his cross-examination, his evidence will be struck out. *Burnett* v. *Phalon*, 19 How., 530; *S. C.*, 11 Abb., 157.

SECTION XXVI.

RE-EXAMINATION.

After a witness has been cross-examined, he may be re-examined by the party who called him; and upon such re-examination he may be examined as to all matters upon which he has been cross-examined, which will give an opportunity for explaining any new facts which have thus come out. Counsel have a right, on such re-examination, to ask all such questions as may be proper to draw forth an explanation of the sense and meaning of the expressions used by the witness on cross-examination, if they are in themselves doubtful; and also to ascertain the motive by which the witness was induced to use those expressions; but he has no right to go further, and to introduce matter new in itself, and not

suited to the purpose of explaining either the expressions or the motives of the witness.

It has already been seen that a witness cannot obtrude evidence on cross-examination, which he could not have been permitted to give on an examination in chief, *ante*, 475; but if counsel voluntarily cross-examine as to inadmissible matter, the opposite counsel is entitled to re-examine upon it. *Blewett* v. *Tregonning*, 3 Ad. & Ell., 554; *Greville* v. *Chapman*, 5 Ad. & Ell. N. S., 731. In the case last cited, a witness for the plaintiff stated, on cross-examination, that by the rules of the jockey club the owner of a horse might bet against his own horse, and then withdraw him; but it was held that he might be asked, on re-examination, whether he did not consider such conduct dishonorable.

SECTION XXVII.

FURTHER EXAMINATION.

After the witness has been examined in chief, on cross and on a re-examination, it not unfrequently happens that one or the other of the parties desires to ask further questions of the witness, on account of the accidental omission of inquiring as to some fact which escaped attention or recollection, or because the party then learned, for the first time, that the witness knew some fact which was not before known to such party, or for some similar reason. And so, in other cases, after the evidence in the entire case has been closed, one of the parties sometimes desires to recall a witness and further examine him; or he may even wish to call a new witness, who has not before been sworn. In all such cases, the matter is entirely within the discretion of the court.

In ordinary practice, this discretion is liberally exercised, if it is for the furtherance of justice.

As to each witness, the practice is, as we have seen, *ante*, 477, for the party who calls the witness to examine him first. He is then cross-examined and finally re-examined. So, too, on the whole trial, the party holding the affirmative of the issue calls his witnesses and they are examined, and he then rests his side of the case. The opposite side then calls his witnesses, who are also examined, and that side of the case submitted; and finally the party opening the case introduces his evidence in reply, when, in the usual course of practice, the evidence in the case is considered closed. But there are so many causes of error and of omission as to the introduction of evidence, that this strict rule is scarcely ever enforced. The material rights of either party ought never to be permitted to suffer by reason of an excusable omission. A single material question may have been inadvertently omitted, and the mouth of the witness ought not to be closed for that reason. And it may sometimes be necessary to examine a witness as to entirely new matter, or to call several new witnesses, for the purpose of attaining entire justice in the

cause. In such cases a further examination is permitted, and with it the right to further cross-examine, re-examine, &c.

So the court has power to permit a witness to be examined, cross-examined and re-examined, over and over again, at any time during the trial. But great care should be taken in the exercise of this discretion, so as to prevent either party from gaining any advantage over the other by any trick, artifice or fraud. If the plaintiff should declare that he had finished his evidence, and in consequence of such declaration the defendant should dismiss some or all of his witnesses, and the plaintiff should then offer to produce new evidence, which might, perhaps, have been contradicted, or answered, or explained by the witnesses who were dismissed, the court would never tolerate so unfair a practice, nor suffer a plaintiff to avail himself of the advantage of such ungenerous and fraudulent conduct.

This same rule applies, of course, to both parties, and, therefore, if the defendant declares his evidence closed, and the plaintiff dismisses his witnesses in consequence, the defendant will be precluded from calling witnesses as to any matter which might have been answered by the plaintiff's witnesses, who were dismissed.

When evidence has been duly taken on a trial, without objection, and it bears upon material issues, the court has no right to strike it out, or to exclude it from the consideration of the court or jury. *Hall* v. *Earnest*, 36 Barb., 585, 591. If the evidence is proper in kind, though not in degree, or if it is objectionable otherwise upon some technical ground, all right of exception to it is waived by the parties, by not objecting in time, and all rightful control over it by the court is gone. *Ib.*

It is only when evidence is received upon some *condition, mistake* or *contingency*, that the court can properly direct the jury to disregard it and treat it as not received. But when it has been given and received absolutely, it cannot in any way be stricken out of the case or disregarded. *Ib.*

Parties sometimes introduce evidence which does not answer their purpose, or they elicit an answer from a witness which is unfavorable; in all such cases they must abide by the election made and its results, for they cannot withdraw the evidence, nor require it to be struck out. *Decker* v. *Bryant*, 7 Barb., 183, 189; *Vibbard* v. *Staats*, 3 Hill, 144. Evidence once given belongs to the cause, and is the common property of all the parties. *Ib.* There are some cases in which evidence may be struck out, even after it has been given. But it is to be done by the party opposed to the introduction of the evidence. If, for instance, property has been sold by a bill of sale, and the plaintiff proves the sale by oral evidence, and the defendant first discovers on a second cross-examination that the sale was by writing, he may move to strike out the oral evidence. *Dunn* v. *Hewitt*, 2 Denio, 637.

So where a witness has given considerable evidence before it is disclosed that he is not a competent witness, the opposite party

must then move to strike out his evidence if he would avail himself of the objection. *Heely* v. *Barnes*, 4 Denio, 73.

Parties sometimes estop themselves from objecting to evidence which would have been objectionable but for their own acts.

If both parties give parol evidence of the contents of a written instrument, without any objection by either of them, both parties will be held to have acquiesced in receiving parol evidence of its contents, and neither party will be permitted to object to showing fully the entire contents of the instrument by parol evidence. *Morss* v. *Stone*, 5 Barb., 516; *Seaman* v. *Benson*, 4 Barb., 445. And when one party agrees that the opposite party may introduce evidence which is legally inadmissible, if objected to, he cannot afterwards complain of the reception of such evidence, nor of the reception of other evidence of a similar character. *Rundell* v. *Butler*, 10 Wend., 119. When a party consents to establish a law of his own as to evidence, he must abide by it. *Ib.*

In taking notes of evidence, it is sometimes the case that a question is raised as to what the witness testified. In such a case, if the witness is requested to repeat his answer, and he does so partially, but omits to state the whole of it, or if it is claimed by counsel that a part of it is omitted, and the witness asserts that he has repeated the entire answer, the party claiming the entire answer may call the stenographer or shorthand writer of the court, and swear him as to the fact whether he has taken such answer, and whether the witness has repeated the whole of it. *Rex* v. *Slater*, 6 Carr. & Payne, 334. So, too, any other person would be equally competent for the same purpose, if he took the entire answer down in the language employed by the witness, and he can swear positively that it was used by the witness.

SECTION XXVIII.

OPINIONS AND BELIEF, SKILL AND SCIENCE, &C.

A witness is examined, either as to facts, simply, which he himself knows, or, in some instances, as to his own inferences from facts, or as to facts which he has heard from others. In ordinary cases, the witness ought to be examined as to facts only, and not as to any opinion or conclusion which he may have drawn from facts, for those are to be formed by the court or a jury, except, indeed, where the conclusion is an inference of skill and judgment. A witness examined as to facts, ought to state those only of which he has personal knowledge; and such knowledge is supposed, if not expressly stated, upon the examination in chief; and, upon cross-examination, his means of knowledge may be fully investigated, and if he has not had sufficient and adequate means of knowledge, his evidence will be struck out. A witness, on his examination in chief, must not, as a general rule, be examined as to his *belief*, or his *persuasion*, but only as to his knowledge of the facts in the case, because judgment is to be given according to the allegations and the *proofs*. A recent case will illustrate this principle: The question in the case was, whether a notice of

protest was duly served. The service was made by a clerk of the notary; and on the trial he was a witness, but he had no recollection whether the service was made at the proper time. He produced a copy of the protest, at the foot of which was a memorandum in these words: "Served notices of protest at indorsers' offices;" which memorandum was in his handwriting. He further testified that he had no recollection of the service, except what was indicated by the memorandum; that he was certain that the memorandum was made on the day of the protest, though he had no positive recollection when it was made; that he was confident of the service, from his invariable custom; and that it was possible that the service was not made as the memorandum stated. The court held the proof of service defective, and used the following language: "The testimony of the clerk, in respect to the time of the service, is nothing more than the conclusion he draws from the existence of the memorandum, the time of protest, and his custom in serving such notices. It was no proof of the fact that the service was made within the time required by law, but simply a conclusion formed in his mind, from the existence of other facts. If he had any recollection of the circumstance of having served the notices, however faint may have been the impression remaining upon his memory, it would be evidence of the fact to submit to a jury. But he had none. His memory totally failed him. When he saw the memorandum, he was convinced that he had made the service, and was willing to swear positively that he made it on the 14th, but not because the memorandum recalled or revived the recollection of a circumstance which had passed from his memory, but from a conviction in his mind, the result of an operation of reason and judgment. The recollection of a fact by a witness is one thing, and his presuming or being convinced of the existence of a fact, in respect to which he has no recollection, is an other. The former is the only testimony which it is competent for a witness to give; the other, upon a fact which is disputed, is no testimony at all." DALY, J., *Taylor* v. *Stringer*, 1 Hilt., 377, 381.

In an other case it was important to show that a specified conversation alluded to a particular time, at which it was alleged a warranty was made as to a certain horse. The witness testified that there was nothing in the conversation from which he could say that the plaintiff alluded to the time of the sale as the period when the defendant had given this information. He was then asked by the defendant's counsel what his *belief* was as to that fact. This was objected to, but the evidence was allowed, and the judgment was reversed. The court said: "The justice erred in permitting the witness to state his *belief*, after he had sworn that there was nothing in the conversation from which he could say that the plaintiff referred to the time of the sale. *Cutler* v. *Carpenter*, 1 Cow., 81, 83, and see *Butler* v. *Benson*, 1 Barb., 527, 537. So, too, it is not proper to ask a witness what he supposed, at the time, was the effect of a particular transaction, or to ask

what impression was produced upon his mind by what passed. The inquiry ought to be what was said or done. *Weber* v. *Kingsland*, 8 Bosw., 416.

So far as it regards mere belief or persuasion, which does not rest upon a sufficient or legal foundation, the cases just cited show that they are not competent evidence. But there are cases of persuasion or belief, founded upon the actual knowledge of the witness, in which the belief of the witness is proper evidence. On questions of identity of persons, or of handwriting, when the witness is familiar with the handwriting in question, or with the person whose identity is in dispute, such witness may state his belief as to the identity of the person or the genuineness of the signature, although he may not be able or willing to swear positively. In such a case, however, the question is not merely one of belief, as in the cases cited. It is clearly a matter of recollection, and the question is, how confidently the witness can speak upon that subject. The belief of the witness, in such a case, is a mere matter of recollection, and its value is entirely a question for the jury or the justice in their place.

There are well established exceptions to the rule that witnesses must speak as to facts alone. One of these exceptions is when the question is one of skill or science. When professional men and others give evidence on matters of skill and judgment, their evidence frequently does not, and often cannot, from the nature of the case, extend beyond opinion and belief. And the general rule is, that when the question is one of skill or science, or the inference is one of skill and judgment, the opinion of experienced persons is admissible, for by such means only can a court or jury be enabled to form a correct conclusion. The general distinction is this, that the jury must judge of the facts for themselves, but that whenever the question depends on the exercise of peculiar skill and knowledge that may be made available, it is not a decision by the witness on a fact to the exclusion of the jury, but the establishment of a new fact, relation, or connection, which would otherwise remain unproved. Not to admit such evidence would be to reject what was essential to the investigation of truth. But, to render opinions competent evidence, it is important that two things should exist in the case. First, the matter upon which it is proposed to introduce evidence of opinions, must be one of *skill* or *science*. And, secondly, the witness must be shown to possess such knowledge or skill as to render him competent to give an opinion. Where the question is not one of skill or science, opinions will not be evidence, no matter how learned or scientific the witness may be whose opinion is asked. A few illustrations from the adjudged cases will not be inappropriate, by way of applying these principles.

In one case, *Lamoure* v. *Caryl*, 4 Denio, 370, the opinion of a farmer was held to be incompetent to prove the value of the services of a clerk in a country store. And the court said, pages 373, 374: "A witness for the defendant, who had known him a

clerk while in the service of the plaintiff, was asked by the defendant what his services were worth. The witness had testified that he was a farmer, and did not know what clerks in country stores usually received. The plaintiff objected to the inquiry, but the objection was overruled, and the question was answered. In general the opinion of a witness is not evidence for a jury, although there are exceptions to the rule. But they all proceed upon the principle, that the question is one of science or skill, or has reference to some subject upon which the jury are supposed not to have the same degree of knowledge with the witness. The evidence of experts is received, on the ground of science or skill, and witnesses may speak on the value of property or labor, when it appears they have any peculiar sources of knowledge to guide them on these subjects, and which are not presumed to be equally within reach of the jury. The witness whose opinion was received was not shown to have any means of knowledge on this subject, beyond the range of the jury. Objection was made to his opinion being received as evidence. The objection was well founded, and should have been sustained. The parties were entitled to the judgment of the jury on the value of the defendant's services, and how were they, rightfully, to be aided by the mere opinion of a witness who had no means of information beyond their own? Opinions are to be formed by jurors, but it is the business of witnesses to deal with facts. Even where their opinions are allowable, it is more with a view to inform the jury on some matter of fact, than for the mere purpose of obtaining an opinion. The expressed opinion of an expert, or of a person acquainted with some peculiar subject or business, is little more than a brief abstract of a long examination. The law, in such case, allows the opinion as a substitute for an extended examination. It is brief and intelligible, and may very properly be received as the result of what would be established by the evidence of the witness, if given in detail. But when the witness has no such information to impart, the law will in no case permit his opinion to be received." And see *Jefferson Ins. Co.* v. *Cotheal*, 7 Wend., 72, 78.

The amount of damages which may result from the breach of a contract cannot be proved by the opinion of a witness.

In an action upon a lease for the recovery of rent, the defendant claimed to recoup damages, which he alleged he was entitled to, by reason of the neglect or refusal of the plaintiff to construct or keep in repair certain water arrangements upon the premises occupied by the defendant, for the purposes of a tavern, and an innkeeper was called as a witness for the defendant, and the witness was asked, in a great variety of forms, how much it was worth to the defendant to have that water, supplied by the aqueduct, by the day, the quarter, and by the year; and what damage the defendant would sustain, per day, quarter, and year, by being deprived of the water; but this evidence was excluded, which was held right. *Harger* v. *Edmonds*, 4 Barb., 256. "The

great objection to this species of evidence is, that it calls for the *opinion* of the witness upon a question on which the opinions of witnesses are not evidence. The diminution in the annual, quarterly, or daily value of the premises, occasioned by the withdrawal of this water; or, in other words, the amount of the damage of the defendant, arising from such withdrawal or deprivation, would depend, for its just determination, not on any professional skill or knowledge of the witness, but on a vast variety of facts, from which any sensible man could form a judgment, as well as a tavernkeeper, living in an other town. The situation of the tavern, the amount of business or custom it enjoyed, the kind of customers who frequented it, the distance from a stream, well, spring, or other supply of water, and perhaps the expense of digging a well, would all be material facts on which to found a correct opinion. When these facts should be spread before a jury, with the length of time which the water was withheld, the jury would be enabled to give a reasonable estimate of the damages." *Ib.*, 258, per GRIDLEY, J.

So, in an action by a tenant against a landlord for his refusal to deliver possession of the premises to the plaintiff, it is not competent to prove the amount of damages by the opinions of witnesses. *Giles* v. *O'Toole*, 4 Barb., 261.

Again, in an action for the recovery of damages, for not feeding the plaintiff's cattle as good hay as the defendant agreed to do, it is not competent to prove the amount of damages by asking a witness what damage accrued in consequence of feeding the cattle upon the hay in question, instead of the hay agreed upon. *Morehouse* v. *Mathews*, 2 Comst., 514. The court said, page 516: "In the case before us, the witness could have legally testified to the degree of inferiority of the hay fed, to that agreed to be fed, by the defendant. He could also have testified as to the condition of the cattle when brought to the defendant's and when taken away; and to any other fact calculated to enable the court or jury to form a just opinion on the question of damages; but the mere opinion of the witness on the amount of damage, was entitled to no weight. If the witness had testified that he was acquainted with the value of cattle, I think he might have been allowed to state how much less valuable these were when taken away than when driven to the defendant's, in consequence of the inferior quality of the food. But then he should state the facts upon which he founded his valuation, so that the jury might be able to appreciate his estimate at its just value." And see *Nellis* v. *McCarn*, 35 Barb., 115; and opinion in *De Witt* v. *Barly*, 3 E. P. Smith, 345.

But, where the question is one of skill or science, and the witness is competent to express an opinion, he may be asked his opinion. When, for instance, the witness is a brick or a tile maker, and he has followed the business several years, he may be asked whether a certain described mode of placing the brick in the kiln is a proper one; or he may be asked what effect

it would have if the tiles or bricks were burned when lying flat, instead of upon an end. *Wiggins* v. *Wallace*, 19 Barb., 338. Whether a witness is competent to express an opinion is a question for the justice, yet, if he misjudges, it is as much an error as though he misjudged upon any other question. *Ib.*

But, where a person is liable for proper advances which may be needed for the support of an infant, it is not proper to prove by a witness that certain payments were properly made for articles purchased for such infant. *Merritt* v. *Seaman*, 2 Seld., 168.

In actions for negligence it is not competent to ask a witness whether the negligence of one of the parties caused the alleged injury for which the action is brought, or whether certain specified acts constitute negligence. In an action for injuries arising from a collision of vessels, it is not competent for the defendant to ask his pilot either of the following questions: "Was that collision caused by any negligence of yours?" or, "From what you discovered of the tug in coming down, was she in fault, and how?" because such questions are intended to elicit the opinion of the witness upon questions which are to be decided by the court or jury upon the evidence introduced on the trial. *Crofut* v. *Brooklyn Ferry Co.*, 36 Barb., 201.

So in an action to recover damages for losses sustained from fire, alleged to have been caused by the negligence of the defendant in the use of a steam dredging machine, it is not competent to ask a witness whether he considers it dangerous to use a steam dredge without a spark catcher. *Teall* v. *Barton*, 40 Barb., 137; *S. C.*, 11 E. P. Smith, 544, by name of *Hinds* v. *Barton*.

So, in an action by a traveler for the recovery of money which had been stolen from a locked portmanteau left in a locked room of the defendant, who was an innkeeper, it was held that the opinions of other innkeepers that the plaintiff was negligent in thus leaving his money, were not competent evidence. *Taylor* v. *Monnot*, 4 Duer, 116.

In an action against a defendant for the loss of a considerable quantity of wheat, which it is alleged was lost by reason of the negligence of the defendant in threshing it, the cases are conflicting whether the plaintiff is permitted to ask a witness how much wheat was wasted by the defendant in threshing 648 bushels of wheat, according to the defendant's tally of the plaintiff's wheat. It was held that he could not do so in *Cook* v. *Brockway*, 21 Barb., 331; but see *Harpending* v. *Shoemaker*, 37 Barb., 270, to the contrary, where the following question was held to be proper, after showing the witness to be competent to express an opinion: "How much less buckwheat was there, than there would have been if the same had been properly threshed?"

In an action for the recovery of damages sustained by the plaintiff, by reason of having his land burned over, and the wood and timber thereon burned and injured, by the negligence of the defendant in improperly setting fire to brush on his own farm, it is not competent for the plaintiff to ask a witness to state, from

what he saw, how much damage was done to the farm. *Simons* v. *Monier*, 29 Barb., 420.

In an action against a carrier for the recovery of the value of a horse, which, it was alleged by the plaintiff, had died from injuries caused by the negligence of the defendant, it is not competent to ask the opinion of a witness whether a wound, which he saw inflicted on the horse, was sufficient to cause the death of the horse, when the witness has testified previously to asking such question, as follows: "I have been acquainted with horses twenty-five years; I have owned horses for twenty-five years, from one to sixty, all the time; I have doctored all my own horses for fifteen years, and the same for other people; I doctor a horse pretty much as I do myself." *Harris* v. *Panama Railroad Co.*, 3 Bosw., 7. In the case last cited, the witness, after expressing an opinion that the wound was sufficient to cause the death of the horse, testified as follows in cross-examination: "I am not a horse doctor; I have seen the skeleton of a horse, but never have seen the sinews and nerves; I was called up to doctor a horse about two years ago; the mare had run away, and had run a shaft into her shoulder; I bled the mare that night; that wound did not bleed." The court said, pages 12, 13: "Whether a man has owned only one horse or a span continuously, or has owned from one to sixty, if he has never studied the diseases of horses, and more especially if he is unskilled as to the effect of wounds, and has never treated such injuries, it is difficult to say on what principle his mere opinion upon the question whether a particular wound was sufficient to produce death, is admissible as evidence. In such a case the opinion is not based upon skill or science, which the jury cannot be supposed to possess to the same extent as the witness."

When it is alleged that a horse has a particular disease, medical books are not competent evidence to prove the existence of the disease, but the facts stated in such books must be proved in the same manner as any other facts are established on the trial. *Ib.;* and see *Collier* v. *Simpson*, 5 Carr. & Payne, 73. A general dictionary of the English language is not authority to show, on a trial, the meaning of a word which is relied on as deriving a peculiar meaning from mercantile usage. *Houghton* v. *Gilbart,* 7 Carr. & Payne, 701.

In actions for torts, the amount of damages cannot be proved by opinions. And in an action by a landlord against a tenant for committing waste by cutting down trees, it is not competent for the tenant to prove, by the opinion of witnesses, that such acts were not injurious to the inheritance, and, therefore, not waste. *McGregor* v. *Brown*, 6 Seld., 114.

But it has been held that, in an action for the recovery of damages for a negligent destruction of fruit trees, it is competent to prove the value of such trees, independent of their connection with the land, if such value is proved by a witness who is competent to speak of their value, as, for instance, a nurseryman.

Whitbeck v. *New York Central R. R. Co.*, 36 Barb., 644. This rule does not extend so far as to permit a witness to give his opinion as to the amount of damages which a plaintiff sustains in consequence of a wrongful act of the defendant. And, in an action by a tenant against a landlord for unlawfully cutting a door into one of the tenant's rooms; it was held that the tenant could not ask a witness how much damage was sustained in the operation of the work. *Rodgers* v. *Fletcher*, 13 Abb., 299.

So in an action of trespass by a tenant against his landlord for entering upon the demised premises, and making alterations and additions to the building, it is not competent to ask witnesses the general question, what was the amount of the damage sustained by the plaintiff. *Duff* v. *Lyon*, 1 E. D. Smith, 536. The witnesses should state the facts, and they may also give evidence of any special damages alleged in the complaint, and the jury are then to estimate and assess the damages upon all the evidence. *Ib.*

So in an action for wrongfully preventing the plaintiff from using a saw mill, it is not proper to ask a witness what amount of damage the plaintiff sustained in consequence of the mill's lying still for a fortnight. *Dolittle* v. *Eddy*, 7 Barb., 74. Though, if the question is improperly allowed, and the witness does not give any opinion upon the matter, but merely states proper facts, the erroneous decision will do no harm. *Ib.*

The value of a dog cannot be proved by opinion, when the action is for unlawfully killing him. *Dunlap* v. *Snyder*, 17 Barb., 561, overruling *Brill* v. *Flagler*, 23 Wend., 354.

In actions for the recovery of damages for a nuisance, the amount of damages sustained cannot be proved by the opinions of witnesses. *Fish* v. *Dodge*, 4 Denio, 312. This was so held in the case last cited, in which the plaintiff sued the defendant, for causing dust and noise to annoy the plaintiff, by doing the work of finishing steam boilers in a part of the building adjoining that in which the plaintiff lived.

There is one important exception to the rule, that witnesses cannot give opinions as evidence, when the question is not one of skill and science. It is now well settled that any person who is acquainted with the value of the particular kind of property sold, or the kind of services rendered, may express an opinion as to its value. *Rochester and Syracuse R. R. Co.* v. *Budlong*, 10 How., 289.

A person who has acted in the capacity of bookkeeper in a large brewery for more than four years is naturally and necessarily acquainted with the market price of ale and beer during that time, and he is a competent witness to speak of its value. *Kerr* v. *McGuire*, 28 How., 28, in court of appeals.

In an action to recover compensation for drawing leases, &c., the value of such services can be proved by the opinion of an attorney-at-law. *Beekman* v. *Platner*, 15 Barb., 550.

The value of horses may be proved in this manner, by competent witnesses. And in an action for a breach of warranty in

the sale of a span of horses, which were warranted to be only 10 and 11 years old, respectively, when the proof showed that they were over 20 years old at the time of the sale, a witness was allowed to state what the value of the horses would be if they were of the age represented, and also what their value was at the age they were proved to be. *Rogers* v. *Ackerman*, 22 Barb., 134. So, in an action to recover damages for a fraud in the sale of a horse, a competent witness may be asked what the horse in question would be worth at the time of the sale, if kind and not balky. *Nickley* v. *Thomas*, 22 Barb., 652.

So, the value of a stove may be proved by opinion in the same manner. *Smith* v. *Hill*, 22 Barb., 656.

So, in an action to recover damages for the breach of a contract of warranty in the sale of a cow, as good and young, which was not as warranted, a witness who had seen the cow was allowed to state what she would have been worth if good and young; and also to state what she would have been worth, provided she gave but four quarts of milk daily. *Joy* v. *Hopkins*, 5 Denio, 84.

The value of services rendered may always be proved by those competent to speak of such value. But, where the plaintiff worked for the defendant, and was boarded and clothed by him, it is not competent for the defendant, in an action for the recovery of the value of such services, to ask a witness how much the plaintiff's services were worth over and above his board, clothing, &c., without proving or offering to prove that the witness knew the quantity or value of either item assumed by the question to have been furnished. *Lewis* v. *Trickey*, 20 Barb., 387. Nor, in such a case, can the defendant put this general question to the witness: How much, under all the circumstances, were the plaintiff's services worth over his board? *Ib.*

So, although the value of the property may be proved by the opinions of competent witnesses, it is not proper to receive the opinion of a witness as to the value of property which he has not seen. *Westlake* v. *St. Lawrence Co. Mutual Ins. Co.*, 14 Barb., 206; and see *Jefferson Ins. Co.* v. *Cotheal*, 7 Wend., 72.

But, as one species of opinion, it is competent to show what the goods in question brought at a fair public sale by auction. *Campbell* v. *Woodworth*, 6 E. P. Smith, 499. Such evidence is competent, and it is for the jury or the court in their place, to give it such weight as it may be entitled to when compared with the other evidence in the case. *Ib.*

So, when it is important to determine who was in actual possession of real estate at a specified time, a witness who knows the fact may be asked the question, who was in such possession. *Parsons* v. *Brown*, 15 Barb., 590. The question may be said to be a mixed one of law and fact; but that will not render the question objectionable; and if the opposite party desires to question the accuracy of such opinion, it must be done by a cross-examination of the witness. *Ib.* Where the question relates to

the intention of a party when he is the witness, it is sometimes competent to ask for his intentions so far as they relate to some act done by him. When it is a question of fact whether an assignment was made with an intent to hinder, delay or defraud creditors, it is competent to ask the assignor, if he is a witness, whether he intended to hinder, delay or defraud his creditors in making the assignment. *Seymour* v. *Wilson*, 4 Kern., 567.

So, in an action for a fraud, as in the case of a sale or exchange of horses, if the party charged with the fraud is a witness, he may testify that he did not cheat or defraud, and that he had no intention to cheat or defraud the opposite party. *Pope* v. *Hart*, 35 Barb., 630; *S. C.*, 23 How., 215. In the case last cited, the action was for a fraud in the sale of a span of horses; and on the trial, the counsel for the defendant asked him the following question: "Did you intend, on that sale, to cheat, defraud or deceive the plaintiff in any manner?" The justice refused to allow the question to be answered; but the supreme court held the question to be proper, and reversed the judgment of the justice and that of the county court in affirmance of it.

The terms of a contract may in some cases be proved without stating the precise language used in making it. In one case, the action was for the use and occupation of certain premises which had been leased by the witness as an agent of the plaintiffs. On the trial, he testified to the leasing of the premises by a parol lease. The witness was then requested to "go on and state the terms on which he leased the premises to the defendant." This was objected to by the defendant, on the ground that the witness should state what was said between the parties, and that it was for the court to decide from that, what the terms of the lease were, but the question was allowed, and the witness then stated that he leased the premises to the defendant for one year, at $50 a year, payable quarterly; that the defendant accepted it on those terms, and went on and occupied the premises. This was held right, and the court said, *Frost* v. *Benedict*, 21 Barb., 248, 249, "We think the questions upon these objections were correctly decided by the justice. The question objected to did not call for the conclusion of the witness, as the counsel for the appellant supposes. The witness had just before stated the fact, without objection, that he had leased the premises for the plaintiff to the defendant, at $50 a year, and the question required him to state the terms on which the premises were leased to the defendant. The leasing was by parol, and the question was nothing more or less than asking the witness to state what the contract was; to state what each party agreed to; to state the terms or provisions of the parol contract, or the particulars of the transaction. When the witness stated that the defendant accepted it on those terms, and went on and occupied it, it was equivalent to stating the fact that he, the defendant, agreed to take the lot upon the terms mentioned, and consummated the agreement by going into possession."

So, where the question is whether the defendant alone, or he, with other persons, employed the plaintiff to do certain work, it is competent, on the direct examination, to ask a witness this question, "On the part and behalf, and for whom were the services rendered?" *Sweet* v. *Tuttle*, 4 Kern., 465. Such a question calls for a fact, not a conclusion or opinion. *Ib.* The court said, page 471, "The fact which it called for may have been a conclusion deducible from other special facts, but this could not well appear until the question was answered and the examination then pushed somewhat further. After the inquiry was answered, the plaintiff had a right, if he pleased, to cross-examine, and it might thus have appeared that the fact stated by the witness was a mere deduction of his own mind from the special circumstances of the transaction. But this course was not taken; and on the face of the question I think the answer called for belonged to a class of facts to which a witness may be allowed to speak directly."

But the rule is never so far relaxed as to permit a witness to give his *understanding* of an agreement or his *opinion* as to what it was. *Murray* v. *Bethune*, 1 Wend., 191; *Rich* v. *Jakway*, 18 Barb., 357; *Simmons* v. *Fay*, 1 E. D. Smith, 107. The witness need not give the precise words of the contract; the substance of it will be sufficient, if that is all the witness can give. *Ante*, 396. But a mere vague impression, or an understanding or opinion, is entirely illegal evidence, if properly objected to.

When it is important to determine the mental condition of a person, opinions are sometimes evidence, even when the question is not one of skill or science.

When the question is whether a person was intoxicated at the time he did a certain act, it is competent to ask a witness who saw him at that time, whether, in his judgment, such person was to any considerable extent under the influence of intoxicating liquors. *People* v. *Eastwood*, 4 Kern., 562. The court said, page 566: "A child six years old may answer whether a man (whom it has seen) was drunk or sober; it does not require science or opinion to answer the question, but observation, merely; but the child could not, probably, describe the conduct of the man so that, from its description, others could decide the question. Whether a person is drunk or sober, or how far he was affected by intoxication, is better determined by the direct answer of those who have seen him, than by their description of his conduct. Many persons cannot describe particulars; if their testimony were excluded, great injustice would frequently ensue. The parties who rely on their testimony will still suffer an inconvenience, for the court and the jury are always most impressed by those witnesses who can draw and act a living picture before them of what they have seen; so that if there is any controversy as to the fact, such witnesses control; if there is no controversy as to it, the general testimony answers all useful purposes."

The subscribing witnesses to a will or deed are competent witnesses as to the soundness of mind of a testator or grantor, at the time of executing the instrument, whether such witnesses are persons of science and skill or not. *Dewitt* v. *Barley*, 5 Seld., 371. But the opinions of no other persons are thus competent unless they are possessed of the requisite science or skill to authorize them to express an opinion upon the subject. *Ib.*, and see same case, 3 E. P. Smith, 340, where it is decided that the opinions of unprofessional witnesses must be confined to facts alone, and not allowed to embrace any matter of law. Mental imbecility, arising from old age, stands upon the same principle. *Ib.*

So, upon a trial involving the question of the mental imbecility of the testator or grantor, a non-professional witness cannot be asked the broad question whether, at the time referred to, such person "was out of his mind," nor the question: "Was he so affected in his mind as to be unfit for transacting business?" *Deshon* v. *Merchants' Bank*, 8 Bosw., 461.

On a question of sanity or insanity, a medical witness, who is not acquainted with the person whose sanity is in question, and who has heard but a portion of the evidence on the trial relating to that question, is not competent to give an opinion upon the subject. *People* v. *Lake*, 2 Kern., 358.

When a question is a complex one, of law and fact, and when it is in the nature of a conclusion of law, the general rule is that it cannot be proved by opinion. *Heroy* v. *Van Pelt*, 4 Bosw., 60. As to exceptions to the rule, see *ante*, 497.

When the question is, whether a signature or an indorsement was recently made, it is not competent to prove the fact by the opinions of witnesses, as to the age of the ink. *Sackett* v. *Spencer*, 29 Barb., 180. It is not a question of science or skill, and the court and jury are as competent to judge of that fact, from the appearance of the ink, and whether the name were recently written, as would be the opinion of any other person. *Ib.*, and see *Phœnix Fire Ins. Co.* v. *Philip*, 13 Wend., 81.

Where a witness is skilled in a particular profession, art or trade, he is competent to express an opinion upon subjects connected with such profession, &c., although, at the time the question is asked, he may have abandoned it, and have engaged in another business. *Bearss* v. *Copley*, 6 Seld., 93. A party may show, by an expert, that a particular machine was not constructed in a good and workmanlike manner, even though the party offering the evidence declares that he does not propose to follow it by proof of the particulars in which it was defective. *Curtis* v. *Gano*, 12 E. P. Smith, 426. And, if the court rejects the evidence, on the ground that it is not intended to show in what particulars the machine was not constructed in a good and workmanlike manner, it will be an error which will be ground for reversing the judgment. *Ib.* A witness who testifies that he is somewhat familiar with railroad car brakes and with the operation of them, and has

used them on a railroad, and knows which are the best brakes, is a competent witness to testify as to the distance within which any given train can be stopped, with a designated class of brakes and a given number of brakemen. *Mott* v. *Hudson River R. R.*, 8 Bosw., 345.

The value and importance of opinions, is a proper question for the court or jury. A great deal of respect is due to the opinion of a learned and scientific witness, in a matter which requires great skill to understand the subject. But, the opinions of even such a witness are no more controlling than those of any other intelligent and experienced witness, when speaking upon subjects which lie within the range of common observation and experience. *Brehm* v. *Great Western Railway Co.*, 34 Barb., 257, 273.

The order and time of admitting evidence, is so much a matter of discretion, that it will be sufficient to refer to that title for all needful information upon that subject.

SECTION XXIX.

EXAMINING WITNESSES SEPARATELY.

It may, in some cases, be thought advisable to examine witnesses separately and out of the hearing of each other, with a view to obviate the danger of a concerted story among them, and to prevent the influence which the account given by one may have upon an other. For this purpose, the court, on the application of counsel, has authority to order the witnesses on both sides to withdraw from the court room, except those on examination. Attorneys and counsel who are witnesses in the cause, and scientific witnesses, are usually excepted from the rule. Scientific witnesses, who speak to matters of opinion, would properly, if not necessarily, be permitted to remain in court, because their opinion is frequently, if not generally, formed upon the facts which are sworn to by other witnesses.

It was formerly considered a matter of discretion with the court, whether to permit a witness to be sworn, if he disobeyed the order to withdraw; but it is now generally considered a correct practice not to reject such witness, but to allow his disregard of the order to be commented on to the court or jury, as to the credit which should be given his evidence.

In a proper case, the court may enforce the order by committing the witness for a contempt, for his refusal to obey the order. But, that practice should not be adopted, except in an extraordinary case. And it will be a rare case indeed, in which any witness can be found who will attempt to disregard such an order.

SECTION XXX.

LEADING QUESTIONS.

Leading questions, that is, such as instruct or intimate to a witness how he is desired to answer upon material points, are not allowed on an examination in chief.

This rule proceeds partly on the supposition that the witness is favorable to the party who calls him, and, accordingly, it is relaxed whenever it clearly appears that the witness is hostile, or that a more searching mode of examining him is necessary to elicit the truth.

A party, in preparing to support his case by testimony, has an opportunity of examining the witnesses before the trial, and of producing at the trial those only whose testimony he thinks most likely to serve him. The assumption, therefore, that the witness is favorable to the party who calls him is not unreasonable; and in practice, the fact is generally well known to support it. This, however, is not always the case, for a party is sometimes so circumstanced that he is compelled to rely upon the evidence of a witness whom he knows to be hostile, but who also knows material facts, if he will truly and fully disclose them.

And, again, as the practice now stands in this state, either party may call the other as a witness, and the interest of the party so called is almost always and unavoidably adverse to that of the party who calls him.

Questions are objectionable as leading, not only when they directly suggest the answer which is desired, but also when they embody a material fact, and admit of an answer by a simple negative or affirmative, though neither the one nor the other is directly suggested. In this case, as well as in those where direct leading questions are put, the evidence so drawn from the witness is not his genuine unassisted testimony, but a statement artfully contrived, shaped and colored by professional skill, with a complete knowledge of the facts which the party seeks to establish. If such a mode of examination were allowed, it must frequently happen that a witness would not state the whole of a transaction, but a part only would be elicited, and that to secure a particular purpose; the chance also of detecting discrepancies in false or erroneous testimony would be much diminished. Nor would these inconveniences be entirely removed by the power of cross-examination, which, as it must often be conducted without any previous knowledge of the answers to be given by the witness, is not a counterbalance to the facility afforded in the examination in chief, of presenting a selected and concerted portion only of the facts. The rule as to leading questions must, however, be understood in a reasonable sense; for if it were not allowed to approach the points at issue by such questions, the examination would be unnecessarily and inconveniently protracted. To abridge the proceedings, and bring the witness as soon as possible to the material points or facts as to which he is expected to speak, the examining counsel may lead him on to that length, and may recapitulate to him the acknowledged facts of the case which have been already established.

But, in such cases, the interrogatory must not assume facts to have been proved which have not been proved, nor that particular answers have been given which have not been given. If a

witness should appear to be in the interest of the opposite party, or unwilling to give evidence, the court may deem it right to relax the rule against leading questions, and allow the examination in chief to assume something of the form of cross-examination. When one of the parties to the action is called by the opposite party as a witness, the party so called must be necessarily considered as an adverse witness, and the party calling him has a right to put leading questions to him, even if they assume the form of a cross-examination. In such a case there is no danger that a leading question will tempt the witness to testify as the examining party desires, and therefore the reason of the rule forbidding leading questions, ceases.

But, when a party offers himself as a witness in his own behalf, he ought on no account to be examined by leading questions by his own counsel, for there is no danger but he will answer fully all fair and legitimate questions which may be put to him on his side of the case.

The pernicious influence of leading questions is most felt and to be feared when the object of inquiry is to ascertain the details of a conversation, admission or agreement, and therefore more rigor is called for and justified in confining the direct examination in such cases to its appropriate rules. Per MARCY, J., in *People* v. *Mather*, 4 Wend., 248.

When an omission is caused by want of memory, a suggestion may be permitted to assist it. Thus where a witness, called to prove the partnership of the plaintiffs, was not able at the moment to specify the several names of the parties, the court permitted the witness to be asked whether certain specified persons were members of the firm. There are other cases in which some suggestion may be allowed to be given to a witness, as where he is called to prove a delivery of goods, consisting of numerous items, or delivered at various times. Such cases evidently do not fall within the principle which prohibits leading questions.

It has been said that when a witness has been examined by one party, he may afterwards be cross-examined by the same party, as an adverse witness, when he is called by the adversary as one of his own witnesses. *Dickinson* v. *Shee*, 4 Esp. N. P., 67. But if a party omits, from prudential motives, to examine his adversary's witness as to any branch of his own case, there seems to be no reason why, when he afterwards adopts him as his own witness, he should not be so considered for all purposes, and why the adversary should not then be entitled to cross-examine him. The same witness may know distinct parts of the transaction, one branch of which makes for the plaintiff, and the other for the defendant, and if each party calls him as his own witness, there seems to be no reason why each should not in turn be bound by the same principle — why each, in examining into his own case, should not be precluded from putting leading questions, and be entitled to cross-examine as to his adversary's case.

There is no settled and absolute rule as to what extent leading questions may be put on an examination in chief, when the object is to prove that an other witness, examined on the opposite side, has, on some former occasion, made a different and contradictory statement. If, for example, a witness, on cross-examination, were to deny that he ever gave a different account of the transaction, or that, in conversing upon the subject with a third person, he used certain words or expressions imputed to him, it is sometimes considered a question whether it would be competent for the counsel in examining that third person in chief as his witness, for the purpose of contradicting the former witness, to ask him, in the first instance, whether the former witness, in conversing with him, said so and so, or used such and such expressions.

This form of putting the question is certainly not uncommon, and frequently passes without objection. But a very little consideration will show that such a leading question is irregular. For, in the first place, it must evidently be quite unnecessary to lead the witness to such a length; it would be sufficient to lead him up to the subject of conversation; and that being done, the most regular course would be, to inquire generally, what the former witness said, or what account he gave, relative to the transaction, thus leaving him, as in fairness he ought to be left, to the use of his own memory. If the witness has a distinct recollection of the conversation, and of the representation made by the other person, whose account is now disputed, he requires only to have his attention directed to the subject, to enable him to speak what he knows; if he has not that distinct recollection, he is ill qualified to contradict the other witness, as to the expressions supposed to have been used by him; in other words, he is incompetent for the purpose for which he is called. The plea of necessity, therefore, altogether fails. But the principal objection to such leading questions appears to be, that they suggest the desired answer so broadly and obviously, that a witness of the dullest intellect and weakest memory can hardly fail to take the hint, and may easily shape his evidence, if he is so disposed, as may best serve the interest and wishes of the party who calls him. In effect, the question puts into the mouth of the witness the very words he is to echo back either in the affirmative or in the negative, thus supplying a forgetful witness with a false memory, and an artful witness with a prompt and concerted answer. Is there, then, anything in the nature of this particular case which ought to take it from the general rule applicable to examinations in chief? On the contrary, if there is any case in which that general rule against leading questions ought to be strictly maintained, it is the one now under consideration, where a witness is called, for the purpose of proving the account given by an other witness to be inconsistent with some former statement, supposed to have been made by him. Whether the question at issue between the two witnesses is a question of credit,

or whether it is to be considered rather as a question of mere memory, leading is, in either point of view, equally objectionable.

If it is a question of memory, the only fair way of trying it is by allowing the witness to speak for himself, unprompted, as his own memory may suggest. If the question is one of credit, then it is undoubtedly due to the witness whose veracity is impeached, that the contradictory statement, supposed to have been made by him, should be distinctly proved, without the aid of leading, and without any undue influence. Upon the whole, therefore, the most unexceptionable and proper course appears to be, to ask the witness who is called to prove a contradictory statement made by an other witness, what the other witness said relative to the transaction in question, and not in the first instance to ask, in the leading form, whether he said so and so, or used such and such expressions. After an answer has been given to such inquiry, it may be proper, for the purpose of making the contradiction more complete, to ask whether the former witness has, or has not, used the expressions imputed to him.

Whether a leading question shall be put to a witness, is always a matter which appeals to the discretion of the court, and the allowance or the refusal of such a question is never a ground of reversal of the judgment. *Cheeney* v. *Arnold*, 18 Barb., 435; *Budlong* v. *Van Nostrand*, 24 Barb., 25; *Williams* v. *Eldridge*, 1 Hill, 250; *Seymour* v. *Bradfield*, 35 Barb., 49; *Weber* v. *Kingsland*, 8 Bosw., 416. There may be cases in which there is such a palpable abuse of this discretion as may authorize an appellate court to correct it, by a reversal of the judgment, though such cases are very rare. *Ib.*

Where a commission has been issued, executed, and returned, it is a matter of discretion with the justice, when an objection is taken to an interrogatory as leading, to admit or to reject the answer. *Hall* v. *Barton*, 25 Barb., 274; *Cope* v. *Sibley*, 12 Barb., 521, overruling *Williams* v. *Eldridge*, 1 Hill, 249.

Leading questions are admitted on the cross-examination of a witness, where much larger powers are given to counsel than in the original examination. Witnesses under cross-examination may be led immediately to the point on which their answers are required. If they betray a zeal against the cross-examining party, or show an unwillingness to speak fairly and impartially, they may be questioned with minuteness as to particular facts, or even particular expressions. There can be no danger of leading too much, where the witness is obstinately determined not to follow.

On the other hand, instances frequently occur where the witness is adverse to the party who calls him, and leans strongly to the other side; here there must be some restrictions as to the form and manner of cross-examining. It often happens that a witness, on cross-examination, waits only for a hint to shape a favorable answer, and is, in effect, the witness of the cross-

examining party, though technically called the witness of the opposite side, as, when one party calls the other as a witness. To put strong leading questions to such a witness, on cross-examination, without limitation or reserve, is substantially preparing a statement for him, and appears to be inconsistent with justice and a fair trial.

SECTION XXXI.

REFRESHING MEMORY.

Although, in general, leading questions are not to be put to a witness, yet, where his memory has failed, he may, even during examination, read, or, if necessary, hear the contents of a document read, for the purpose of reviving his former recollection. And if, by that means, he obtains a recollection of the facts themselves, as distinct from the memorandum, his statement is admissible in evidence.

But it is not, in every case, admissible to put a memorandum into the hands of a witness, and then request him to examine it, for the purpose of refreshing his recollection. If a witness, on his examination in chief, does not suggest any want of recollection, nor express any desire to refresh his memory, nor manifest, by his answers, any want of ability to answer, readily and fully, all questions that are put to him, the examining counsel will not be permitted to put into his hands any document, paper, or memorandum, relating to the facts concerning which he has been called to testify. *Young* v. *Catlett*, 6 Duer, 437. In the case just cited, the court said, pages 441, 442: "In the progress of the trial, the defendant, while examining one of his witnesses (after numerous questions, all of which were answered with great particularity, and without any suggestion or pretense of want of recollection of any detail or particular called for), required the witness to look, for the purpose of refreshing his memory, at a memorandum, copied by himself from entries made in certain books of account, at or about the time of the transactions in question, by other persons. The objection of the plaintiff's counsel to his referring to any such paper, for any such purpose, was sustained, and the defendant excepted. The examination of the witness was continued and completed; and, though examined at great length, there was no intimation of any failure of memory, to recall each and all the circumstances inquired of by the defendant's counsel, and his answers were explicit and positive; nor does it appear that there was any intention to examine him as to any other facts than those to which he testified.

"If it were conceded that a copy from entries made by others was no more liable to objection than the original books, and the fact that the entries were not made by himself, did not affect the question, *Huff* v. *Bennett*, 2 Seld., 337, still, we do not perceive the propriety of putting into the hands of a witness a paper, for the purpose of refreshing his recollection, when his memory is already fresh and his recollection full, on the subject of inquiry.

On the contrary, if the witness assumes to know and to remember, and does answer the inquiries proposed, we not only think it unnecessary to refresh his recollection, but that it would be unjust to the adverse party to permit it. An important ground for questioning the credibility of a witness, whether as untruthful or biased, is often found in his assuming to know and state what he does not know, or to recollect what, from lapse of time or other circumstances, it is in a high degree improbable that he can remember; and so long as the witness assumes to answer from memory, we think he should be permitted to do so. If it might be permitted to the examining party, by anticipation, to guard against falsehood, misstatements, or indications of partiality, by showing the paper to the witness on the stand, when he gave no intimation of any want of memory, it would be liable to great abuse, and deprive the adverse party of important means of affecting his credibility. And, although it may be very proper to show such a paper to a witness, for the purpose of enabling him to supply deficiencies in his testimony, or, perhaps, even to correct inaccuracies into which he has fallen, yet, where there was, as in this case, no pretense of either, in respect to any matter to which the memorandum related, we think the ruling does not call for any interference with the judgment.

"To permit the examining party to place a paper in the hands of a witness, under the circumstances stated, in anticipation of the contemplated questions, is to suggest to him the answers that are desired, and is open to the strongest objections that can be urged against the allowance of leading questions. When the witness does not suggest any want of recollection, nor express any desire to refresh his memory, nor manifest by the answers he gives any lack of ability to answer fully and specifically, we cannot think it is error not to permit him to look at a paper, at the solicitation of the counsel."

There are three classes of cases in which it is permitted to refresh the recollection of a witness by memoranda. First, when the writing serves merely to revive or assist the memory of the witness, and to bring to his mind a recollection of the facts. Secondly, where the witness recollects having seen the writing before, and though he has no independent recollection of the facts mentioned in it, yet remembers that, at the time he saw it, he knew the contents to be correct. Thirdly, when it brings to the mind of the witness neither any recollection of the facts mentioned in it, nor any recollection of the writing itself, but which, nevertheless, enables him to swear to a particular fact, from the conviction on his mind on seeing a writing which he knows to be genuine, as, for instance, where a banker's clerk is shown a bill of exchange which has his writing upon it, from which he knows that the bill has passed through his hands, though he has no recollection of that fact, nor of his writing anything upon the bill.

In the first class of cases, where the memory has been revived by the previous inspection of a writing, it is not necessary, as a condition of the admission of his oral testimony, that the writing should be produced in court. The case seems to differ only in degree from many others in which the memory is revived by reference in the mind of a witness to any circumstance to which his attention may have been drawn with a peculiar degree of force. The absence, however, of the writing, might afford matter of observation. If it is produced, the counsel of the other party has a right to see it, and cross-examine from it.

Where the writing has not the effect of reviving the memory of the witness, but it yet enables him to speak positively to a fact, so that his testimony depends upon his inference from the writing, the writing must be produced, and on proper proof that the witness knows that the statements in the paper were true at the time it was made, the paper itself is received in evidence.

According to Mr. Phillips' view of the English rule, such memoranda may be used to refresh the recollection of the witness, but can have no force as evidence, unless the witness, after referring to the memorandum, has a present recollection of the facts to which the memorandum relates.

A different rule prevails in this state; and if a witness swears that at the time a memorandum was made, he knew that the facts stated in it were true, whether he made the writing himself, or saw one written by an other, and he does not recollect the facts stated after refreshing his memory, by reading the writing, such writing may be read in evidence in connection with the oral testimony of the witness. *Halsey* v. *Sinsebaugh*, 1 E. P. Smith, 485.

In a recent case, *Russell* v. *Hudson River Railroad Co.*, 3 E. P. Smith, 134, 140, the court, in speaking of this rule, said: "Here, a witness who says that after refreshing his memory by a written memorandum, made by himself at or about the time of the occurrence, he cannot recollect the facts, but that he is confident that he knew the memorandum to be correct when it was made, is not required to swear to the fact in positive terms, but the memorandum itself is received in connection with, and as auxiliary to the oral testimony. I confess my decided preference for the American practice, since it is obvious that nothing whatever is added to the force of the evidence by the positive oath of the witness, after he has stated that he has no recollection of the facts aside from the memorandum. It is, however, an indispensable preliminary to the introduction of such a memorandum in evidence, that it should appear that the witness is unable, with the aid of the memorandum, to speak from memory as to the facts. It is only as auxiliary to, and not as a substitute for the oral testimony of the witness, that the writing is admissible. It is the duty of the court, in all such cases, to see, before receiving the memorandum in evidence, that it was made at or about the

time of the transaction to which it relates; that its accuracy is duly certified by the oath of the witness, and that there is a necessity for its introduction, on account of the inability of the witness to recollect the facts." If the witness recollects the facts independently of the paper, such paper is not admissible in evidence. *Ib.*

The rule that the memorandum must be one which is made in the ordinary course of business, and as a part of the business of the witness, is not in force in this state; and every species of memorandum is admissible here, provided it is brought within the rules relating to the admission of any memoranda. *Guy* v. *Mead*, 8 E. P. Smith, 462. In the last case cited, the question was as to the time the later of two indorsements was made upon a promissory note. A witness testified that he made a computation of interest upon the note; and that at the time he made it there was but one indorsement upon the note. He also swore, on his direct examination, that the computation was made on the 1st day of April, 1848; but on his cross-examination, he stated that he had no recollection as to the time when it was made, independently of the writing; but that he had no doubt that the computation was accurate, and that the last indorsement was not on the note at the time when the written computation was made. This memorandum or computation was held to be competent evidence in connection with the oral evidence of the witness who made it.

A witness may look at a memorandum for the purpose of refreshing his recollection, and if, after reading it, his memory is so much revived that he can speak accurately and confidently of the fact to which such memorandum relates, his evidence will be competent. And the witness may, in such a case, refresh his recollection by looking at an unstamped writing, even though the paper itself may be inadmissible for want of a proper stamp. *Maugham* v. *Hubbard*, 8 Barn. & Cress., 14.

SECTION XXXII.

CRIMINATING ANSWERS.

The privilege of witnesses in not being compellable to answer those questions which may affect their own personal rights, is a matter of frequent occurrence, and of considerable importance. The cases which will be here considered, are those where the witness may, by answering, subject himself, first to a criminal prosecution, to a penalty, or forfeiture; or, secondly, to an action commenced by civil process.

In the first place, then, it is clear that a witness cannot be compelled to answer any question, the answering of which may expose, or tend to expose him to a criminal charge, or to any kind of punishment. He is exempted by his privilege from answering not merely what will criminate him directly, but also from what has any tendency to criminate him; and the reason is, because otherwise question might be put after question, and

though no single question might be asked which directly criminates, yet enough might be got from him by successive questions whereon to found a criminal charge against him. *Henry* v. *Bank of Salina*, 1 Comst., 83.

It is the province of the court to decide whether a proposed question has a tendency to criminate a witness; and it is the duty of the court, while it protects the witness in the due exercise of his privilege, to take care that he does not, under the pretense of defending himself, secure others from justice, or withhold evidence which he might safely give. The court will require to be satisfied that the witness is acting an honest part, and that he may incur danger by answering. When satisfied of this, it will allow the privilege. To force him to reveal particulars might lead to a prosecution, against which he has a right to protect himself.

The privilege of refusing to answer a question is the privilege of the witness, and not of the party by whom he is called, and for that reason the court will not allow counsel to argue in support of the privilege as belonging to the party whom he represents. *Thomas* v. *Newton*, Mood. & Malk., 48, note *a*.

The counsel of the parties have no right to interrupt an examination, by advising a witness that he is not bound to answer the question. *Taylor* v. *Wood*, 2 Edw. Ch., 94. It is the duty of the court to inform the witness of his legal rights, and to say to him that he is not bound to answer questions which will criminate him or subject him to a penalty. *Ib.* The court will, therefore, always apprise a witness of his privilege as soon as a question is asked which may place him in danger.

On the trial of an indictment, the public prosecutor has no right to object that a question put to a witness will subject him to a criminal punishment. It is the personal privilege of the witness alone. *Ward* v. *People*, 6 Hill, 144.

So, in a civil action, the privilege is exclusively that of the witness; and if he asserts it, but is notwithstanding compelled to answer, the party cannot allege this as a ground of error. *Cloyes* v. *Thayer*, 3 Hill, 564. But, if the court improperly allows the privilege, and excludes the evidence when it ought to have been admitted, this will be error. *Ib.*

The same rule of law which excuses a witness from answering questions which may tend to convict him of a crime or misdemeanor, undoubtedly excuses him from producing books or papers, the contents of which may be used against him, and tend to the same result. *Byass* v. *Sullivan*, 21 How., 50, 53.

When the court can see that the statute of limitations has barred a prosecution for the offense, and all suits to enforce the penalty, the court must see that the witness cannot be prejudiced, and in such a case he is not left to judge whether he can safely testify or not, but the court is bound to pronounce against his exemption. *Close* v. *Olney*, 1 Denio, 319, 323.

But, in such a case, before the privilege of the witness can be declared against and set aside, it must appear affirmatively that no legal prosecution or steps have been taken for the purpose of punishing the offense, or of collecting the penalty. *Bank of Salina* v. *Henry*, 2 Denio., 156; *S. C.*, 1 Comst., 83.

In an action at law, where the defendant pleads or gives notice of usury as a defense, and verifies his answer or notice by affidavit, the plaintiff may be called as a witness to prove the usury. 3 R. S., 74, § 11, 5th ed. But the evidence so given by the plaintiff cannot be used against him before a grand jury, nor on the trial of any indictment against him. 3 R. S., 74, § 17, 5th ed.

A witness cannot be asked on cross-examination whether he has not been convicted of petit larceny, although he does not object to answering the question, provided the objection is taken by the opposite party. *Newcomb* v. *Griswold*, 10 E. P. Smith, 298. So a party may object to a question whether the witness had not made certain statements in an affidavit, which is not produced, although the witness does not object to answering. *Ib.*

If a witness claims the protection of the court, on the ground that his answer would tend to criminate himself, and there appears to be reasonable ground to believe that it would do so, he is not compellable to answer; and, if obliged to answer, notwithstanding, what he says must be regarded to have been obtained by compulsion, and cannot be given afterwards in evidence against him. *Regina* v. *Garbett*, 2 Car. & Kir. N. P., 474. It makes no difference to the right of the witness to protection, that he had before answered in part, as he is entitled to claim the privilege at any stage of the inquiry, and no answers forced from him by the court, after such claim, can be afterwards given in evidence against him. *Ib.*

A witness is not bound to answer any question which will subject him to a penalty, or have a tendency to subject him thereto. The cases in which penalties are recoverable are so numerous that no attempt at illustration from the cases will be made.

"Any competent witness in a cause shall not be excused from answering a question relevant to the matter in issue, on the ground merely that the answer to such question may establish or tend to establish that such witness owes a debt, or is otherwise subject to a civil suit. But this provision shall not be construed to require a witness to give any answer which will have a tendency to accuse himself of any crime or misdemeanor, or to expose him to any penalty or forfeiture, nor in any respect to vary or alter any other rule respecting the examination of witnesses." 3 R. S., 690, § 102, 5th ed.

A witness may waive his privilege, and answer any such questions, and his evidence will then be competent, however much it may affect the interest of the parties to the action. And in all cases counsel have a right to put questions which might call for a criminating answer. After the question is put, it is then for the

witness to claim his exemption from answering, or to waive it and answer the question.

SECTION XXXIII.

DEGRADING ANSWERS.

The English authorities are so contradictory on the question how far a witness may be compelled to answer questions which are degrading to his character, that but little assistance can be derived from a review of them. One point is clearly established in relation to the matter. Where the transaction as to which the witness is interrogated forms a part of the issue to be tried, he is bound to answer the question, however strongly the evidence may reflect upon his character. But, when the question is asked for a mere collateral purpose, such, for instance, as the impeachment of the character of the witness, he is not bound to answer any question which will degrade or tend to degrade his character. *Lohman* v. *People*, 1 Comst., 380. *Post*, 515.

The refusal of a witness to answer a question which imputes discredit, generally has an effect unfavorable to character, and excites suspicion; whether reasonably or justly, must depend upon the sort of person produced and the question put. A man of high honor and character, may be disposed to refuse, with scorn and indignation, to answer a question which he feels as an insult; and to infer dishonor in such a case might be the height of injustice. A refusal to answer such a question is never to be taken as an admission of the truth of the imputation conveyed by asking the question. A refusal to answer leaves the matter just as it would have stood if no such question had been asked. But, if the witness chooses to answer the question, the answer will be conclusive, and not liable to contradiction. There is an exception to this rule, perhaps, and that is, where a witness denies, on his cross-examination, that he has attempted to dissuade a witness of the opposite party from attending the trial. In such a case, he may be contradicted. *Atwood* v. *Welton*, 7 Conn., 66, 70, 72. So it may be shown that a witness has attempted to suborn an other witness to swear falsely, if he denies, on cross-examination, that he has done so. *Morgan* v. *Frees*, 15 Barb., 352.

SECTION XXXIV.

CONFIDENTIAL COMMUNICATIONS.

Communications, made on the faith of that professional confidence which a client reposes in his counsel, attorney or solicitor, are not allowed to be revealed in a court of justice, to the prejudice of the client.

The expediency of this rule must depend, not on the impropriety of violating the confidence reposed, but on a consideration that the collateral inconvenience, which would ensue if no such confidence were reposed, would preponderate over the direct mischief produced by a chance of the failure of justice, resulting from the exclusion of evidence. If, in the cases within the ope-

ration of the rule, the only confidence reposed were a confession of guilt or dishonesty, the rule would be obviously detrimental to the interests of justice; but it is conceived that, in a multitude of instances, a person possessed of just rights, would be materially impeded in vindicating them, if every communication, made to his professional adviser, might be used against him; if such were the law, it would be necessary, in self-defense, to accompany all communications made to a professional adviser, with a statement of the several circumstances and explanations, which, however unnecessary for the purpose of communication, would be requisite to prevent it from being unfairly used.

If, touching matters that came within the ordinary scope of professional employment, attorneys, counsel or solicitors receive a communication in their professional capacity, either from a client, or on his account and for his benefit, in the transaction of his business, or, which amounts to the same thing, if they commit to paper, in the course of their employment in his behalf, matters which they know only through their professional relation to the client, they are not only justified in withholding such matters, but bound to withhold them, and will not be compelled to disclose the information or produce the papers, in any court of law or equity, either as party or as witness. If this protection were confined to cases where proceedings had been commenced, the rule would exclude the most confidential, and it may be the most important, of all communications—those made with a view of being prepared either for instituting or defending a suit, up to the instant that the process of the court was issued.

If it were confined to proceedings begun or in contemplation, then every communication would be unprotected which a party makes with a view to his general defense against attacks which he apprehends, although at the time no one may have resolved to assail him. But, were it allowed to extend over such communications, the protection would be insufficient, if it only concluded communications more or less connected with judicial proceedings; for a person oftentimes requires the aid of professional advice upon the subject of his rights and liabilities, with no reference to any particular litigation, and without any other reference to litigation generally than all human affairs have, in so far as every transaction may, by possibility, become the subject of judicial inquiry. *Williams* v. *Fitch*, 4 E. P. Smith, 546; *Greenough* v. *Gaskell*, 1 Mylne & Keene, 102, 103.

It would be most mischievous if it could be doubted whether or not an attorney, consulted upon a man's title to an estate, was at liberty to divulge a flaw. The reason of the rule is obvious. It is out of regard to the interests of justice which cannot be upheld, and to the administration of justice which cannot go on, without the aid of men skilled in jurisprudence, in the practice of the courts, and in those matters affecting rights and obligations which form the subject of all judicial proceedings. If the privilege were confined to communications connected with suits

begun, or intended, or expected, or apprehended, no one could safely adopt such precautions as might eventually render any proceedings successful or all proceedings superfluous.

The privilege is that of the client and not of the professional adviser; and an attorney or counsel will not be allowed, against his client's will, to disclose matters of professional confidence, although he himself is willing to do so. The client, however, may waive his privilege; in which case the court will compel the legal adviser to discover what he knows, even though the interest in the subject matter, respecting which the confidential communication was made, has passed to a third person, and he objects to the disclosure. *Benjamin* v. *Coventry*, 19 Wend., 353. But he is not to be considered as waiving it, by calling his attorney or counsel as a witness, unless he examines him as to confidential communications. But, where the privilege belongs to several clients, it cannot be waived by one only, nor even by a majority, contrary to the expressed wish of the others. *Bank of Utica* v. *Mersereau*, 3 Barb. Ch., 533, 596.

The privilege endures forever, unless removed by the client. *Ib.* But it extends only to information derived from the client, as such, either by oral communications, or books or papers shown to him, or put in his hands by his client, and not to information derived from other persons or sources, while acting as such attorney or counsel. *Spenceley* v. *Schulenburgh*, 7 East, 357; *Crosby* v. *Berger*, 11 Paige, 377.

The seal of professional confidence will not cover a communication made to an attorney or counsel to obtain professional advice or assistance, as to the commission of a felony or other crime which is *malum in se*. *Bank of Utica* v. *Mersereau*, 3 Barb. Ch., 534, 598, 599, 600. But when the communication merely relates to a fraud which is not punishable criminally, the communication is protected. *Ib.*

A communication made to a clerk of the plaintiff's attorney for the purpose of enabling such clerk to draw a complaint in an action pending in favor of the person making such communication, is protected. *Sibley* v. *Waffle*, 2 E. P. Smith, 180, 183.

When a client makes communications to his counsel in the presence of a third person, not connected with the latter, the privilege does not extend to such third person, and he may be compelled to testify what he has heard upon the subject. *Jackson* v. *French*, 3 Wend., 337. An attorney or counsel cannot, after he ceases to act in that capacity, disclose what was communicated to him professionally. *Yordan* v. *Hess*, 13 Johns., 492. But if the client, after the professional relation ceases, chooses to repeat to such attorney any such communication, it will not then be privileged. *Ib.*

The same principle which protects oral communications to counsel, also extends to papers or writings in the hands of an attorney or counsel, if placed there for professional purposes.

People v. *Benjamin*, 9 How., 419; *Jackson* v. *Burtis*, 14 Johns., 392; *Jackson* v. *Denison*, 4 Wend., 558.

"No minister of the gospel, or priest of any denomination whatever, shall be allowed to disclose any confessions made to him in his professional character, in the course of discipline enjoined by the rules or practice of such denomination." 3 R. S., 690, § 103, 5th ed.

"No person duly authorized to practice physic or surgery, shall be allowed to disclose any information which he may have acquired in attending any patient in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or to do any act for him as a surgeon." 3 R. S. 690, § 104, 5th ed.

A person who consults a physician as to the means of procuring an abortion, and who gives the name of the female who is pregnant, does it at the risk of an exposure of the information given, for such communication is not privileged within this statute. *Hewit* v. *Prime*, 21 Wend., 79.

In an action by a physician to recover for his professional services, he may prove the nature of the disease, and the character of the treatment adopted, for the purpose of determining the value of the services rendered. *Kendall* v. *Grey*, 2 Hilt., 300.

The privilege extends only to physicians and surgeons, and the information given to them to enable them to act or prescribe professionally; and it does not extend to communications which may be made to a person who may be in charge of the office of such physician in his absence, when it is not shown that such communication was made as the basis of a prescription. *Ib.*

Admissions made to a clergyman, but not in the course of discipline of his church, are not protected by the statute, even when the confessions relate to a criminal offense. *People* v. *Gates*, 13 Wend., 312.

A conversation, between a person who had been tried upon an indictment and acquitted, and one who was his counsel at the trial, and which was had after the relation of counsel and client had ceased, no further proceedings being contemplated, upon a subject not connected with that to which the employment of the witness as counsel related, is not a privileged communication. *Mandeville* v. *Guernsey*, 38 Barb., 225.

If the communication is a privileged one, and it was made by two or more clients jointly to their mutual legal adviser, the seal of confidence cannot be removed unless by the consent of all the clients. *Whiting* v. *Barney*, 38 Barb., 393. The consent of even a majority is not sufficient; and one or more of the clients cannot require a disclosure of the communication as evidence against the others, without their consent. *Ib.*

SECTION XXXV.

IMPEACHING CREDIT OF WITNESSES.

There are several modes of impeaching witnesses, each of which will be briefly noticed in its order. And first, it may be premised generally, that the credit of a witness may be impeached either by cross-examination, or by general evidence affecting his credit, or by evidence that he has before said or done that which is inconsistent with his evidence on the trial; or, lastly, by contrary evidence as to the facts themselves.

There are numerous matters as to which a witness may be cross-examined, for the purpose of impeaching his credit. But there are limits beyond which a party is not permitted to go; and, therefore, on cross-examination, a witness cannot be examined as to what he has said at other times in relation to a fact at issue in the action, where he has not been examined as to such fact by the party calling him; and the matters inquired about are not such as could legally affect his credibility. *Bearss* v. *Copley*, 6 Seld., 93.

In cross-examining a witness, for the purpose of affecting his credit, courts are usually quite liberal towards the cross-examining counsel. But where the sole object of the cross-examination is the impeachment of the witness, and the matters inquired about are collateral and not pertinent to the matters in issue, the extent to which such cross-examination shall extend is entirely discretionary with the court. *Allen* v. *Bodine*, 6 Barb., 383. And it is in the discretion of the court to interpose and protect a witness against any inquiries not relevant to the issues to be tried, and having no object in view but the impeachment of the witness. *Varona* v. *Socarras*, 8 Abb., 302; *Great W. Turnpike Co.* v. *Loomis*, 5 Tiff., 127.

And the rule is conclusively settled, that a witness cannot be cross-examined as to any fact or matter which is collateral or irrelevant to the issue, merely for the purpose of contradicting him by other evidence, if he should deny it, with intent thereby to discredit his testimony. *Plato* v. *Reynolds*, 13 E. P. Smith, 586.

It is also perfectly well settled that the credit of a witness can be impeached by evidence as to general character only, and not by evidence as to particular facts not relevant to the issue, for this would cause the inquiry, which ought to be simple and confined to the matters in issue, to branch out into an indefinite number of issues.

The characters, not only of the witnesses in the principal cause, but of every one of the impeaching collateral witnesses, might be impeached by separate charges, and loaded with such an accumulated burden of collateral proof, that the administration of justice would become impracticable. Besides this, no man could come prepared to defend himself against charges which might thus be brought against him, without previous notice; and though every man may be supposed to be capable of defending his general character, he cannot be prepared to

defend himself against particular charges of which he has had no previous notice.

Before one witness is permitted to speak of the general character of an other, it must be proved that the former has a proper knowledge of that character.

In one case, *Curtis* v. *Fay*, 37 Barb., 64, 69, 70, the plaintiff called a witness named Pritchard to speak as to the character of a witness named Jones. Pritchard did not, of himself, know anything about Jones' reputation. All he could testify on the subject of his reputation was what some person at Genoa, whom he did not know, told him it was. This was held to be insufficient, and the court said: "An impeaching or sustaining witness is not to speak of the reputation unless he knows it, and such knowledge must be founded upon an acquaintance and intercourse with the neighbors and acquaintances of the individual whose character is in question, and that intercourse must be of some length of time—sufficient, at least, to enable him to gather the general estimation in which he is held in the community where he resides."

The character of a witness may be impeached by persons in whose neighborhood the attacked witness had resided until within four years prior to the trial, notwithstanding such witness had then removed to a place fourteen miles distant from that neighborhood, where he had since resided, and the impeaching witness did not know the character borne by the attacked witness at the latter place. *Sleeper* v. *Van Middleworth*, 4 Denio, 431. But when the acquaintance with the witness is limited, and its existence was at a remote period, a different rule prevails.

In one case, *Wilmot* v. *Richardson*, 6 Duer, 328, 340, the character of a witness on the part of the plaintiff had been thoroughly impeached. A supporting witness was then called, who had seen the impeached witness for some six months, at a period twelve years before the trial, and who had not seen the impeached witness since then until within six months of the time of the trial; and he further testified that he had never heard the other witness spoken of one way or the other. The court below permitted him to testify as to the character of the impeached witness, which was held to be wrong, and the court said: "This decision cannot be sustained, unless it be a sound rule that a witness whose character is impeached may counteract the effect of the impeaching evidence by proof that, in the opinion of others who have but a slight acquaintance with him, and never heard him spoken of one way or the other, and who know nothing of his general character, he is a credible witness. I presume no one holds the opinion that a witness can be impeached by the testimony of persons who really know nothing of his general character, and never heard him spoken of, that they do not consider him a credible witness. If such evidence is incompetent for the purpose of impeaching a witness, I think it is equally so to sustain one who has been effectually impeached."

The proper inquiry as to the character of the witness, must be as to his general reputation where he is best known. It is not enough that the impeaching or the sustaining witnesses can state what "others say," for those others may be few in number, and their acquaintance with the witness may be extremely limited. Ordinarily, the impeaching or sustaining witness ought to come from the neighborhood of the person whose character is in question.

A person is not permitted to manufacture evidence for the purpose of impeaching witnesses. And where a person went a distance to a strange place, for the purpose of ascertaining the character of a witness, and for the purpose of subpœnaing impeaching witnesses against him, he was not permitted to testify as to the result of his inquiries, nor to give his views as to the character of the witness whose credit was in question. *Douglass* v. *Tousey*, 2 Wend., 352.

In the impeachment of witnesses, it is general character alone that is in question; and, therefore, specific acts of immorality on the part of a witness cannot be given in evidence to impair his credibility. *Corning* v. *Corning*, 2 Seld., 97; *Varona* v. *Socarras*, 8 Abb., 302.

Petit larcency is not a felony, and, therefore, a conviction for that offense does not destroy the competency of a witness, but the record of conviction may be introduced for the purpose of affecting the credit of a witness who has been convicted of that offense. *Carpenter* v. *Nixon*, 5 Hill, 260. Interest does not render a witness incompetent, but it may affect his credit, and, therefore, it may be shown by a witness, on cross-examination, that he is the real party in interest, and that a transfer of his interest to the plaintiff wasa mere sham. *Hoyt* v. *Lynch*, 2 Sandf., 328. When a party to the action is a witness, he may be impeached in the same manner as any other witness. *Varona* v. *Socarras*, 8 Abb., 302.

It has been held, that merely proving that the general character of a witness is bad, is not enough to effectually impeach him, when the impeaching witness is not asked whether he would believe the other witness on oath. *Gilbert* v. *Sheldon*, 13 Barb., 623. To show general bad character is immaterial; the party must go further, and prove that the character of the witness is bad as to truth and veracity, or must show, by the impeaching witness, that he would not believe the other on oath. *Ib.* In the case last cited, it was not even shown that the general *moral* character of the witness was bad.

But, in a late case, it has been held, that, after impeaching witnesses are shown to be acquainted with the general moral character of the person whose credit is assailed, and they declare it to be bad, the question of credit is then for the jury, under proper comments from the court, without any inquiry of the discrediting witnesses as to whether they would believe him under oath. *Wright* v. *Paige*, 36 Barb., 438, 446.

In the case just cited, the court said: "In the case at bar, a female witness is shown to be of bad moral character—reputed to be dishonest, unchaste, wanting integrity, untruthful, thievish, and a keeper of a resort for vile characters; and the court is asked to charge the jury that she stands before them, as regards the question of general impeachment, a perfectly fair witness; in the exact language of the request, 'that the impeaching testimony in that behalf was of no force;' and for the reason simply that the witnesses were not asked whether they would believe her under oath. The proposition is contrary to the dictates of reason and propriety—simply absurd." Per BOCKES, J.

The almost invariable practice, however, of asking the impeaching witness whether he would believe the other on oath, is not to be disregarded in practice. And a neglect or refusal to put the question, implies a doubt whether the impeaching witness would declare against the credit of the witness, so far as to swear that he was not to be believed under oath. In these cases, "the true object to be effected is, to prove the witness' general character *for truth* to be bad. His general character, in other respects, is of no consequence. All experience shows, that the general characters of many men are bad, in the common acceptation of the word, while their veracity is unimpeachable. Indeed, most men term that man's general character bad, who has some one cardinal vice, although in other respects he may be irreproachable. In short, I hold, that proof of general bad character, as that term is generally understood and used in society, does not, *necessarily* and legally, prove the fact that the witness' character for veracity is bad; and, therefore, I consider it to be immaterial evidence, where the party avows his intention to stop with that question. All the elementary writers, in their formula of queries to the impeaching witness, indicate, most clearly and decidedly, that further questions must be put, in order to render the impeachment effectual." Per SHANKLAND, J., in *Gilbert* v. *Sheldon*, 13 Barb., 626, 627. And it is proper to remark here, that where a witness is sought to be impeached, on account of his bad character, and witnesses are called for that purpose, who testify that they are acquainted with the *general character* of the witness whose credit is in question, they may be asked whether they would believe him on oath, notwithstanding they disclaim all knowledge of the witness' *character for truth and veracity. Johnson* v. *People*, 3 Hill, 178.

Where it is sought to impeach a witness, on the ground that he has made statements, out of court, which are contrary to what he has sworn on the trial, such proof may be made by any competent witness who heard his previous statements. And, where such previous statements were made on oath as a witness, any person who was present in court, and heard the testimony of the witness, is as competent to testify what he swore to as the judge who presided at the trial, or as counsel who took minutes of the evidence. *Grimm* v. *Hamel*, 2 Hilt., 434; *Tooker* v. *Gormer*, 2

Hilt., 71. Written notes or minutes of the evidence may be more reliable, and therefore a jury or court might attach more credit to them than to a statement from mere memory, if any conflict existed between them.

But a witness, or a party who is a witness, is not bound to state what he swore to on a former trial, since his statements might be used against him, in a prosecution for perjury, if there was a contradiction between the two statements. *Pickard* v. *Collins*, 23 Barb., 444. So, if the witness has made a contradictory statement in writing, as, for instance, in a letter, it may be used for the purpose of contradicting him.

On the subject of relevancy, it has been long settled, that a witness may be asked whether, on some former occasions, he has not given a different and contradictory representation of the same subject.

If the witness answers in the affirmative, the question and its answer of course affects his credit, whether the subject matter of the answer be relevant or irrelevant to the matters in issue; if he answers in the negative, and the subject of the answer be irrelevant to the matters in issue, the answer is conclusive, and evidence cannot be given to contradict the witness; but if the subject of the answer be relevant to the matters in issue, then evidence may be given, to show that the witness has, on a former occasion, given a different representation of the subject; and the inquiry is made, in order to lay a foundation for proof of contradictory statements.

Where a witness has made a written sworn statement of facts which contradicts what he has since sworn to as a witness on a trial, such sworn statement may be put in evidence to contradict his evidence and to impeach him, without first calling his attention to such statement, and interrogating him in relation to it. *Clapp* v. *Wilson*, 5 Denio, 285. The witness has a right, however, to explain the reason why he made such sworn statement, and to explain the circumstances under which it was made, if such explanation tends to show truth and fairness on the part of the witness. *Ib.*

Such written instruments are not made evidence, by merely producing them and proving their execution; to render them evidence in the cause, they must be read, or the reading must be expressly or impliedly waived. *Ib.*

It is only when a witness has stated *facts* differently from what he swears, that he can be contradicted; and, therefore, it is not competent to show that a witness has previously expressed an *opinion* contradictory to his present opinion or statement. *Holmes* v. *Anderson*, 18 Barb., 420; *Elton* v. *Larkins*, 5 Carr. & Payne, 385. This rule, however, does not seem to be without exceptions. In one case, *Patchin* v. *Astor Mutual Ins. Co.*, 3 Kern., 268, the question was, whether a certain steamer was seaworthy or unseaworthy, on account of an alleged defect in the fire jackets, and whether the vessel took fire from this cause. A witness for the

plaintiff, named Stebbins, was on board at the time of the fire, as chief engineer, and he was competent to give an opinion upon the subject. He testified that the vessel was seaworthy, and his evidence tended to show that the fire did not originate from such defect. On his cross-examination he was asked whether he did not say on the day of the loss, "My God! is it possible that so many lives should be lost, when $500 expended on those water jackets would have saved the whole;" and he denied any recollection of using that expression, and stated that he had no such idea. It was held that the defendant might contradict this witness, by showing that he made such statement, for the purpose of discrediting him. The question put, for the purpose of contradiction, was in this form: "Did Stebbins say, my God! is it possible that boat has burned, when $500 laid out on the water jackets would have saved her?" And it was held that the slight discrepancy between the expression about which he was examined and the one offered to be proved, was not material.

But, where a party calls a witness and has him sworn and examined, he cannot, for the purpose of impeaching the witness, give evidence to show that he has at other times made declarations or statements which are contradictory of those sworn to on the trial. *Thompson* v. *Blanchard*, 4 Comst., 303; *People* v. *Safford*, 5 Denio, 112.

It is a general rule that whenever the credit of a witness is to be impeached by proof of anything that he has said or declared, or done in relation to the cause, he is first to be asked, upon cross-examination, whether he has said or declared, or done that which is intended to be proved. For in every such case there are two questions; first, whether the witness ever did the act or used the expressions alleged; secondly, whether his having done so impeaches his credit, or is capable of explanation. It would be manifestly unjust to receive the testimony of the adversary's witness to prove the fact, without also admitting the party's witness to deny; and assuming the act to have been done, or the expression to have been used, it would also be unjust to deny to the party, or the witness who admits the act or expression, the best, or, it may be, the only means of explanation.

If the witness admits the words, declarations or acts, proof on the other side becomes unnecessary, and an opportunity is afforded to the witness of giving such reasons, explanations, or exculpations of his conduct, if any there be, as the circumstances may furnish; and thus the whole matter is brought before the court at once, which is the most convenient course.

If the witness denies the words, declarations or acts imputed to him, then, if it is not a matter collateral to the cause, witnesses may be called to contradict him. But it is not enough, in such a case, to ask a witness the general question whether he has ever said so and so. He must be asked as to the time, place and person involved in the supposed contradiction, or some other circumstance sufficient to point out the particular occasion. *Pen-*

dleton v. *Empire Stone Dressing Co.*, 5 E. P. Smith, 13, 18; *Budlong* v. *Van Nostrand*, 24 Barb., 25; *Sprague* v. *Cadwell*, 12 Barb., 516; *Palmer* v. *Haight*, 2 Barb., 210.

If the witness neither directly admits nor denies the act or declaration, as when he merely says that he does not recollect; or, if he gives any other indirect answer not amounting to an admission, it is competent for the adversary to prove the affirmative, for otherwise the witness might in every such case exclude evidence of what he had said or done, by answering that he did not remember.

If the witness declines to answer on account of the tendency of the question to criminate him, the adverse party is still at liberty to adduce the same proof. And the possibility that the witness may on that ground decline to answer, affords no sufficient reason for not giving him the opportunity of answering with a view to explain the circumstances and to exculpate himself.

So strict is the rule in relation to the examination of a witness as to contradictory statements, that a witness whose testimony has been taken conditionally (*de bene esse*), cannot be impeached on the trial, by proving that subsequent to such conditional examination he had made statements inconsistent with his testimony, or had said that what he had sworn to was false. Before such evidence can be given, the witness must be interrogated in relation to it. *Stacy* v. *Graham*, 4 Kern., 492; *S. C.*, 3 Duer, 444.

And if a court allows a witness to be impeached by such a contradiction before the witness has been interrogated, it will be error, and the error will not be cured by afterwards recalling the witness and permitting him to explain his testimony. *Sprague* v. *Cadwell*, 12 Barb., 516. Such an explanation would not, or at least might not, in all cases, reinstate the witness to the same standing with the jury, as he would have, in case he had been permitted to make the explanation before being contradicted. An explanation made afterwards might be said to be forced from the witness, which otherwise would appear to be frank and ingenuous.

It is always competent to show that a witness is hostile to the party against whom he is called; that he has threatened revenge, or that a quarrel exists between them. A jury would scrutinize more closely and doubtingly the evidence of a hostile than that of an indifferent or a friendly witness. Hence it is always competent to show the relations which exist between the party against as well as the one for whom he was called. *Starks* v. *People*, 5 Denio, 106, 108.

A party cannot bring evidence to confirm the character of a witness before the credit of that witness has been impeached, either upon cross-examination, or by the testimony of other witnesses; but if the character of a witness has been impeached, although upon cross-examination only, evidence on the other

side may be given to support the character of the witness by general evidence of good conduct.

It is a general rule that a party will not be permitted to give evidence of his witness's good character until it has been attacked on the other side, either by the evidence of witnesses called for such purpose, or by the evidence of the witness on cross-examination going to impeach his general character. *People* v. *Gay*, 3 Seld., 378, 381.

In the last case cited, the witness had stated, on cross-examination, that he had been committed for trial upon a charge of perjury, but this was held not to be a sufficient impeachment to authorize evidence in his behalf of general good character, on the ground that it is a legal presumption that the witness is innocent of the charge made against him.

Evidence which merely goes to show that the account given by a witness is improbable, to show that the facts were different from the account he has given, or to show that the witness had made declarations hostile to the party against whom he was called, does not amount to an attack upon general character, which will authorize the party to call witnesses, to show the general character of the attacked witness to be good. *Starks* v. *People*, 5 Denio, 106; and see *People* v. *Hulse*, 3 Hill, 309; and *Leonori* v. *Bishop*, 4 Duer, 420.

But, where the cross-examination of a witness is conducted in a manner which tends to impair his credibility, by showing that a certain prosecution was the result of a conspiracy in which the witness was concerned, it is competent to the party to sustain his witness by evidence corroborating his statements and vindicating his motives. *Lohman* v. *People*, 1 Comst., 380.

Evidence which is given for the purpose of sustaining the character of a witness, should be as to his character for truth and veracity, and not to his honesty. *Gurney* v. *Kenny*, 2 E. D. Smith, 132. And an opinion that a witness is honest, can have little weight against his own testimony that he had committed numberless larcenies. *Ib.* And after the credit of a witness has been impeached by the production of a record of his conviction for the crime of larceny, it is not competent for the party calling him to give evidence explanatory of the conviction, and in favor of the innocence of the witness notwithstanding the conviction. *Gardner* v. *Bartholomew*, 40 Barb., 325. But, where the cross-examination of a witness tends to impeach his credibility, it is competent for the party calling him, to sustain him by giving in evidence letters of the adverse party which tend to show that the witness is worthy of credit. *Stacy* v. *Graham*, 4 Kern., 492; *S. C.*, 3 Duer, 444.

When an attempt is made to impeach a witness by showing a bias on his part towards the party calling him, on account of relationship, it is competent for such party to show that he and the witness are at variance, and not on good terms. *Clapp* v. *Wilson*, 5 Denio, 285.

It is no corroboration of the testimony of a witness to show that he has previously made declarations out of court, corresponding with the evidence given by him on the trial, and, therefore, such declarations ought not to be received in evidence. *Dudley* v. *Bolles*, 24 Wend., 465; *Smith* v. *Stickney*, 17 Barb., 489. And this is the rule, even when an attempt has been made to impeach the witness by showing that he has made contradictory statements out of court. *Ib.* When the character of a witness is impeached by general evidence, the party who called the witness is at liberty to examine the impeaching witnesses as to the grounds of their belief. And the impeaching witnesses may themselves be impeached in the same manner as any other witness.

SECTION XXXVI.

IMPEACHING A PARTY'S OWN WITNESS.

It is now proposed to inquire, whether a party can be allowed to produce evidence for the purpose of disproving or impeaching the testimony of his own witness, although such evidence should have the effect of throwing discredit upon the witness.

It is clear, that a party is not to be sacrificed to his witness; he is not represented by him, nor ought he to be identified with him, or bound by all he may say. On the other hand, a party ought to be placed under such restrictions as may be necessary for preventing unfair or dishonest practice. If a party produces a witness, knowing him at the time to be a man of infamous character, and that witness, in giving evidence, disappoints or deceives him, he ought not to be allowed to prove his infamy, for the purpose of destroying the effect of his evidence. Knowing the infamy of his character, he had more reason to suspect and disbelieve, than to trust him; nor has he any just ground to complain that his cause is prejudiced by false evidence, as he could expect nothing less from such a witness; and he suffers not unjustly for using a witness whom he knew to be infamous.

But, if a party, not acting himself a dishonest part, is deceived by his witness—or, if a witness, professing himself a friend, turns out an enemy, and, after promising proof of one kind, gives evidence directly contrary—is the party to be restrained from laying the true state of the case before the court? The common sense of mankind might be expected to answer this proposition in the negative, and to decide that the true state of the case should be made known. Further, if a witness, whether from mistake, from ignorance, or from design, gives evidence unfavorable to the party who calls him, is the party to be restrained from calling other witnesses to prove facts different from those which he has represented? All must agree that such proof of a different state of facts ought to be allowed.

But, in the first place, it is to be remembered that it is an established rule, that a party shall never be permitted to produce general evidence to discredit his own witness; for that would be

to enable him to destroy the witness if he spoke against him, and to make him a good witness if he spoke for him, with the means in his hand of destroying his credit if he spoke against him. The meaning of the rule is, that a party, after producing a witness, cannot prove him to be of such general bad character, as would render him unworthy of credit. *Thompson* v. *Blanchard*, 4 Comst., 303, 311. Nor can the party producing a witness, be permitted to prove that such witness has, at an other time, made declarations or statements contradictory to the statements to which he testified, for the purpose of affecting his credibility as a witness. *Ib.; Hunt* v. *Fish*, 4 Barb., 324.

If either party to an action calls his adversary as a witness, he will be bound by the same rules which apply to other witnesses; and he cannot impeach the general character of such witness, nor show that he has made contradictory statements. *Pickard* v. *Collins*, 23 Barb., 444.

The cross-examination of a witness does not, as a general rule, make him the witness of the cross-examining party, so as to prevent him from impeaching the witness. And where a witness for the plaintiff was cross-examined by the defendant, and the cross-examination suspended, and then renewed after the plaintiff had rested, and he was then re-examined by the plaintiff, and again cross-examined by the defendant, this was held not to preclude the defendant from impeaching the general character of the witness, and from showing that he had made contradictory statements. *Mattice* v. *Allen*, 33 Barb., 543; and see *People* v. *Moore*, 15 Wend., 419. But, if the cross-examination relates to entirely new matter; or if the party entitled to cross-examine a witness calls him subsequently to prove new matter on his own side, it may be that he will so far make the witness his own as not to be permitted to impeach his general character. *Ib.*

When, however, a party is under the necessity of calling a witness for the purpose of satisfying the formal proof which the law in some cases requires, he is not precluded from impeaching such a witness. And, for that reason, a party may impeach a subscribing witness, whom he has been compelled to introduce as a witness. *Dennett* v. *Dow*, 5 Shepley, 19; *Shorey* v. *Hussey*, 32 Maine, 579; and see *Greenough* v. *Eccles*, 5 J. Scott, N. S., 807, note and cases cited.

And when a witness by surprise gives evidence against the party who called him, that party will not be precluded from proving his case by other witnesses; for it would be contrary to justice that the treachery of a witness should exclude a party from establishing the truth by the aid of other testimony. When a party is thus surprised by the statements of his own witness, and he calls other witnesses to contradict him as to particular facts, it does not follow from necessity that the whole of the evidence of the contradicted witness is to be rejected. The whole matter is a question for the jury. *Bradley* v. *Ricardo*, 8 Bing., 57.

A party is not precluded from giving evidence to matters in issue between the parties in any case merely because it contradicts his own witness. If the testimony offered is material, and goes to the very facts in issue, it is competent, although it should contradict every other witness whom the party has examined. The rule prohibits a contradiction which is attempted for the mere purpose of impeachment of the party's own witness, or where the matter sought to be contradicted is collateral only, and not going to the issue. *Parsons* v. *Suydam*, 3 E. D. Smith, 276, 282, 283; *Pickard* v. *Collins*, 23 Barb., 444, pl. 5.

A party calling a witness is not bound by his testimony in all its parts. He may, if he is able, satisfy the court or jury, from the facts and circumstances stated by the witness himself, that the witness is mistaken in some of his statements or conclusions, while he is correct in the others. *Keutgen* v. *Parks*, 2 Sandf., 60, 67. When a witness is cross-examined as to collateral matters, for the purpose of affecting his credit, his answers in relation to such matters are conclusive. *Ante*, 481, 519. But, when the questions relate to matters which are material to the issues, his answers are not conclusive, even though the evidence came out on cross-examination, and he may be contradicted by other witnesses. *Mills* v. *Carnly*, 1 Bosw., 160.

The justice has a discretion as to the number of witnesses to be called for the purpose of impeaching a witness. *Green* v. *Brown*, 3 Barb., 120; *Nolton* v. *Moses*, 3 Barb., 31, 35. A reasonable number ought to be allowed on each side; and five or six witnesses on each side would ordinarily be a reasonable number. *Ib.* If the circumstances of the case require it, the court will of course allow the examination of a larger number. *Ib.*

SECTION XXXVII.

DUTY OF A JURY IN WEIGHING EVIDENCE.

A jury taken from the body of the community may well be presumed to be possessed of such knowledge and experience, derived from their intercourse with society, as will peculiarly fit them for the determination of all disputed facts arising out of the ordinary transactions of life.

It must, however, be recollected, that jurors, unaccustomed as they usually are to judicial investigations, require, in complicated cases, all the aid which can be derived from the arguments of counsel, and from the experience and penetration of the court, to direct their attention to the essential points, and enable them to arrive at a just conclusion. When a jury is called, the law, in its wisdom, ultimately relies upon their integrity and understanding, but it, nevertheless, anxiously prepares the way for a correct conclusion, by excluding from their consideration all such evidence as is likely to embarrass, mislead, or prejudice them in the course of their inquiry. So far the law proceeds by certain and definite rules. Much yet remains to be done of a nature which cannot be defined; and when a justice assumes to charge a jury, as

he very properly may, if he chooses, there will be difficulties enough to tax his abilities. To divest a case of all its legal incumbrances; to resolve a complicated mass of evidence into its most simple elements; to exhibit clearly the connection, bearing, and importance of its distinct and separated parts, and their combined tendency and effect, stripped of every extrinsic and superfluous consideration, which might otherwise embarrass or mislead; and to do this in a manner suited to the comprehension and understanding of an ordinary jury, is one of the most arduous as well as the most important duties incident to the judicial office.

There is, perhaps, no instance in which the natural and the acquired powers of the mind are more strikingly and beneficially exerted than in a court of justice, where a confused mass of evidence relating to an intricate case is, by the effort of a vigorous, acute and comprehensive mind, reduced into regularity and order.

The law, to use an ordinary phrase, has no scales wherein to weigh the different degrees of probability, still less to ascertain what weight of evidence shall amount to absolute proof of any disputed fact. Its business is to define, to distinguish, and to apply legal consequences to ascertained facts; but whether a fact is probable or improbable, true or false, admits of no legal definition or test. The principles on which the investigation or ascertainment of truth depend, are fixed and invariable, however the particular process prescribed by different systems of law, for the purpose of investigation, may vary.

As the power of discriminating between truth and falsehood depends rather upon the exercise of an experienced and intelligent mind than upon the application of artificial and technical rules, the law has delegated this important office to a jury of the country, whenever either of the parties choose to call one. If no jury is called, the justice takes the place of a jury, and he is governed by the same legal rules which apply to a jury trial.

One supposed advantage, which arises from a trial by jury is, that this mode of trial excludes a number of technical and artificial rules and distinctions, which, but for the complete and absolute separation of law from fact, would be sure to arise. Were the decision of facts to be constantly referred to the same individual, the frequent occurrence of similar combinations of facts would tempt him to frame general and artificial rules, which, when they were applicable, would save mental exertion in particular instances; and perhaps a laudable wish to decide consistently, and that fondness for generalizing, which is incident to every reflecting mind, would tend to the same point, and would lead to refined and subtle distinctions. A juror, on the contrary, called on to discharge his duty but seldom, possesses neither inclination nor opportunity to generalize and refine. Unfettered, therefore, by technicalities, he decides according to the natural weight and force of the evidence.

Although all questions of pure fact belong peculiarly to the province of a jury, who are to be guided in their decision by their conscientious judgment and belief, yet it is to be recollected that in many instances the effect of particular evidence is the subject of legal definition and cognizance, as in the case of legal presumptions resulting in particular facts.

It will be proper, therefore, in the first place, briefly to inquire to what extent a jury is restrained by legal rules; and, in the next place, to make some general observations on the natural force and weight of evidence.

With a view to the first consideration, that is, how far the law itself interferes as to the force or measure of evidence, it is to be recollected, that except in the few instances when a jury determine by the actual evidence of their senses, all evidence is either, first, *direct;* that is, where the witnesses state or depose to facts of which they have had actual knowledge; or, secondly, it is *indirect;* and *indirect* evidence is either *artificial* or *natural. Artificial*, where the law, by arbitrary appointment, annexes to particular evidence a force or efficacy beyond that which naturally belongs to it; as in the case of records, which, for the sake of public convenience, are usually made final and conclusive evidence of the facts recorded. So, in all instances of legal presumptions, whether they are absolute and conclusive, or whether they are mere presumptions which are operative only until they are rebutted by contrary proof. So of cases in which such artificial evidence may be of a *conventional* nature, as where the parties by deed or other written agreement, constitute the particular instrument to be the expositor of their intentions, and the legal memorial of the facts which it contains.

In these and some other instances, the law prescribes the extent to which the evidence shall operate; and in these and all other cases, where a rule of law intervenes, a jury is bound by that rule of law, even though it is in opposition to their own conclusion as to the truth of the fact drawn from all the circumstances. Or, secondly, the evidence is purely natural, where the jury decide according to the natural weight and effect of the circumstances, either by the aid of experience, when former experience supplies such natural presumptions, or by the aid of reason exercised upon the circumstances, or by the joint and united aid of experience and reason.

Juries are bound by all the rules and presumptions of law, as far as they apply; they are to confine themselves strictly to the matters put in issue by the pleadings; they are bound by the admissions of the parties upon the record, and by all estoppels which in point of law conclude the parties. They are also bound to give proper legal effect to all instruments established by competent evidence, and to notice all matters which are judicially noticed by the court. They are to be governed by the order of proof which the law prescribes, and their verdict must be founded on the evidence adduced in the cause. It is now perfectly settled

that a juror cannot give a verdict founded on his own private knowledge, for it could not be known, in that case, whether the verdict was according to the evidence, or against it; and besides, it is very possible that the private grounds of belief might not amount to legal evidence. And if such evidence were to be privately given by one juror to the rest, it would want the sanction of an oath, and the juror would not be subject to cross-examination. If, therefore, a juror knows any fact material to the issues, he ought to be sworn as a witness, and he is then liable to a cross-examination like other witnesses; and if he privately states such facts to the other jurors, it will be a good ground for a new trial.

It sometimes happens that evidence is admitted for one purpose, while it is not competent evidence for an other purpose. Or it is sometimes admitted as against one party, while it is not competent evidence against the other parties. In all such cases the jury is bound to apply the evidence so far only as it is legally applicable.

Suppose the case of an action against two defendants for the recovery of a demand which, it is claimed, is barred by the statute of limitations. If there is evidence of a new promise, or of a payment by one, such promise or payment is no evidence as against the other. So, if two persons are tried together for a criminal offense, a confession made by one which criminates the other is not evidence except as against the party confessing.

Previous to the remarks which will be made on the force and weight of evidence, whether direct or circumstantial, it is to be observed that the measure of proof sufficient to warrant the verdict of a jury varies much, according to the nature of the case.

Evidence which satisfies the minds of the jury of the truth of the fact in dispute, to the entire exclusion of every reasonable doubt, constitutes full proof of the fact. Absolute, mathematical, or metaphysical certainty is not essential, and in the course of judicial investigations would be usually unattainable.

Even the most direct evidence can produce nothing more than such a high degree of probability as amounts to moral certainty. From the highest degree it may decline, by an infinite number of gradations, until it produces in the mind nothing more than a mere preponderance of assent in favor of a particular fact.

The distinction between full proof and mere preponderance of evidence is, in its application, very important. In all criminal cases whatsoever, it is essential to a verdict of condemnation, that the guilt of the accused should be fully proved; neither a mere preponderance of evidence, nor any weight of preponderant evidence, is sufficient for the purpose, unless it generates full belief of the fact, to the exclusion of all reasonable doubt.

But, in many cases of a civil nature, where the right is dubious, and the claims of the contesting parties are supported by evidence nearly equipoised, a mere preponderance of evidence on

either side may be sufficient to turn the scale. But, even where the contest is as to civil rights only, a mere preponderance of evidence, such as would induce a jury to incline to the one side rather than to the other, is frequently insufficient. And it is so in all cases in which it falls short of fully disproving a legal right once admitted or established, or of rebutting a presumption of law.

One who seeks to charge an other with a debt, must do so by full and satisfactory proof; and, on the other hand, when a debt has once been established by competent proof, the debtor cannot discharge himself but by full proof of its satisfaction.

Again, where the law raises a presumption in favor of the fact, the contrary must be fully proved, or at least such facts must be proved as are sufficient to raise a contrary and stronger presumption.

An other distinction which requires notice, is that between *prima facie* and *conclusive* evidence. *Prima facie* evidence is that which, not being inconsistent with the falsity of the hypothesis, nevertheless raises such a degree of probability in its favor that it must prevail, if it is accredited by the jury, unless it is rebutted or the contrary proved.

Conclusive evidence, on the other hand, is that which excludes, or at least tends to exclude, the possibility of the truth of any other hypothesis than the one attempted to be established. All evidence is weak or strong, by comparison. In civil actions, slight evidence of right or title is sufficient, as against a stranger who possesses no color of title. Thus, the mere possession of goods by one who has found them, is evidence of property, as against a wrongdoer, in an action for their conversion; and so the mere occupation of land, however recent, will enable the occupier to maintain trespass against a stranger.

The evidence to be weighed by a jury, or by a court sitting in their place, consists either in: first, the direct testimony of witnesses; or, secondly, indirect or circumstantial evidence; or, thirdly, in both, either united or opposed to each other. The nature and force of such evidence may be considered either separately or in conflict.

First, as to the direct testimony of witnesses. The credit due to the testimony of witnesses depends upon: 1st, their integrity and honesty; 2d, their ability; 3d, their number, and the consistency of their testimony; 4th, the conformity of their testimony with experience; and, 5th, the coincidence of their testimony with collateral circumstances.

1st. Their *integrity*. A witness, to be trustworthy, must be both *willing* and *able* to declare the truth. His credibility is founded, in the first instance, upon experience of human veracity, from which the law presumes that a disinterested witness, who delivers his testimony under the sanction of an oath, and under the peril of the temporal punishments due to perjury, will speak the truth.

A witness of depraved and abandoned character may not be unworthy of credit, where it appears that there is not the slightest motive or inducement for misrepresentation; for there is a natural tendency to declare the truth, which is never wholly eradicated, even from the most vicious minds; and the danger of detection, and the risk of temporal punishment, may operate as restraints upon the most unprincipled, even where motives for veracity of a higher character or nature are entirely wanting.

But it is to be remarked, that it is difficult to detect the motives which may influence a depraved and corrupted mind; and hence it is for the jury to consider whether the apparent want of motive to deceive is sufficient to give credit to an exceptionable witness, and whether some assurance of the actual absence of such a motive is not necessary to warrant them in placing confidence in such a witness.

It frequently happens that a witness labors under some influence, arising from natural affection, near connection, or mere expectation of contingent benefit or evil, which may afford a strong temptation to perjury. In these, as in so many other cases, it is for the jury to estimate the degree of influence by which the testimony of a witness is likely to be corrupted, and to determine whether, under all the circumstances, he is the witness of truth.

In arriving at this conclusion, a consideration of the demeanor of the witness upon the trial, and of the manner of giving his evidence, both in chief and upon cross-examination, is oftentimes not less material than the testimony itself. An overforward and hasty zeal, on the part of the witness, in giving testimony which will benefit the party whose witness he is; his exaggeration of circumstances; his reluctance in giving adverse evidence; his slowness in answering; his evasive replies; his affectation of not hearing or not understanding the question, for the purpose of gaining time to consider the effect of his answer; precipitancy in answering, without waiting to hear or to understand the nature of the question; his inability to detail any circumstances wherein, if his testimony were untrue, he would be open to contradiction; or his forwardness in minutely detailing those where he knows contradiction to be impossible; an affectation of indifference; are all, to a greater or less extent, obvious marks of insincerity.

On the other hand, his promptness and frankness in answering questions, without regard to consequences, and especially his unhesitating readiness in stating all the circumstances attending the transaction, by which he opens a wide field for contradiction if his testimony is false, are, as well as numerous others of a similar nature, strong internal indications of his sincerity. The means thus afforded by a *viva voce* examination, of judging of the credit due to witnesses, especially where their statements are in conflict, are of incalculable advantage in the investigation of truth, and they not unfrequently supply the only true test by which the real character of the witnesses can be appreciated.

2d. Their *ability*. The ability of a witness to speak the truth must of course depend on the opportunities which he has had of observing the facts, the accuracy of his powers of discerning, and the faithfulness of his memory in retaining the facts once observed and known.

Where a witness testifies to a fact, which is wholly or partially the result of reason upon particular circumstances, it is obvious that the reasons of the witness for drawing that conclusion are of the most essential importance, for the purpose of ascertaining whether his conclusion was a correct one, although it should be borne in mind that the reasons which a witness gives for his belief are those which occur to him upon his examination, and are frequently different from those which actually produced his belief or conviction.

These observations apply with peculiar force to all questions of skill and science, and even to many of mere ordinary fact; thus, where a witness is called to state that an other witness is not to be believed upon his oath, his grounds for arriving at that conclusion are of the highest importance. Where, on the other hand, a witness states the impression on his senses, by any subject matter of frequent experience, his reasons are of little weight; for he will frequently assign a bad reason where his knowledge is certain.

The probability that the witness had originally a clear perception of the facts and their circumstances, is strengthened and confirmed by the consideration, that they were of such a nature as were likely to attract his attention.

On the other hand, it is diminished by the consideration, that the transaction was remote, and such as was not likely to excite notice or observation. Such considerations operate strongly where detailed evidence is given of oral declarations, after the lapse of a considerable interval of time. Every man's experience teaches him how fallible and treacherous the human memory in such cases is. In its freedom from this defect consists one great excellence of written or documentary evidence, and its main superiority over that which is merely oral; and on this principle it is, that the law, out of policy, frequently deems mere oral evidence too weak, and requires a written voucher to prove the fact.

Of all kinds of evidence, that of extra-judicial and casual declarations is the weakest and most unsatisfactory. Such words are often spoken without serious intention, and they are always liable to be mistaken and misremembered; and their meaning is liable to be misrepresented and exaggerated. *Ante*, 381.

A hearer is apt to clothe the ideas of the speaker, as he understands them, in his own language, and by this translation the real meaning must often be lost. A witness, too, who is not entirely indifferent between the parties, will frequently, without being conscious that he does so, give too high a coloring to what has been said.

The necessity for caution cannot be too strongly and emphatically impressed, where particular expressions are detailed in evidence, which were used at a remote period of time, or to which the attention of the witness was not particularly called; or where misconception was likely to arise from their situation and the circumstances under which they were placed; or from the prejudice of the witness, especially if his object was to extract an admission for the purposes of the cause. Such evidence is fabricated easily and contradicted with difficulty.

In cases of this kind, the conduct of the parties, and those facts and circumstances of the case which are free from suspicion, are frequently the safest and surest guides to truth. And evidence of this kind is of the very weakest kind, where it is doubtful whether the party making the admission knew his legal rights and situation. *Ante*, 381, 384.

3d. *Their number and consistency.* The testimony of a single witness, where there is no ground for suspecting either his ability or his integrity, is a sufficient legal ground for belief. That it is strong enough to produce actual belief, every man's experience will vouch.

Where direct testimony is opposed by conflicting evidence, or by ordinary experience, or by the probabilities of the case, the consideration of the number of witnesses becomes most material. It is more improbable that a number of witnesses should be mistaken, or that they should have conspired to commit a fraud by direct perjury, than that one or a few should be mistaken, or willfully perjured. In the next place, not only must the difficulty of procuring a number of false witnesses be greatly increased in proportion to the number, but the danger and risk of detection must be increased in a far higher proportion; for the points on which their false statements may be compared with each other, and with ascertained facts, must necessarily be greatly multiplied.

The *consistency* of testimony is also a strong and most important test for judging of the credibility of witnesses.

Where several witnesses bear testimony to the same transaction, and concur in their statement of a series of particular circumstances, and the order in which they occurred, such coincidences exclude all apprehension of mere chance and accident, and can be accounted for only by one or other of two suppositions — either the testimony is true, or the coincidences are the result of concert and conspiracy.

If, therefore, the independency of the witnesses be proved, and the supposition of previous conspiracy be disproved or rendered highly improbable, to the same extent will the truth of their testimony be established.

So far does this principle extend, that in many cases, except for the purpose of repelling suspicion and fraud and concert, the credit of the witnesses themselves for honesty and veracity may become wholly immaterial. Where it is once established that

the witnesses to a transaction are not acting in concert, then, although individually they should be unworthy of credit, yet if the coincidences in their testimony are too numerous to be attributed to mere accident, they cannot possibly be explained on any other supposition than that of the truth of their statement.

The considerations which tend to negative any suspicion of concert or collusion between the witnesses, are either extrinsic of their testimony, such, for instance, as relate to their character, situation, their remoteness from each other, the absence of previous intercourse with each other or with the parties, and of all interest in the subject matter of the litigation; or they arise internally from a minute and critical examination and comparison of the testimony itself.

The *nature* of such coincidences is most important. Are they natural ones, which do not bear the marks of artifice and premeditation? Do they occur in points obviously material, or in minute and remote points which were not likely to be material, or in matters the importance of which could not have been foreseen? The number of such coincidences is also worthy of the most attentive consideration. Human cunning, to a certain extent, may fabricate coincidences, even with regard to minute points, the more effectually to deceive; but the coincidences of art and invention are necessarily circumscribed and limited, whilst those of truth are indefinite and unlimited. The witnesses of art will be copious in their detail of circumstances, as far as their provision extends; beyond this they will be sparing and reserved, for fear of detection; and thus their testimony will not be even and consistent throughout, but the witnesses of truth will be equally ready and equally copious upon all points.

It is here to be observed, that partial variances in the testimony of different witnesses, on minute and collateral points, although they frequently afford the adverse advocate or counsel a topic for copious observation, are of little importance, unless they are of too prominent and striking a nature to be ascribed to mere inadvertence, inattention or defect of memory. It has been well remarked by a great observer, that "the usual character of human testimony is substantial truth under circumstantial variety." It so rarely happens that witnesses of the same transaction perfectly and entirely agree in all points connected with it, that an entire and complete coincidence in every particular, so far from strengthening their credit, not unfrequently engenders a suspicion of practice and concert.

The real question must always be, whether the points of variance and of discrepancy are of so strong and decisive a nature as to render it impossible, or at least difficult, to attribute them to the ordinary sources of such varieties, inattention, or want of memory. It would, theoretically speaking, be improper to omit the observation, that the weight and force of the united testi-

mony of numbers, upon abstract mathematical principles, increases in a higher ratio than that of the mere numbers of such witnesses.

Upon those principles, if definite degrees of probability could be assigned to the testimony of each witness, the resulting probability in favor of their united testimony would be obtained, not by the mere addition of numbers expressing the several probabilities, but by a process of multiplication.

Such considerations, however, are of little practical importance. The maxim of the law is, *ponderantur testes, non numerantur;* or, in other words, witnesses are weighed, not counted; that is, they are estimated by the weight and value of their testimony, and not by their number.

No definite degrees of probability can, in practice, be assigned to the testimony of witnesses; their credibility usually depends upon the special circumstances attending each particular case, upon their connection with the parties and the subject matter of litigation, their previous characters, the manner of delivering their evidence, and many other circumstances, by a careful consideration of which the value of their testimony is usually so well ascertained as to leave no room for mere numerical comparison.

4th. The *conformity* of their testimony with experience. As one principal ground of faith in human testimony is experience, it necessarily follows that such testimony is strengthened or weakened by its conformity or its inconsistency with our previous knowledge and experience. A man easily credits a witness who states that to have happened which he himself has known to happen under similar circumstances; and he may still believe, although he should not have had actual experience of similar facts; but where that is asserted which is not only unsupported by common experience, but contrary to it, belief is slow and difficult. Mr. Locke gives an amusing instance: "The Dutch ambassador told the king of Siam that in his country the water was so hard in cold weather that it would bear an elephant if he were there. The king replied: Hitherto I have believed the strange things you told me, because I looked upon you as a sober, fair man, but now I am sure you lie."

In ordinary cases, if a witness were to state that which was inconsistent with the known course of nature, or even with the operation of the common principles by which the conduct of mankind is usually governed, he would probably be disbelieved; for it might be more probable in the particular instance, that the witness was mistaken, or meant to deceive, than that such an anomaly had really occurred. But although the improbability of testimony, with reference to experience, affords a just and rational ground for doubt, the very illustration cited by Locke shows that mere improbability is by no means a certain test for trying the credibility of testimony, without regard to the number, consistency, character, independence, and situation of the

witnesses, and the collateral circumstances which tend to confirm their statement.

In ordinary cases, where a witness stands wholly unimpeached by any extrinsic circumstances, credit ought to be given to his testimony, unless it is so grossly improbable as to satisfy the jury that he is not to be trusted. As experience shows that events frequently occur, which would antecedently have been considered most improbable, from their inconsistency with ordinary experience; and, as their improbability usually arises from the want of a more intimate and correct knowledge of the causes which produced them, mere improbability can rarely supply a sufficient ground for disbelieving direct and unexceptionable witnesses of the fact, where there is no room for mistake.

5th. *Conformity* with collateral circumstances. Direct testimony is not only capable of being strengthened or weakened, to an indefinite extent, by its conformity, on the one hand, or its inconsistency on the other, with circumstances which are collateral to the disputed fact, or the main fact in question in the case. These collateral circumstances, as to their value as evidence, is determined by the rules applicable to circumstantial evidence. Any evidence which is not direct and positive is of this class. *Ante*, 363.

An inference or conclusion from circumstantial or presumptive evidence, may be either the pure result of previous experience of the ordinary or the necessary connection between the known or admitted facts and the fact inferred; or, of both reason and experience conjointly. And hence, such an inference or conclusion differs from a presumption, although the latter term has sometimes, yet not with strict propriety, been used in the same extended sense; for a presumption, in strictness, is an inference as to the existence of one fact, from a knowledge of the existence of some other fact, made solely by virtue of previous experience of the ordinary connection between the known and the inferred facts, and independently of any process of reason in the particular instance.

By circumstantial or presumptive proof, is meant that measure and degree of circumstantial evidence which is sufficient to produce conviction in the minds of the jury of the fact in question.

To the validity of every such proof, it is essential, first, that a basis of facts be established by sufficient evidence; and, in the next place, that the proper conclusion should be deduced, by the aid of reason and experience, from those facts and circumstances so established. The force and tendency of circumstantial evidence to produce conviction and belief, depend upon a consideration of the coincidence of circumstances with the fact to be inferred; that is, with the hypothesis, and the adequacy of such coincidences to exclude every other hypothesis.

All human dealings and transactions are a vast context of circumstances, interwoven and connected with each other, and also with the natural world, by innumerable mutual links and ties.

No one fact or circumstance ever happens which does not owe its birth to a multitude of others, which is not connected on every side by kindred facts, and which does not tend to the generation of a host of dependent ones, which necessarily coincide and agree in their minutest bearings and relations, in perfect harmony and concord, without the slightest discrepancy or disorder.

It is obvious that all facts and circumstances which have really happened, were perfectly consistent with each other, for they did so actually consist. It is, therefore, a necessary consequence, that if a number of the circumstances which attended a disputed fact be known and ascertained, and those so coincide and agree with the hypothesis that the disputed fact is true, that no other hypothesis can consist with those circumstances, the truth of that hypothesis is necessarily established.

And again, where the known and ascertained facts so coincide and agree with the hypothesis that the disputed fact is true, as to render the truth of any other hypothesis, on the principles of reason and experience, exceedingly remote and improbable, and reasonably, though not absolutely and metaphysically, impossible, the hypothesis is established as morally true. It also follows, that if any of the established circumstances be absolutely inconsistent with the existence of the supposed fact, the hypothesis cannot be true, notwithstanding the degree and extent of coincidence in other respects; for, if that fact really existed, it was necessarily consistent with all the circumstances.

Thus, in the first place, it sometimes happens that the coincidence between the known facts and the hypothesis is such as absolutely and demonstratively to exclude any other. If, for instance, it were to be proved that A. entered a room containing a watch, and that the watch was gone on his departure, and it were also proved that no agent but A. in the interval had had access to the room, the proof that A. took the watch would be conclusive and complete, for the supposition that it had been removed by any other agent would be entirely excluded.

In the next place, the nature and degree of coincidence between the circumstances and the hypothesis may oftentimes be sufficient to exclude all reasonable doubt, and thus generate full moral conviction and belief, although it is not, as in the former case, of an absolute and demonstrative nature. The probability of a hypothesis must always be proportioned to the *nature, extent* and *number* of its coincidences with the circumstances proved.

Connections and coincidences between circumstances and the hypothesis which they tend to prove are either those of a natural or mechanical nature, which are the objects of sense, or they are of a moral nature. Those of the first class may consist generally in proximity in point of time and space, and all other circumstances which show that the supposed agent had the means and opportunity of doing the particular act, and connect him with it. As common instances, the possession of stolen goods, in case of burglary, robbery or larceny, and stains of blood upon the per-

son, the possession of deadly weapons recently used, marks of conflict and violence, in case of homicide, may be cited.

Circumstances of the above description, although they may be in themselves of an imperfect and inconclusive nature, frequently derive a conclusive tendency from those which are of a moral kind, and which depend upon a knowledge and experience of man as a rational and moral agent.

There are, in fact, no existing relations, natural or artificial, no occurrences or incidents in the course of nature or dealings of society, which may not constitute the materials of proof, and become important links in the chain of evidence. Experience points out some laws of human conduct almost as general and constant in their operation as the mechanical laws of the material world themselves are.

That a man will consult his own preservation, and serve his own interests; that he will prefer pleasure to pain, and gain to loss; that he will not (in a state of sanity) commit a crime or any other act manifestly tending to endanger his person or property, without a motive; and conversely, that if he has done such an act he had a motive for doing it, are principles of action and of conduct so clear that they may be properly regarded as axioms in the theory of evidence.

In estimating the force of a number of circumstances tending to the proof of a disputed fact, it is of essential importance to consider whether they are dependent or independent. If the facts A. B. C. and D. are so essential to the particular inferences to be derived from them, when established, that the failure in the proof of any one of them would destroy the inference altogether, they are *dependent* facts; if, on the other hand, notwithstanding the failure in proof of one or more of those facts, the rest of them would still afford the same inference or probability as to the contested fact which they did before, they would be properly termed *independent* facts.

The force of a particular inference, drawn from a number of *dependent* facts, is not augmented, neither is it diminished, in respect of the number of such independent facts, provided they are established; but the probability that the inference itself rests upon sure grounds, is, in general, weakened by the multiplication of the number of circumstances essential to the proof; for the greater the number of circumstances essential to the proof is, the greater latitude is there for mistake or deception.

On the other hand, where each of a number of independent circumstances, or combinations of circumstances, tends to the same conclusion, the probability of the truth of the fact is necessarily greatly increased in proportion to the number of those independent circumstances.

In concluding the subject of circumstantial evidence, a few of the general rules will be noticed. And these rules are always essential in the application of circumstantial proof.

First. The circumstances from which the conclusion is drawn must be fully established. If the basis be unsound, the superstructure cannot be secure. The party upon whom the burden of proof rests is bound to prove every single circumstance which is essential to the conclusion, in the same manner and to the same extent as if the whole issue had rested upon the proof of each individual and essential circumstance.

It is obvious that proof of this nature is more strong and cogent where the circumstances are numerous, and derived from many different and independent sources, than where they are few, and depend on the credit and testimony of one or two witnesses. Where all the circumstances rest on the testimony of a single witness, the evidence can never be superior to the lowest degree of direct evidence, and must frequently fall below it; for, in addition to the question, whether the witness was trustworthy, an other question would arise, that is, whether the inference was correctly drawn from the facts which he was supposed to prove.

A few circumstances may be consistent with several solutions; but the whole context of circumstances can consist with one hypothesis only; and the wider the range of circumstances is, the more certain will it be that the hypothesis which consists with, and reconciles them all, is the true one.

Secondly. It is essential that all the facts should be consistent with the hypothesis. For, as all things which have happened were necessarily congruous and consistent, it follows that if any one established fact is wholly irreconcilable with the hypothesis, the latter cannot be true. Such an incongruity and inconsistency is sufficient to negative the hypothesis, even although it coincides and agrees with all the other facts and circumstances of the case to the minutest extent. Undoubtedly such an intimate coincidence in other respects would suggest the necessity of investigating the truth of the incongruous circumstances with great caution; yet, if the incongruity could not eventually be removed, the hypothesis would fall, although no other could be suggested.

Thirdly. It is essential that the circumstances should be of a conclusive nature and tendency. Evidence is always indefinite and inconclusive, when it raises no more than a limited probability in favor of the fact, as compared with some definite probability against it, whether the precise proposition can or cannot be ascertained. It is, on the other hand, of a conclusive nature and tendency, where the probability in favor of the hypothesis exceeds all arithmetical or definite limits.

Such evidence is always insufficient, where, assuming all to be proved which the evidence tends to prove, some other hypothesis may still be true; for it is the actual exclusion of every other hypothesis which invests the circumstances with the force of proof.

Whenever, therefore, the evidence leaves it indifferent which of several hypotheses is true, or merely establishes some finite probability in favor of one hypothesis rather than an other,

such evidence cannot amount to proof, however great the probability may be.

Fourthly. It is essential that the circumstances should, to a moral certainty, actually exclude every hypothesis but the one proposed to be proved. Hence results the rule in criminal cases, that the coincidence of circumstances to indicate guilt, however numerous they may be, avails nothing unless the *corpus delicti*, the fact that the crime has been actually perpetrated, be first established. So long as the least doubt exists as to the *act*, there can be no certainty as to the criminal agent.

Hence, in charges of homicide, it is an established rule that the accused shall not be convicted unless the death be first distinctly proved, either by direct evidence of the fact, or by an inspection of the body.

So a prisoner cannot be convicted of larceny in stealing the goods of a person unknown, unless the fact of the larceny or robbery be previously proved.

Lastly. Mere circumstantial evidence ought in no case to be relied on when direct and positive evidence, which might have been given, is willfully withheld by the prosecutor, or the person attempting to establish the issue in his favor by the introduction of evidence. Where direct evidence is attainable, circumstantial evidence is of a secondary nature; and besides this, the great excellence of indirect evidence is its freedom from suspicion, and no greater discredit can be thrown upon it than by the withholding of direct evidence.

Weighing conflicting evidence.] Where the evidence is conflicting, the first step in the process of inquiry must naturally and obviously be, to ascertain whether the apparent inconsistencies and incongruities which such evidence presents, may not, without violence, be reconciled; and if not, to what extent, and in what particulars, the adverse evidence is irreconcilable; and then, by careful investigation and comparison, to reject that which is vicious; and thus, if it is practicable, to reduce the whole to testimony and circumstances of uniform and consistent tendency.

Where the testimony of direct witnesses is apparently at variance, it is to be considered, in the first place, whether they are not, in reality, reconcilable, especially where there is no extrinsic reason for suspecting error or fraud. But if their statements, upon examination, are found to be irreconcilable, it becomes an important duty to distinguish between the misconceptions of an innocent witness, which may not affect his general testimony, and willful and corrupt misrepresentations, which destroy his credit altogether. The presumption of reason as well as of law, in favor of innocence, will attribute a variance in testimony to the former, rather than to the latter origin. Partial incongruities and discrepancies in testimony, as to collateral points, are, as has been already observed, to be expected; and it is for a jury to determine whether, in the particular instance, they are of such a nature and character, under all the circumstances, that they may

be, or cannot be, attributed to mistake. In estimating the probability of mistake and error, and also in deciding on which side the mistake lies, much must depend on the natural talents of the adverse witnesses, their quickness of perception, strength of memory, their previous habits of general attention, or of attention to particular subject matters. A physician or surgeon would be much more likely to observe particular symptoms or appearances, in a medical or surgical case, and to form from them correct conclusions, than an unskillful and inexperienced person would be likely to do. Much also must depend upon a comparison of the means and opportunity which the witnesses had for making observations, of the circumstances which were likely to excite and engage their attention, and of their reasons and motives for attending; and here it is to be observed, that there is an important distinction between positive and negative testimony.

If one witness were to swear positively that he saw or heard a fact, and an other were to swear that he was present, but did not see or hear it, and the witnesses were equally trustworthy, the general principle would, in ordinary cases, create a preponderance in favor of the affirmative; for it would usually happen that a witness who swore positively, minutely and circumstantially to a fact which was untrue, would be guilty of perjury; but it would by no means follow, that a witness who swore negatively would be perjured, although the affirmative were true; because the falsity of the testimony might arise from inattention, mistake, or defect of memory; and, therefore, even independently of the usual presumption in favor of innocence, the probability would be in favor of the affirmative.

If, for instance, two persons should remain in the same room for the same period of time, and one of them should swear that during that time he heard a clock in the room strike the hour, and the other should swear that he did not hear the clock strike, it is very possible that the fact might be true that the clock did strike, and yet each might swear truly.

It is not only possible, but it is probable that the latter witness, though in the same room, through inattention, might be unconscious of the fact, or being conscious of it at the time, that the recollection had afterwards faded or escaped from his memory. It follows, therefore, by way of corollary to the last proposition, that in such cases, unless the contrary manifestly appears, the presumption in favor of human veracity operates to support the affirmative.

And further, when, in cases of conflicting testimony, upon a comparison between the witnesses in respect of the means and opportunity which they have had of ascertaining the facts to which they testify, it turns out that the one class has had more competent and adequate means of information than the other; or that, under the circumstances, the attention of the latter was not so likely to be so fully excited and particularly directed to the facts, this principle co-operates with the weight of evidence

in favor of the former, in all cases where there is room for error or mistake.

The application of this principle supposes that the positive can be reconciled with the negative testimony without violence and constraint. Evidence of a negative nature may, under particular circumstances, not only be equal, but superior, to positive evidence. This must always depend upon the question, whether, under the particular circumstances, the negative testimony can be attributed to inattention, error, or defect of memory. If, in the instance already supposed, two persons were placed in the room where the clock was, for the express purpose of ascertaining, by their senses, whether it would strike or not, there would be little room to attribute the variance between their negative testimony and the positive testimony of a third witness to mistake or inattention, and the real question would be as to the credit of the witnesses.

Where the testimony of conflicting witnesses is irreconcilable, and cannot be attributed to incapacity or error, it frequently becomes a painful and difficult task to decide to which class credit is due. And here it is to be observed, in the first place, that all those considerations which have been applied as tests of the credit and veracity of witnesses uncontradicted, are also tests of credibility in cases of conflict in their evidence. The first point of comparison is their character for integrity.

This may either depend on positive evidence as to their previous situation, conduct and character, or may be a matter of inference and presumption, from their relative situation as to the parties, or the subject-matter of the cause, and the various and almost innumerable circumstances by which their testimony may be influenced or biased. Where the testimony is equally balanced in all other respects, a slight degree of interest or connection may be sufficient to turn the scale. In such cases, also, any variance in the testimony of the witness from a former statement relating to the same transaction, if it is established and not explained, necessarily tends to impeach either his integrity or his ability.

All those circumstances which were likely to influence and bias a witness in favor of the party, are of course entitled to great consideration in weighing their credit, although they do not exclude their testimony. These are of too obvious and extensive a nature to require enumeration. Not only may the stronger motives arising from the ties of consanguinity, affinity, friendship or expectation of future gain, cast a doubt upon the credit of witnesses whose testimony is contrasted with that of persons who stand wholly indifferent, but so also in cases where, in other respects, the weight of testimony is nicely balanced, nay, many considerations of an inferior and weaker description, such as the interest which the witness may possess in a similar question, or the bias and prejudice which may arise in favor of a party from connection in the way of trade, profession or membership of any description; considerations of this kind, which would frequently

afford not the slightest ground for questioning the credit of an unimpeached witness, may become of essential importance when the credit of conflicting witnesses is in other respects in a state of equipoise.

Such considerations become still more important where any suspicion arises from the manner and demeanor of the witness in delivering his testimony. These, indeed, frequently afford strong tests for judging of his sincerity, although his motive be not apparent. Manifestations of warmth and zeal beyond those which the occasion naturally calls for, over-forwardness in testifying that which will benefit the party for whom he testifies, and ill-concealed reluctance in declaring that which tends to his prejudice, flippancy and levity of manner, coldness and apathy in describing injuries which would naturally excite a contrary feeling, indications of subtlety, artifice and cunning, are, with a multitude of others, tests for estimating the true character of a witness and the value of his testimony. But, above all, where the credit of conflicting witnesses is doubtful, as far as regards their number, their integrity, their means of knowledge, and the consistency and probability of their testimony, a comparison of their statements with each other, and with undisputed or established facts, is a great test of credibility.

The relative consistency of testimony is a most important test of comparison. The testimonies of witnesses of truth will consist with each other, and with all the established circumstances of the case, in numerous and minute particulars, which are frequently beyond the reach of invention, and will exhibit that degree of solid coherency which necessarily results from a real and actual connection and congruity in nature, which minuteness and detail of circumstances will serve but to render more complete. With false witnesses the very reverse takes place. Their testimony must either be sparing in circumstances, and therefore of a nature obviously suspicious, or be liable to detection from comparing the invented circumstances with each other, and with those which are known to be true.

In cases of conflicting testimony, and particularly where the subject of litigation is remote in point of time, or the question depends upon the terms of oral communications, the evidence of written instruments or documents connected with the transaction are, on account of their permanency, of the most obvious and essential importance. Every day furnishes instances of the weakness of human memory in such cases, and great opportunity is afforded for misrepresentation or mistake, whilst writings are permanent, and, as has well been observed, are witnesses difficult to be corrupted.

As the depositions of dead or absent witnesses are, in point of law, of a secondary nature to the *viva voce* testimony of witnesses subjected to the ordeal of cross-examination, so are they inferior and weaker in point of force and effect; so true is it that a witness will frequently depose that in private which he would be

ashamed to testify before a public tribunal. It is by the test of a public examination, and by that alone, that the credit of a witness, both as to honesty and ability, can be thoroughly tried and appreciated.

As the credit due to a witness is founded in the first instance on general experience of human veracity, it follows that a witness who gives false testimony as to one particular, cannot be credited as to any, according to the legal maxim, *falsum in uno, falsum in omnibus.* The presumption that the witness will declare the truth ceases as soon as it manifestly appears that he is capable of perjury. Faith in a witness's testimony cannot be partial or fractional. Where any material fact rests on his testimony, the degree of credit due to him must be ascertained, and according to the result his testimony is to be credited or rejected.*

It is scarcely necessary to observe that this does not extend to the total rejection of a witness whose misrepresentation has resulted from mistake or infirmity, and not from design; but though his honesty remains unimpeached, this is a consideration which necessarily affects his character for accuracy.

Neither does the principle apply to the testimony given in favor of the adversary. Such evidence is rather to be considered as truth reluctantly admitted, and divulged only because it was not in the power of a corrupt witness to conceal it. Hence it is a general principle that a jury may believe that which makes against his point who swears, although they do not believe that which makes for it.

The presumption is always *prima facie*, and, in the absence of circumstances which generate suspicion, in favor of the veracity of a witness; but, where the usual and general presumption is encountered by an opposite one, it is necessary that the credit of the witness should be established by some collateral aid, to the satisfaction of the jury.

The correspondence or inconsistency of direct evidence with well established circumstances, is the great, and frequently the only test, for trying the truth of direct testimony which labors under suspicion. A perjured witness will naturally, with a view to his own security, so frame his fiction as to render contradiction, by direct and opposite testimony, impracticable. He will also be sparing in his detail of circumstances which are false, and which are capable of contradiction, because the more circumstantial his statement is, the more it is open to detection. Hence it is that circumstantiality of detail is usually a test of sincerity, provided the circumstances are of such a nature as to be capable of contradiction if they are false; and that, on the other hand, if a witness is copious in his detail of circumstances which are incapable of contradiction, but sparing of those which are of an opposite kind, his testimony must necessarily be regarded with a degree of suspicion. As circumstances are the best and frequently the only means of detecting false testimony, it follows that no fictions are more formidable and more difficult to be

detected than those which are mixed up with a large portion of truth, because every circumstance of truth interwoven with the fiction, so far from being merely negative in its effect, in affording no aid for detecting the fraud, actually tends to confirm it.

Where doubts arise from circumstances of an apparently opposite and conflicting tendency, the first step in the natural order of inquiry is to ascertain whether they are not in reality reconcilable, especially where circumstances cannot be rejected without imputing perjury to a witness; for perjury is not to be presumed; and in the absence of all suspicion, that hypothesis is to be adopted which consists with and reconciles all the circumstances which the case supplies. In the next place, where the circumstances are inconsistent and irreconcilable, it becomes necessary to inquire which of them are attributable to error and which to design. Here, again, in distinguishing between the real and genuine circumstances, and those which are spurious, regard is to be had to those principles which have been adverted to; for it is rather to be presumed that one witness was mistaken, where there was room for mistake, than that an other witness, where the facts excluded all mistake, was willfully perjured. Where mistake is out of the question, an examination of the different degrees of credit due to the witnesses on whose testimony the conflicting circumstances depend, becomes material; and in such cases a careful comparison of the circumstances which they state, with facts either admitted or fully established, is of the most obvious and essential importance. Every admitted or established fact affords an additional test for trying the truth and genuineness of those which are doubtful, by means of which those which are genuine may be established and become additional tests of truth, and those which are false may be rejected.

Whenever any fact is found to be wholly inconsistent with those which are either admitted or indubitably proved, the mere rejection of that single fact, and the difficulty thus removed, is not the only step gained in the progress towards truth; for the vicious evidence must have resulted from error or fraud; and whether, under the circumstances, it is to be ascribed to the one source or the other, it affords a test for judging of the ability or integrity of the witness, and not unfrequently affords some insight into the conduct or motives of the party.

A few words more in relation to the excuses which jurors sometimes offer, for the rendering of a verdict which is not in accordance with either law or justice, nor even with the fair preponderance of evidence when that is properly weighed and applied.

What circumstances will amount to proof can never be matter of general definition. The legal test is the sufficiency of the evidence to satisfy the judgment and the conscience of the jury. Sometimes evidence is given by a witness which is so improbable as to amount to a moral certainty that it is false, or at least unreliable, and yet effect is given to it by jurors who found their

verdict upon it. In such cases the excuse is made by jurors that the facts were sworn to, and they could not do otherwise than to act upon them. If the jurors did not credit the evidence, they had no right, under their oath, to give it any such effect. It is true that jurors cannot arbitrarily disregard the evidence in a cause; but, as we have already seen, the law gives them a large latitude in judging of the credit of witnesses, and of the effect to be given to their evidence. If, on a full and careful examination of the evidence of a witness, the jury are satisfied that it cannot be true, they ought not to give effect to it in rendering their verdict.

There are in many cases difficulties enough as to the proper disposition of some portions of the evidence, and the general rules which have been given were intended to aid the proper solution of the difficulty. No cases of conflicting evidence are more difficult of solution than those where facts, apparently well established, lead to opposite conclusions. These, in some remarkable instances, are of such a nature as to leave the mind in a state of perplexity after the most patient and laborious investigation. But it rarely happens where there are such conflicting probabilities, so nicely balanced, that some rule of legal policy does not intervene to turn the scale. And in all such cases in which the evidence leaves the matter so doubtful, the true rule is to decide it against the party who holds the affirmative of the issue, whether that party be plaintiff or defendant. *Long* v. *Hitchcock*, 9 Carr. & Payne, 619; *Fox* v. *Decker*, 3 E. D. Smith, 150; *Cotton* v. *Wood*, 8 J. Scott, N. S., 568.

Where there is a general denial of all the allegations in the complaint, the plaintiff will be required to satisfy the court or jury that there is a preponderance of evidence in his favor, or he will fail to recover. So, where the defendant does not interpose a denial, or where he concedes that the plaintiff's cause of action is established, but he relies upon some affirmative defense; such as a set-off, recoupment, tender, payment and the like, the burden of proof is on the defendant to establish these issues, and, if he does not satisfy the court or jury that the preponderance of evidence is in his favor on these issues, his defense will fail.

PART VII.

TRIAL.

CHAPTER I.

PREPARATION FOR TRIAL.

SECTION I.

SUBPŒNA.

After an issue has been joined, and the cause adjourned to a day for trial, the next important matter which requires attention is to make a careful preparation for such trial. This preparation relates to two different subjects. The first is to examine the law in relation to the action upon its merits, and also as to the admissibility of any evidence which is not clearly admissible within the general rules of evidence. So, it is also proper to examine such legal questions as may be properly raised by the matters disclosed by the answer. The duty of investigating all legal questions, will, of course, devolve upon the attorney or counsel who is to try the cause. And to a young lawyer nothing can be of greater service than to make a full and careful brief for the trial of every cause of any importance. No point of law and no class of evidence need be overlooked in the hurry of a trial if this is properly done. It is not necessary to make a formal brief in every case, but a methodical and diligent examination of the points of law, and of the details of the evidence in a cause, are nearly indispensable to a certainty of success, or to a thorough and exhaustive trial on the merits. It may be convenient to state those points, upon which a brief should be explicit. A brief usually consists of three parts: 1st. An abstract of the pleadings; 2d. A statement of the case, and, 3d. A statement of the proofs. A more particular and formal brief may contain an enumeration of several important matters: 1st. The names of the parties, their residence and occupation, the character in which they sue or defend, and the reason why they prosecute or resist the action. 2d. An abridgment of the pleadings, showing what facts are in issue, and what facts are admitted. 3d. A regular chronological and methodical statement of all material facts. 4th. A summary of the points or questions in issue, and of the proof which is to support such issues, mentioning specially the names of the witnesses by whom the facts are to be proved, or, if it is to be established by written evidence, an abstract of such evidence. 5th. The personal character of the witnesses should be mentioned, whether the moral character is good or bad, whether they are

naturally timid or over-zealous, whether firm or wavering. 6th. If known, the evidence which will be introduced by the opposite party should be stated, and such facts or witnesses as are adapted to oppose, rebut, explain or answer it by new matter, should be mentioned. Let the facts be stated in such a manner that it will be convenient, at any moment, to find the desired information which has been noted. Brevity is desirable, but when the facts are material they cannot be too numerous, and so, when the argument is pertinent and weighty, it cannot be too extended. 7th. A full and careful statement of the legal principles involved, with a reference to the authorities which sustain them, is always an indispensable part of a lawyer's duty in the preparation of a cause for trial or for argument. It is not to be understood that it is recommended that a very formal and particular brief should be made for the trial of every action, since, in some cases, the facts may be few and the legal rules undisputed. But, an experienced lawyer is well aware of the numerous surprises which have been in reserve for him, in cases in which it was supposed that the matter was too plain to be doubted. And, when an inexperienced practitioner is required to meet counsel of long experience, the propriety of a thorough preparation will probably be fully appreciated, even by those who rely quite confidently upon fine natural abilities. And it may be stated as a rule, that in the practice of the law, thorough examination of the law, and a careful investigation of the evidence are indispensable prerequisites of professional success. Too many causes have been tried, and a just cause lost, or a meritorious defense has been disregarded for the want of due preparation for trial. And it is not a little annoying to find that a cause was lost in consequence of great negligence in not discovering and proving important facts which really existed, but which a want of proper attention has failed to elicit and prove on the trial. More has been said upon this point, perhaps, than might be deemed necessary, but, it will be found in practice, that far too many important causes are disposed of in such a hasty and unprepared manner, that justice fails and innocent parties unnecessarily and unjustly suffer loss. Causes are occasionally tried on the return day of the process, but this is so rarely the case that no particular remarks need be made in relation to the matter.

But when an issue has been joined, and the cause adjourned for trial, the first duty of the parties is to obtain a subpœna, and then immediately subpœna every material witness who may be needed at such trial. And, so far as it is practicable, the party ought to acquaint himself with the particulars of the evidence which each witness will give. An observance of this rule will avoid the subpœnaing of unnecessary witnesses, as well as with the too common occurrence of swearing a witness before it is known whether his evidence will not aid the opposite side of the case more than that of the party calling him. And it is quite too frequently the case that a witness is called and sworn, and then

examined, merely to end in a disclosure that he knows nothing material in relation to the case. Every material witness ought to be duly subpœnaed. This course will compel his attendance, if he is unwilling to appear voluntarily. But it is always best to subpœna every witness, however willing he may be to attend. Some event may occur which prevents his attendance, and if an adjournment becomes necessary in consequence, it is important to show due diligence to entitle the party to such adjournment. *Deas* v. *Smith*, 1 Caines, 172. So, if an attachment is desired, it is important to show that the witness has been duly subpœnaed. The attendance of witnesses to give evidence orally is procured by the service of a subpœna, which is a process authorized by the statute for that purpose.

A subpœna is usually obtained from the justice before whom the cause is pending. This, however, is not indispensable, since any justice of the peace may issue a subpœna to compel the attendance of witnesses, either before himself or before any other justice. Vol. I, 49, § 70. But no justice has a right to issue a subpœna returnable before any justice other than himself. unless the party applying for it shall prove by his own oath, or that of some other person, that an action is actually depending before such other justice. Vol. I, 49, § 71. The oath may be in the following form:

You do swear that you will true answers make to all such questions as may be put to you in relation to the propriety or necessity of issuing a subpœna in a cause said to be now depending before A. E., Esq., a justice of the peace of the town of New Scotland, in the county of Albany, in which action C. D. is plaintiff, and E. L. is defendant.

After administering the oath, the justice may examine the party sworn as to the pendency of the action, and when the actual pendency of such action is shown, he should issue the subpœna, making it returnable, of course, before the justice before whom the action is to be tried.

A justice's subpœna extends, territorially, farther than the limits of the county in which it is issued. And a subpœna is valid to compel the attendance of any witness in the county in which it issued, or from any adjoining county, but in no other case. Vol. I, 49, § 70.

When the subpœna merely requires the witness to attend and be sworn and examined orally, the process is called a *subpœna ad testificandum*. There are cases, however, in which it is desirable that the witness should *bring with him*, and produce at the trial, certain books, documents, instruments or papers, which are described in the process, and it is then called a *subpœna duces tecum*.

There is, however, but one subpœna, for when it is desirable that a witness should produce a paper, &c., it is merely necessary to add a clause to that effect, in the manner shown by the following forms:

Subpœna to testify.

TOWN OF WATERVLIET, } ss.
COUNTY OF ALBANY. }

The people of the State of New York, to John Smith, greeting: You are hereby commanded to appear personally before me, the undersigned, a justice of the peace of the town and county aforesaid, at my office in the town aforesaid, on the 27th day of March, 1865, at ten o'clock in the forenoon, to give evidence in a certain civil action, now depending before me, and then and there to be tried between A. B., plaintiff, and C. D., defendant, on the part of the defendant (*or plaintiff*). * Hereof fail not at your peril. Given under my hand, at the town aforesaid, this 17th day of March, 1865.

E. F., *Justice.*

If either of the witnesses has a paper, &c., which is desired as evidence at the trial, then add the following clause to the original subpœna:

Duces tecum clause.

And you, John Smith, are also commanded to bring with you, and there produce as evidence a certain promissory note (*describe with particularity*) which is now in your possession, or under your control, together with all papers, documents, deeds, writings or instruments, which you have in your custody and possession, or under your control, which relate to the said action.

This clause should be inserted immediately after the * in the foregoing form, and then conclude with the words "hereof fail not," &c., as in that precedent.

The particular paper desired must be described accurately in the subpœna, or the witness will not be compelled to produce it. The description, however, will be sufficient if it fully apprises the witness what paper, instrument, &c., he is required to produce. He is entitled to fair notice of the paper required, so that he may comply with the process; so, on the other hand, he will not be permitted to evade the process under the pretense that the notice was not sufficiently explicit, if it is such that the court can say is reasonably particular.

A witness or a party who is subpœnaed with a *subpœna duces tecum* is as much bound to produce the papers or documents required, as he is to appear and give evidence. His mere appearance, without producing them, will not be a compliance with the requirements of the subpœna; and he will be liable to the party subpœnaing him, to all damages which he may sustain in consequence of his disobedience of the process, as well as to all the consequences of a contempt of court. *Lane* v. *Cole*, 12 Barb., 680; *Bonesteel* v. *Lynde*, 8 How., 226, 352; *Mitchell's Case*, 12 Abb., 249. But it does not follow that the court will always order the paper to be introduced as evidence, merely because the witness was bound to produce it at the trial.

There are some cases in which counsel will not be compelled to produce a paper as evidence, if it was put into his hands as a professional man. *Mallory* v. *Benjamin*, 9 How., 419; *Kellogg* v. *Kellogg*, 6 Barb., 116; *Jackson* v. *Denison*, 4 Wend, 558; *Coveney* v. *Tannahill*, 1 Hill, 33. Nor will he be compelled to disclose its

contents as a witness. *Ib.* But he may be compelled to prove the existence of the paper, that it is in his possession, and that it was deposited with him by his client. This is done for the purpose of authorizing secondary evidence of the contents of the paper sought. The right to refuse to produce a paper, does not seem to be favored by the late cases. *Peck* v. *Williams*, 13 Abb., 68; *Mitchell's Case*, 12 Abb., 249. It is for the court and not for the witness to decide whether the disclosure will be a violation of professional confidence. *Ib.* And since the Code requires a party to testify as to all material matters, like other witnesses, the old rule seems to be quite useless, if not really abrogated. *Ib.* A witness is bound to produce a paper for the purpose of identification, if duly subpœnaed for that purpose. *People* v. *Sheriff of N. Y.*, 29 Barb., 622; *S. C.*, 7 Abb., 96. No collusion or combination between a party and his counsel will be tolerated, where the object is to defeat the operation of the process of the court. *Ib.* An officer of a corporation is not bound to produce the corporate books and papers, under such a subpœna, because he has no such control over them, or any such property in them, as makes it his right or his duty to produce them. *La Farge* v. *La Farge Fire Ins. Co.*, 14 How., 26; *S. C.*, 6 Duer, 680.

This process does not require a party to produce anything but papers, documents, &c., and therefore a party cannot be required to produce a chattel in relation to which an action is pending. And where an action was brought upon a warranty made on the sale of a watch, it was held that the plaintiff, though a witness on the stand, was not compellable to produce it for inspection, although he had it in his pocket at the time. *Hunter* v. *Allen*, 35 Barb., 42. But a witness being sworn, and having then a document in his possession, is bound to produce it, if required, though he has not received any notice to produce it, nor been served with a *subpœna duces tecum*. *Snelgrove* v. *Stevens*, 1 Carr. & Marsh., 508, and see *ante*, 405, 406.

This subpœna is intended to secure the production of the paper desired. But a mere notice to produce a paper will be sufficient to authorize the introduction of parol evidence as to its contents, if such notice is served on a party to the action, and he has the paper in his possession, or under his control. This subject has been discussed in a previous place, *ante*, 404 to 408.

A party may take as many subpœnas as he chooses, or he may take a single subpœna and insert the names of as many witnesses as he sees proper. The justice sometimes inserts the name of one witness, and then the party subsequently inserts the names of such other witnesses as he deems material or useful. There is no law, however, which requires a justice to insert the names of any of the witnesses, since the statute relating to blank process does not include subpœnas. *Ante*, 41, 42. The name of the witness may be inserted in the subpœna at any time, whether before or after its service. *Wakefield* v. *Gall*, Holt's N. P., 526. A sub-

pœna may be served by a party to the action, or by an agent or third person, or by a constable. Proof of service is rarely required, unless for the purpose of obtaining an attachment or on the taxation of costs.

A subpœna must be served on the witness a reasonable time before the trial, or he will not be liable to an attachment for non-attendance. *Hammond* v. *Stewart*, 1 Strange, 510; *Chalmers* v. *Melville*, 1 E. D. Smith, 502. A witness is allowed a reasonable time to arrange his own affairs, so as to injure his interests as little as may be. And where a party delays subpœnaing a witness to a very late hour before the trial, he may be compelled to suffer such consequences as may result. An attachment was refused in one case where the witness was served with a subpœna about twelve o'clock at noon, to attend before a referee at half-past three of the same afternoon. At the time of the service of the process, the witness had closed his place of business on Saturday, and was about to go on board of a steamboat to go to a specified place, to remain over the Sabbath, and his family were then on board of the boat. The witness offered to attend as a witness on the Monday following, on his return, and the court held this sufficient, and refused an attachment. *Ib.;* and see *Home* v. *Smith*, 1 Marsh., 410. A reasonable time for travel is allowed to a witness, and he may avail himself of the ordinary modes of conveyance. *Wilkie* v. *Chadwick*, 13 Wend., 49. He cannot be required to travel on the Sabbath; nor can he limit his traveling to thirty miles a day. *Ib.* The service, to be valid, must be personal, and it must be made upon the witness himself. If the witness is a married woman, the service must be made upon her personally, and not upon her husband, and the fees must be paid to her, and not to him. Cro. Car., 522; W. Jon., 430. The subpœna must be served at some place within the county in which the action is to be tried, or an adjoining county. *Ante*, 4 to 11, Jurisdiction.

A witness may be subpœnaed in his own house. And when the outer door of the house is open, the law authorizes the person having such subpœna to enter the house and to make due service of the process. And such person is not bound to leave the house before he can reasonably make the service, notwithstanding he may be ordered to leave. And if he entered the house peaceably, through an open door, or in any other legal manner, he may lawfully resist any person who attempts to prevent the service of the process. *Hager* v. *Danforth*, 20 Barb., 16. A subpœna may be served by reading it to the witness, or by stating its contents to him. Vol. I, 50, § 72. Where the service of a subpœna is commenced, either by reading, or by stating its contents to a witness, he cannot evade such service by running off so as not to hear it. The person making the service may continue reading or stating the contents of the process, and the service will be entirely valid, notwithstanding such witness failed to hear what was read or stated, because it was the fault of the witness himself that he

did not hear it, and he will not be allowed to take any advantage of his own wrong. Vol. I, 571, 856, 940.

As a part of the service of a subpœna, it is necessary to pay to the witness, or to tender to him, at the time of such service, the fees allowed by law for one day's attendance. Vol. I, 50, § 72. Since the enactment of the Code, which requires a party to appear as a witness, when subpœnaed by the opposite party, it is as necessary to pay fees to a party, when subpœnaed, as it is to pay them to any other witness. *Anderson* v. *Johnson*, 1 Sandf., 713; *Hewlett* v. *Brown*, 7 Abb., 74. No witness is bound to appear in obedience to the commands of a subpœna until his legal fees are paid or tendered to him. *Hurd* v. *Swan*, 4 Denio, 75; *Fuller* v. *Prentice*, 1 H. Bla., 49. Nor can a witness be compelled to be sworn as a witness until his fees are paid or tendered, although he may be actually present in court at the trial. *Hurd* v. *Swan*, 4 Denio, 75; *Bowles* v. *Johnson*, 1 W. Bla., 36. The same rule applies to a party when he is called as a witness by the opposite party. *Hewlett* v. *Brown*, 1 Bosw., 655; *S. C.*, 7 Abb., 74.

When the trial of a cause will occupy more than one day, it is the duty of the plaintiff to seek for his witnesses, and to pay or to tender to them their fees for a second day's attendance. And this ought to be done on the first day, as the witness is under no legal obligation to remain any longer than the first day, unless the fees for the second day are paid or tendered. *Hurd* v. *Swan*, 4 Denio, 75. The witness is not bound to apply for his fees, nor to notify the party that he will leave if his fees are not paid. *Ib.* It is the duty of the plaintiff, too, to be certain that he has paid a sufficient sum as witnesses' fees; and if he pays too little, the witness will not be bound to appear, though he accepted the money, unless he expressly agreed to accept the sum paid as sufficient, and promised to attend court. *Ib.* A witness may waive the payment of fees, if he chooses to do so, by an express agreement to that effect. *Ib.; Goodwin* v. *West*, Cro. Car., 522, 540. So a witness may agree to attend as a witness, and accept of his board and traveling expenses in lieu of fees, and this will be a valid contract. When there are two causes adjourned for trial on the same day, and at the same place, the witness is entitled to fees in both suits, even though the parties are the same in both actions. *Vence* v. *Speir*, 18 How., 168; *Hicks* v. *Brennan*, 10 Abb., 305.

A party cannot charge fees as a witness unless he attended for that purpose, and not for the purpose of superintending the trial of the cause. *Logan* v. *Thomas*, 11 How., 160; *Case* v. *Price*, 17 Id., 348; *S. C.*, 9 Abb., 111; *Cornell* v. *Potter*, 15 How., 278. So one defendant cannot tax witnesses fees for the attendance of a co-defendant, unless he attended expressly and solely as a witness. *Walker* v. *Russell*, 16 How., 91. But if proof is made that a party attended solely as a witness, his fees are taxable. *Ib.; Bronner* v. *Frauenthal*, 20 How., 355; *S. C.*, 12 Abb., 183; see cases cited and reviewed. The fees of witnesses cannot be allowed unless they

have been subpœnaed and paid, or unless they have actually attended at the trial. *Brown* v. *Bowen*, 16 How., 545; *Wheeler* v. *Lozee*, 12 Id., 446.

The statute prescribes the amount of fees payable to witnesses. Each witness is entitled to twelve and a half cents a day for his attendance, when he attends in the county of his residence, and when he attends from an adjoining county or elsewhere, he is entitled to twenty-five cents for each day's actual attendance. Vol. I, 64, § 151 f.

A witness who has been duly subpœnaed is bound to attend the trial in obedience to its command, and a refusal or an inexcusable neglect to do so will subject him to a liability for a fine, as well as to the payment of all damages which may be sustained by the party who subpœnaed him. Vol. I, 50, 51, §§ 75, 80; *Hasbrouck* v. *Baker*, 10 Johns., 248; and see *Heermans* v. *Williams*, 11 Wend., 636.

But before an action will lie, it must be made to appear that the witness was a material one, and that the failure to try the cause or the defeat of the party, arose from the absence of such witness. *Hurd* v. *Swan*, 4 Denio, 75; *Courtney* v. *Baker*, 3 Id., 27; Vol. I, 729. If the statute provides a mode of proof, by which the attendance of an officer may be dispensed with, by producing certified copies of such officer's proceedings, and the plaintiff neglects or refuses to procure such evidence, he cannot maintain an action against such officer for not attending with the original papers or records. This was so held, in an action against a justice of the peace, for not producing his docket. *Heermans* v. *Williams*, 11 Wend., 636. If the failure of the action arose in consequence of the absence of the witness, it is not necessary to show that a jury was impanneled in the cause in which such witness was subpœnaed. *Hurd* v. *Swan*, 4 Denio, 75. And it is not necessary to show that the plaintiff had a good cause of action, if he was nonsuited for the non-production of a book which the witness was subpœnaed to produce at the trial. *Lane* v. *Cole*, 12 Barb., 680. In an action against a witness for a penalty for non-attendance, he may prove, if he can, that the plaintiff declared that such witness knew nothing about the controversy in the former action, in which such witness was subpœnaed. *Courtney* v. *Baker*, 3 Denio, 27.

And a party who knowingly subpœnas a witness for the purpose of vexation, when such witness does not know anything of the case, is guilty of a contempt of court. *Ib.*

A party who voluntarily submits to a nonsuit, when he could have avoided it, by obtaining and producing written or documentary evidence instead of calling such witness, cannot maintain an action against him for non-attendance. *Heermans* v. *Williams*, 11 Wend., 636. A witness who attends the trial at the request of a party, and is sworn, may recover his fees notwithstanding the fact that he was not subpœnaed. *Baker* v. *Brill*, 15 Johns., 260; *Wheeler* v. *Lozee*, 12 How., 446. Where the statute prescribes the amount

of the fees which shall be paid, no more than that sum can be recovered, either by an officer or a witness, even upon an express promise to pay more, notwithstanding such promise is made before the service is rendered. *Downs* v. *McGlynn*, 2 Hilt., 14; *S. C.*, 6 Abb., 241; *Hatch* v. *Mann*, 15 Wend., 44; *Fuller* v. *Mattice*, 14 Johns., 357; Vol. I, 105. Nor can a witness recover for the loss of time while attending court, even upon an express promise to pay for it. *Willis* v. *Peckham*, 1 Brod. & Bing., 515; *Lopes* v. *De Tastet*, 3 Brod. & Bing., 292. But a witness who is called to depose to a matter of opinion, depending upon his skill in a particular trade, has, before he is examined, a right to demand from the party calling him, a compensation for his loss of time; and there is a distinction between a witness thus called, and a witness who is called to depose to facts which he saw. *Webb* v. *Page*, 1 Carr. & Kir. N. P., 23. The last case cited was in a court of record, and it is an English case, and how far it would be enforced in a justice's court is uncertain. But, if a witness of skill or science, or a professional man, is requested to examine any matter or question, in order to render him an important witness, there is no reason why he should not be paid for the services so rendered on request, and on a promise, express or implied, to pay him what his time is reasonably worth. A witness who is subpœnaed, but not paid his fees, may attend the trial and refuse to be sworn until his fees are paid, and if for that reason he is not called by the party subpœnaing him, such witness may nevertheless maintain an action to recover his fees for attendance. *Hallet* v. *Mears*, 13 East, 15. Though a witness, subpœnaed by both parties, obtains from each, without the knowledge of the other, full payment of his fees, the party succeeding is entitled to have his payment to the witness allowed him in his taxed costs of suit, and that, although he made his payment after the witness had been already paid by the other party. *Benson* v. *Schneider*, 7 Taunt., 337; *S. C.*, 1 Moore, 76. A witness who has been subpœnaed and paid, and has been sworn in chief, is bound to testify on his cross-examination, or to give affirmative evidence for the defendant, without further fees. *Edmonds* v. *Pearson*, 3 Carr. & Payne, 113.

When a witness has been duly and in good faith subpœnaed to attend any court, in any case where the attendance of such witness may be enforced by attachment, or commitment, he is exonerated from arrest in any civil suit, while going to the place which such subpœna requires him to attend, while remaining at such place, and while returning therefrom. 3 R. S., 685, § 65, 5th ed. The court before whom the witness was subpœnaed to attend may discharge any witness who is arrested in violation of the last section. 3 R. S., 685, § 66, 5th ed. Every such arrest is absolutely void, and subjects the person who makes it to a liability of three times the amount of damages assessed by a jury, as well as to all other damages which may result from loss or hindrance caused by such arrest. 3 R. S., 685, § 68. This exemption from arrest

extends to those cases only in which the person is attending as a witness, after having been duly served with a subpœna, and it does not extend to the case of one who voluntarily attends as a witness. And this is the rule even in those cases in which a witness was first examined, after being duly subpœnaed, and then discharged, but subsequently appeared voluntarily to answer further in the cause. *Hardenbrook's Case*, 8 Abb., 416; *Cole* v. *McClellan*, 4 Hill, 59. But if a witness from an other state attends voluntarily as a witness, and in good faith, solely to testify as a witness, he will be protected from arrest. *Seaver* v. *Robinson*, 3 Duer, 622; *Merrill* v. *George*, 23 How., 331; *Norris* v. *Beach*, 2 Johns., 294; *Sanford* v. *Chase*, 3 Cow., 381.

The law allows a reasonable time for going and returning from court as a witness. *Lightfoot* v. *Cameron*, 2 W. Bla., 1113. But if he takes an unreasonable time for that purpose, he will forfeit his privilege and be liable to arrest. *Randall* v. *Gurney*, 3 Barn. & Ald., 252. And where he has previously been arrested in a civil action, and has given bail, he may be arrested by such bail at any time; and if he has absconded, he may be retaken even in court. *Horn* v. *Swinford*, Dowl. & Ryl., N. P., 20; *Ex parte Lyne*, 3 Stark., 132. This privilege from arrest is personal, and it may be waived by the witness. If he puts in bail without objection, the privilege will be gone; and so of giving notice of retainer generally, and demanding a copy of complaint. *Stewart* v. *Howard*, 15 Barb., 26.

Attachment against a defaulting witness.] Whenever a material witness has been duly subpœnaed, and he makes default by not appearing, the party who subpœnaed him may procure an attachment against such witness. Vol. I, 50, § 73. But before an attachment can be issued there must be due proof made that such witness is material, that he has been duly subpœnaed, and that without just cause, he has neglected or refused to attend as a witness. *Ib.*

The subpœna, as we have seen, *ante*, 551, may be served by any person, and, regularly, the proof of service of it ought to be made by the person who served such subpœna. This, however, is not indispensable, since the proof may be made by any person who knows all the necessary facts of his own knowledge, by being present at the service. There are several ways in which proof may be made of the service of a subpœna for the purpose of obtaining an attachment against a witness. It may be made by affidavit, by oral oath, or by the return of a constable. An affidavit is a very convenient and prudent mode of making such proof, since it leaves no question as to the facts proved, and it is, besides, a proper and reliable method of retaining due proof of the proceedings. The statute requires satisfactory proof, which means, as in other cases, *ante*, 138, 139, such proof as is judicially satisfactory.

Proof that a witness has neglected or refused to attend without just cause, is sufficiently proved, when it is shown that the wit-

ness does not attend in obedience to the command of the subpœna. Due proof of his non-appearance is *prima facie* evidence of a want of just cause, and until the witness shows affirmatively that he had a sufficient excuse for his neglect, he will be liable to be attached. Before taking proceedings for the purpose of attaching a witness, he ought to be duly and publicly called in open court, after the cause has been properly called by the court. And if he does not then appear the proper steps may be taken for issuing an attachment.

Form of affidavit for an attachment.

ALBANY COUNTY, *ss:* John Doe, the plaintiff named in the subpœna which is hereto annexed, being duly sworn, says, that on the 17th day of March, 1865, he did at the town of Watervliet, in said county, serve the said subpœna personally upon John Smith, a witness therein named, by reading said subpœna to him, (or by stating its contents to him), and that at the same time paid (or tendered) to him the sum of twelve and a half cents. And this deponent further says, that such service of said subpœna was made on said witness in the county in which such action is to be tried, (or a county adjoining thereto), and in which said witness resides. And this deponent further says that the testimony of the said John Smith is material to this deponent, upon the trial of the action mentioned in the said subpœna, and that the said John Smith has neglected (or refuses) to attend the trial of said action, as he was commanded to do in and by said subpœna.

JOHN DOE.

Sworn before me, this 28th day of March, 1865,

A. B., *Justice.*

This affidavit should be annexed to the subpœna, by virtue of which the witness was subpœnaed, and this will be sufficient proof to authorize the issuing of an attachment against the witness named.

It is not necessary, however, that the proof for an attachment should be made by affidavit. If the party or any other competent person is sworn, and gives evidence of such facts as will authorize the issuing of an attachment, that will be sufficient. *Baker* v *Williams*, 12 Barb., 527. And when this course is adopted the following form of oath may be administered.

Oath to prove service of a subpœna.

You do swear that you will true answers make to all such questions as shall be put to you in relation to the service of a subpœna, in an action now pending before me, in which A. B. is plaintiff, and C. D. is defendant.

It may be necessary to swear the plaintiff (or the defendant), as to the materiality of the witness, since no other person may be able to testify as to that fact; while it may be necessary to swear an other person in order to prove the service of the subpœna, which was made by him. In any event, there must be due proof made of the facts required by the statute, whether such proof is made by one person or by several.

When a subpœna has been served by a constable, his return will be due proof of the service. The return may be in the following form:

Return to subpœna.

On the 17th day of March, 1865, I did, at the town of Watervliet, in the county of Albany, serve the within subpœna personally on A. B., the witness therein named, and at the same time I paid to him the sum of twelve and a half cents. G. H., *Constable.*

Constable's fees $0.12½

The proof as to the materiality of a witness, may be made by the agent or attorney, in the same manner that it is done on a motion to adjourn a cause. *Ante*, 346.

When the application for an attachment is made by the defendant, the necessary changes must be made in the affidavit, if that mode of proof is adopted.

When a cause is called for trial on an adjourned day, both parties should see that all their material witnesses are present, before the trial of the cause is commenced. If they are not present, and the motion to attach them is made before the trial is commenced, an attachment may be demanded as a matter of right, on making due proof, in pursuance of the statute. If the application is delayed until the cause is partially tried, that course may cause an unnecessary waste of time, which might have been avoided by an earlier application. And not only that, an application made at that late time may cause a loss of time to a jury, which would not have been impanneled, had the application been made at the proper time. A justice might, perhaps, in his discretion, issue an attachment on an application made after the trial has commenced, but he would not be authorized to adjourn it as he might have done had the motion been made at the proper time. *Aberhall* v. *Roach*, 11 How., 95; *S. C.*, 3 E. D. Smith, 345; *Story* v. *Bishop*, 4 E. D. Smith, 423. But, if a witness has been regularly subpœnaed, and he attended court, and then left it after the trial commenced, the justice may, in his discretion, suspend the trial until the witness can be attached and brought in, if that can be done within a reasonable time. *Rapelye* v. *Prince*, 4 Hill, 119. If the trial of the cause has not commenced, a justice may adjourn the cause, for a reasonable time, if that is necessary, for the service and return of the attachment. The object of issuing the attachment is to procure the attendance of the witness, and not to punish him for the contempt, which may be done at an other time and in an other manner. And where the statute gives a process for a specific purpose, it also gives, by implication, all other necessary powers to carry that purpose into effect. Vol. I, 775. For this reason, therefore, an adjournment may be made by the justice, for a reasonable time, whether the attachment be obtained by the plaintiff or by the defendant.

When the witness is near the place of trial, and it is probable that his attendance may be secured in a short time, it will sometimes be most convenient to hold the cause open for a short time, instead of adjourning it. But, if the witness is at a distance, and it is probable that some time will elapse before the attachment can be served and returned, the better course will be for the

justice to adjourn the cause to some day on which the witness will be in court, and make the attachment returnable at that time. If a single adjournment is not sufficient to enable the constable to serve the attachment on the witness, a further adjournment may be granted, though such a power ought to be cautiously exercised. This may be done in a court of record, and a justice has all necessary powers which courts of record have. Vol. I, 37, § 1.

Attachment to compel attendance of witness.

ALBANY COUNTY, *ss:* The People of the State of New York to any constable of said county, Greeting: Whereas it has been made to appear to the undersigned, a justice of the peace of the town of New Scotland, in the county of Albany, by due and legal proof made before him, that John Smith has been duly subpœnaed to attend on this day, at one o'clock in the afternoon, at the office of said justice in New Scotland, aforesaid, as a witness in behalf of John Doe, in an action now depending before said justice, and then and there appointed to be tried, wherein John Doe is plaintiff, and Richard Roe is defendant; and that the said John Smith has neglected or refused, without just cause, to attend as a witness in obedience to the command of said subpœna; and the said John Doe having made due proof by his affidavit, or otherwise by competent testimony, to the satisfaction of the said justice, that the testimony of the said John Smith is material on the trial of said cause: We hereby command you to attach the body of the said John Smith, and take him forthwith (or on some specified day) before the said justice, at his office in New Scotland aforesaid, to give evidence in said cause, and also to answer all such matters as shall then and there be objected against him for having neglected to attend the trial of the said action as a witness. And have you then and there this precept. Given under the hand of the said justice, at New Scotland, aforesaid, this 28th day of March, 1865. A. B., *Justice.*

After the attachment is made out it must be delivered to a constable to be executed. And the statute declares that it shall be executed in the same manner as a warrant. Vol. I, 50, § 74. The constable should make a return of his proceedings upon the attachment. And if the witness has been attached, it may be in the following form:

Return of constable.

By virtue of the within attachment I have attached John Smith as I am herein commanded, and I have his body, together with said attachment, before the said justice as by said attachment directed and required. Dated March 28th, 1865. Fees $1.00. L. M., *Constable.*

The fees of the officers who issued and served the attachment must be paid by the defaulting witness, unless he shows reasonable cause, to the satisfaction of the justice, why he omitted to attend. *Ib.* In case the witness shows satisfactory cause for his non-attendance, the party who procured the attachment must pay all the costs of issuing and serving it. *Ib.* Immediately on the return of an attachment, and the appearance of the attached witness, the justice should determine whether the witness or the party should pay the costs and expenses of issuing and serving such attachment. If the witness claims to have a legal and sufficient excuse for his non-attendance the justice should hear his

proof of the facts. And, for that purpose, he may administer an oath to such witness, or to any other persons who may be offered as witnesses to establish such excuse. The oath may be in the following form:

Form of oath.

You do swear that you will true answers make to all such questions as may be put to you in relation to the omission of John Smith to attend as a witness on the part of the plaintiff, in an action appointed to be tried on the 28th day of March, 1865, before A. B., justice, at his office in New Scotland, wherein John Doe was plaintiff and Richard Roe defendant.

After swearing the party, he may be permitted to state the reasons why he did not attend as a witness, in obedience to the subpœna. And the justice or the person who procured the attachment may interrogate the witness as to any matter pertinent to the question. The burden of proof is on the witness to show satisfactory cause why he did not attend. And if he does not prove satisfactorily to the justice that he has a sufficient cause to excuse his non-attendance, such justice should order the witness to pay the costs and expenses incurred. The party who procured the attachment is primarily liable to the justice and constable for their fees. But, if the witness is ordered to pay the costs, and he neglects to do so, the party who procured the attachment may then pay the amount, and afterwards bring an action against such witness to recover the amount so paid. If the justice decides that the party shall pay the costs, he will be liable to the justice and constable in the same manner that he would be for any similar service which might have been rendered at his request.

Imposing fine upon witness.] A witness who disobeys a subpœna, or who attends and refuses to be sworn, or who is sworn, but refuses to answer proper questions, is not liable to the payment of costs merely, but he is liable to a fine, and imprisonment if the fine is not paid. Vol. I, 50, § 75. His liability to the party has been discussed. *Ante*, 553. If the witness has been brought in upon an attachment, and is present before the justice, and has an opportunity of being heard against the imposition of a fine upon him for his refusal to appear, or to be sworn or to answer, &c., the justice may proceed with the matter without issuing any summons or other process. Vol. I, 50, § 76. In such a case, the justice ought to call upon the witness to show cause why a fine should not be imposed upon him, and the cause of imposing such fine should be distinctly stated to him, so that he may know what he is called upon to answer. The excuse or defense offered by such witness must be upon oath, either of himself or of that of some other person. Vol. I, 50, § 75. If no sufficient cause is shown, the justice should impose a fine upon the witness, which cannot exceed ten dollars, nor must it be less than sixty-two cents. Vol. I, 50, § 75.

The law gives a discretion as to the amount of the fine between the limits specified. And this discretion will enable a justice to

administer such punishment as may be just under all the circumstances of the case. When the disobedience has been intentional, and with a view to insult the court, the whole amount of the fine should be promptly adjudged as the sum to be paid. But, on the other hand, if the evidence shows mitigating circumstances, the fine may be reduced to the lowest sum authorized. This power of punishing a refusal to be sworn, relates exclusively to the trial of civil actions; and a justice has no authority to commit a witness for refusing to answer as to the cause of his intoxication, when he has been arrested under § 17 of the act to suppress intemperance, &c., passed April 16th, 1857. *People* v. *Webster*, 14 How., 242. If the witness is not present before the justice, or if the proceedings are taken before some justice other than the one before whom the previous trial was had, and in the proceedings of which the penalty was incurred, a summons should be issued against such defaulting witness.

The statute does not prescribe any form for such summons, nor does it fix any time for its return day, or for the time which shall intervene between its date and return, nor as to the length of time between the time of the service of the summons and its return. The object of the process is to inform the witness that he is to be proceeded against for his neglect or refusal to obey the subpœna, or for refusing to be sworn or to answer proper questions, &c. The summons ought, therefore, to have a reasonable time intervening between the date and its return; and so the service ought to be made at a reasonable time before the return day of the process. What is a reasonable time will depend much upon circumstances. If the witness resides in the immediate vicinity of the justice, a short notice is sufficient; but if his residence is at a distance, a longer notice ought to be given. The proceedings against a defaulting juror are analogous to those against a defaulting witness. Vol. I, 50, 54, §§ 75, 76, 103. In one case a summons against a defaulting juror was made returnable in two days from its date; that is, it was issued on the 9th day of the month, and returnable on the 11th, and was served on the juror on the 10th, and this was held to be a sufficient notice, either as to time or as to service. *Robbins* v. *Gorham*, 26 Barb., 586; *S. C.*, affirmed, 11 E. P. Smith, 588. This proceeding by summons may be, and usually ought to be, taken at a time subsequent to the trial of the action in which penalty is incurred. *Ib.* The summons ought to be personally served, and the justice ought not, in any case, to proceed with the matter until a personal service of such summons has been made upon the defaulting witness.

Summons against witness.

Albany County, *ss:* The People of the State of New York, to any constable of said county, greeting: We command you to summon John Smith to appear before the undersigned, a justice of the peace of the town of Watervliet, in said county, at his office in said town, on the 19th day of March, 1865, at one o'clock in the afternoon, to show cause why a fine

should not be imposed upon him, according to law, for his non-attendance as a witness before the said justice, at his office in the said town, on the 28th day of February, 1865, to give evidence in a cause then depending before said justice, in which John Doe was plaintiff and Richard Roe defendant, on the part of the plaintiff. And have you then and there this precept. Given under my hand, this 17th day of March, 1865.

A. B., *Justice.*

Constable's return to said summons.

I certify and return that, on the 17th day of March, 1865, at the town of Watervliet, in the county of Albany, I did personally serve the within summons on John Smith, therein named, as by said summons I am commanded. Dated March 17th, 1865. Constable's fees $0.50.

C. D., *Constable.*

The summons may be served by any other person than a constable, if duly authorized by the justice for that purpose. *Ante*, 48, 49, and Vol. I, 72, § 196.

A justice ought, in all cases, to require a proper return of the service of the summons before acting in the matter, since he has no authority to proceed, except such as is given by the statute, and a statute authority ought always to be strictly followed. It is said that the proof may be made by oral testimony. 2 Cow. Treat., 320, 3d ed; Benedict's Treat., 234, 4th ed. But the prudent course will be to require a regular return, as in the case of other process. The service of this summons may be made in the same manner that a personal service is made of an ordinary summons. If a fine is imposed, the justice is required to make up a minute of the conviction and to enter it into his docket, and it must state the cause of conviction. Vol. I, 50, § 77. Such conviction is to be deemed a judgment, at the suit of the overseers of the poor of the town. *Ib.*

Minute of conviction of defaulting witness.

ALBANY COUNTY, *ss:* Be it remembered that on the 19th day of March, 1865, John Smith is convicted before me, and fined the sum of ten dollars besides one dollar and fifty cents costs for non-attendance as a witness, to give evidence before me, at my office, in the town of Watervliet, in said county, on the 28th day of February, 1865, in a certain cause then and there depending before me, in which John Doe was plaintiff, and Richard Roe was defendant. A. B., *Justice.*

After the imposition of the fine the defendant must pay the amount of such fine, together with the costs, and in default of such payment the justice is required forthwith to issue an execution for the collection thereof. Vol. I, 50, 51, § 78. The fine and costs are to be collected of the goods and chattels of such delinquent, and in case he has no goods or chattels out of which the amount can be collected, his person is liable to imprisonment. *Ib.* Though such imprisonment cannot exceed thirty days. *Ib.* If the money is collected it is to be returned to the justice, who is required to pay it over to the overseers of the poor of the town. Vol. I, 51, § 79.

The constable to whom the execution is delivered should levy, advertise, and sell the property in the same manner as upon any ordinary execution. And if he cannot find goods and chattels to satisfy the execution, the arrest of the defaulting witness is to be made as in other cases of arrest upon an execution. The proceedings of a justice, in imposing a fine upon a witness or juror, are of a judicial nature, and, therefore, no civil action can be maintained against him to overhaul his acts, nor to recover the amount paid. *Robbins* v. *Gorham*, 26 Barb., 586; *S. C.*, affirmed, 11 E. P. Smith, 588; *Moor* v. *Ames*, 3 Caines, 170; *Richmond* v. *Dayton*, 10 Johns., 393; Vol. I, 737.

The only mode of redress is by a review of the matter by proceedings in the same cause or matter. *Ib.* The conviction will be valid, although it may not have been entered in the justice's docket, since the statute, in that respect, is merely directory. *Ib.* After drawing up and subscribing the record of conviction, the justice is authorized and required to issue an execution, which may be in the following form:

Execution to collect fine.

ALBANY COUNTY, *ss:* The People of the State of New York: To any constable of said county, GREETING: Whereas John Smith was, on the 19th day of March, 1865, convicted and fined by me, the undersigned, a justice of the peace of Watervliet, in said county, the sum of ten dollars, besides one dollar and fifty cents costs, for non-attendance as a witness to give evidence before me, at my office in the said town of Watervliet, in said county, on the 28th day of February, 1865, in a certain action then and there depending before me, the said justice, in which John Doe was plaintiff, and Richard Roe was defendant, a record of which conviction, and of the cause thereof, has been duly made up, subscribed and entered in the docket of said justice. And, whereas the said John Smith has neglected to pay the said fine and costs, you are therefore hereby commanded, in the name of the people of the State of New York, to levy the said fine and costs of the goods and chattels of the said John Smith, and, for want thereof, to take and convey the said John Smith to the jail of the said county of Albany, there to remain until he shall pay such fine and costs; and the keeper thereof is hereby required to keep the said John Smith in close custody in said jail until the fine and costs aforesaid are paid, or until thirty days after the commencement of his imprisonment. Given under my hand, at Watervliet, in said county, on the 19th day of March, 1865.

A. B., *Justice.*

The various precedents, which have been previously given, are intended as a mere general guide, and whenever the circumstances of the case differ from those set out in such forms, the justice will make the necessary alterations, so as to make them correspond with the actual facts of the particular case. If the proceedings to collect the penalty are taken before some justice other than the one before whom the penalty was incurred, the summons, conviction, and execution will be modified accordingly; and so in all similar matters.

The county court has power to remit the fine, and to discharge the party from imprisonment. 3 R. S., 789, § 43, 5th ed.

SECTION II.

COMMISSION TO TAKE EVIDENCE.

When the attendance of a witness cannot be procured because he resides at a place beyond the reach of a subpœna, the statute provides for taking his evidence on a commission. Vol. I, 67, 68, §§ 169, 170, 171. The two principal points to be shown are, that the witness is material to the prosecution or the defense of the action, and that he does not reside in the county in which the suit is pending, nor in any county adjoining thereto. *Ib.* The commission may be directed to one or more competent persons; and it may authorize them or any one of them to examine the witness, upon oath, upon the interrogatories sent for that purpose. Vol. I, 67, § 169. The commission ought to be directed to persons against whom neither party can raise a reasonable objection. In a court of record it is usual for the moving party to name the commissioners. *Harris* v. *Wilson*, 2 Wend., 627. But the court will not nominate any person as commissioner if a reasonable ground can be shown why he should not be appointed. Such objection must, in strictness, be proved on oath if that is required, or the proof of the facts may be made by affidavit. *Biays* v. *Merrihew*, 3 Johns., 251. If the justice knows of any good reason why any particular person ought not to be appointed a commissioner, the appointment of such person ought not to be made. So, if it is shown by affidavit, or other satisfactory evidence, that a particular person named as commissioner is not a proper person to be appointed, the adverse party may object to him, and in that case he ought not to be appointed.

The application for a commission may be made by *either party;* and it may be made *at any time*, if due notice has been given at least six days before the application. Vol. I, 68, § 170. Due proof must be made of the service of such notice, if that fact is not admitted by the opposite party, or waived by his appearance and non-objection upon that ground. *Ib.*

The issuing of a commission will not authorize an adjournment beyond ninety days from the joining of issue, unless by consent of the parties. *Ib.* There must be an issue of fact to authorize the issuing of a commission, unless it is in a case in which the defendant neglects or refuses to appear and answer in the action, and in that case the plaintiff is entitled to a commission to examine a material witness, who cannot be reached by a subpœna. Vol. I, 68, § 170.

The names of the witnesses to be examined ought always to be inserted in the commission, if possible. And when the names of the witnesses might have been ascertained by due diligence, but this was not done, the commission was refused. *Wright* v. *Jessup*, 3 Duer, 642. Where the names of the witnesses are not known, and they cannot reasonably be ascertained, the commission may describe them in such a manner as to be most likely to identify the witness, or the commission may be general to

examine such witnesses as may be produced for examination. *Shaffer* v. *Wilcox*, 2 Hall, 502.

The commission, in the last case cited, authorized the examination of the *clerks* of a person who was named.

The notice of application for a commission ought to be given at the joining of issue, or, at least, six days before the adjourned day, if the application is made by the plaintiff. He can have but one adjournment, *ante*, 337, and that must be had at the joining of the issue; and he is also required to give six days' notice of this application. The notice may be given at any time after the service of the process and its return, so that the application may be made on the day of joining issue, if there is time to give the proper notice, and if that course is desirable.

The statute does not provide that an adjournment may be granted, on motion of the plaintiff, for the purpose of giving him an opportunity to serve the required notice, and, therefore, he ought to be careful to adjourn for a length of time sufficient to serve a proper notice before the adjourned day.

The statute does not authorize an adjournment, on motion of the plaintiff, at any other time than at the joining of issue, in those cases in which the attendance of his witnesses is procured by subpœna. And the statute does not, in express language, give any greater privilege when a commission is taken.

It will be most convenient to serve a written notice of the intended application for a commission, since the proof of service will be readily made, and the terms of the notice indisputable.

Notice of application for a commission.

JUSTICE'S COURT.

John Doe *agt.* Richard Roe.	Before A. B., a justice of the peace of Watervliet, in Albany county.

Sir: Please to take notice, that on the 27th day of March, 1865, at ten o'clock, in the forenoon, at the office of the said justice, in the town of Watervliet, in said county, I shall make an application to the said justice, A. B., for a commission, to be directed to C. D., of the city of Buffalo, to examine E. F., of the same place, as a witness in the above entitled action, upon interrogatories to be annexed to said commission. Dated March 17th, 1865.

JOHN DOE, *Plaintiff.*

To Richard Roe, *Defendant.*

If the opposite party appears at the time and place mentioned in the notice, and he does not require proof of the service of the notice, or if the service is expressly admitted, no proof of service need be made. But if such party does not appear, either in person or by attorney, then due proof of the service must be made by the party who desires such commission. Such proof may be made orally and upon oath, or it may be made by affidavit, which is the advisable course. The affidavit may be drawn upon the back of such notice, or at the bottom of it, in the following form:

Albany County, *ss:* John Doe being duly sworn, says that he is the plaintiff named in the within (or above) entitled action, and that, on

the 17th day of March, 1865, at the town of Watervliet, in said county, he personally served said notice on the said defendant, by delivering to him a true copy thereof, and leaving the same with him. JOHN DOE.

Sworn before me this 27th day of March, 1865,

A. B., *Justice*.

If the proof is oral, an oath in the following form may be administered:

You do swear that you will true answers make to such questions as may be put to you in relation to the service of a notice for an application for a commission in this action.

When the service of the notice is not admitted expressly, or by implication, by appearance without objection, or where the opposite party does not appear, there must be legal *proof* of the service of such notice. Vol. I, 68, § 170. The notice may be served by any person, and the proof of service may, of course, be made by the person who serves the notice. If the opposite party should not appear, and the commission should be issued without proof of the service of the notice, the issuing of the commission will be irregular, and unless the irregularity is subsequently waived, the evidence returned by the commissioner will not be legally admissible. If the notice is defective in form, or if it is not served in time, nor personally, an objection may be taken by the opposite party. But these objections, and all others of a similar character, must be taken at the first opportunity, or they will be waived; and if a notice is defective, either in form or substance, the objection must be taken at the time when the commission is awarded. It will be too late to raise the objection, for the first time, at the trial, by objecting to the evidence. *Allen* v. *Edwards*, 3 Hill, 499. After proper notice has been given, the party should appear before the justice on the day and at the place mentioned in the notice, for the purpose of furnishing interrogatories and of obtaining the commission. But, before issuing a commission, the justice ought to be satisfied that the evidence of the witness is material, and that he resides out of the reach of a subpœna. This proof may be made by affidavit, or the witness may be sworn and examined orally. The oath may be in the following form:

Form of oath.

You do swear that you will true answers make to such questions as may be put to you in relation to the necessity of issuing a commission in this action.

The proof of the materiality of a witness may be made by the agent or attorney of the party, if he is able to prove facts sufficient to make a case. *Beall* v. *Dey*, 7 Wend., 513; *Murray* v. *Kirkpatrick*, 1 Cow., 210; *Demar* v. *Van Zandt*, 2 Johns. Cas., 69. And this is especially the case when the party himself is absent from the county in which the action is to be tried. *Eaton* v. *North*, 7 Barb., 631. It will be sufficient if the materiality of

the witness is sworn to positively, as it is not necessary to swear to the advice of counsel upon that point. *Beall* v. *Dey*, 7 Wend., 513; *Demar* v. *Van Zandt*, 2 Johns. Cas., 69. But it is necessary to show that the witness does not reside in the county in which the trial is to be had, or in an adjoining county; and if an affidavit does not state that fact, it will be defective. *Parmelee* v. *Thompson*, 7 Hill, 77. To state merely that the witness is in an other county, is not sufficient, since that is consistent with his being in an adjoining county. *Ib.* The residence of the witness need not be sworn to positively; it will be sufficient if sworn to upon information and belief. *Eaton* v. *North*, 7 Barb., 631. If there are no circumstances of a suspicious nature, the justice has no right to require a party to state what he expects to prove by the witness, whose evidence is desired to be taken on such commission. *Eaton* v. *North*, 7 Barb., 631. But if the party applying for a commission states what he expects to prove by such witness, and the opposite party offers to admit the truth of the *facts* so stated, not merely that the witness would swear to them, the commission may be refused. *People* v. *Vermilyea*, 7 Cow., 369; *Bank of Commerce* v. *Michel*, 1 Sandf., 687. But an admission of that nature which is to be introduced in evidence on the trial, ought, in all cases, to be reduced to writing, and signed by the party making such admission, and the admission delivered to the party who applied for the commission. This course will obviate all question, on the trial, as to what facts were really admitted, and it will also be conclusive evidence of the truth of those facts.

Ordinarily a commission is granted when a *prima facie* case is made; but there may be suspicious circumstances shown which will authorize a justice to require the applicant to state what he expects to prove by his witness. *Rogers* v. *Rogers*, 7 Wend., 514. So where a party offers to admit whatever the applicant will swear he expects to prove by the witness, the justice may require a statement of the facts expected to be proved. *Bank of Commerce* v. *Michel*, 1 Sandf., 687. The admission, however, must be that the facts so stated are *true*, not merely that such witness will swear to them. *Ib.* Such offers of admission, however, will not frequently be made, even to prevent the issuing of a commission. If a statement is made as to the facts which are to be proved by the absent witness, and those facts are not material or relevant, the commission may be denied. This power, however, should be exercised cautiously, since it is not always easy to determine in advance what facts may become material on the trial. The defendant is not compelled to take a commission, if he can procure the attendance of his witness within the ninety days allowed by law. He may take the chances of getting his witness if he prefers to do so, and may adjourn the cause in the usual manner. But, since a plaintiff is not entitled to such adjournments, he must take a commission if he would secure the evidence.

Commission.

Albany County, *ss:* To James Smith, of the city of Buffalo, in the county of Erie and State of New York: Whereas it appears to me, the undersigned, a justice of the peace in the town of Watervliet, in the county of Albany, that A. B., of the town of , in the county aforesaid, is a material witness in the prosecution (or defense) of a certain action now depending before me, in which John Doe is plaintiff and Richard Roe defendant. Now, therefore, confiding in your prudence and fidelity, and in pursuance of the statute, I have appointed, and by these presents do appoint you, commissioner to examine the said witness; and for that purpose do authorize you, at certain days and places, to be by you appointed, diligently to examine the said witness on the interrogatories hereto annexed, on oath, to be taken before you; and to cause such examination to be reduced to writing, and signed by such witness, and certified by yourself, and to return the same, annexed hereto, to me, inclosed under your seal, according to the directions herewith given you. Given under my hand, at Watervliet, aforesaid, this 27th day of March, 1865.

E. F., *Justice.*

Directions indorsed upon commission.

The commissioner within named will return said commission to me, at West Troy, in the town of Watervliet, in Albany county, my place of residence, by mail. E. F., *Justice.*

If the commission is to be returned by express, or by a specified agent, then state that fact, and require its return by the person named as agent, or by such express company.

Interrogatories and cross-interrogatories.

IN JUSTICE'S COURT.

John Doe
agt.
Richard Roe. } Before E. F., a justice of the peace of Watervliet, in Albany county.

Interrogatories to be administered to A. B., a witness to be produced, sworn and examined under the annexed commission, on the part and behalf of John Doe, plaintiff, in the above entitled action, now depending before E. F., a justice of the peace of Watervliet, in Albany county:

First. Do you know the parties, plaintiff and defendant, in the title of these interrogatories named, or either of them and which of them, and how long have you known them, or either of them?

Second. Are you acquainted with the handwriting of the said Richard Roe?

Third. Look at and examine the paper writing now produced and shown to you at the time of your examination, and marked "A," and purporting to be a promissory note made by the said Richard Roe, and payable to the said John Doe or bearer, for two hundred dollars, and dated January 1st, 1863. In whose handwriting is the signature to the said note?

Fourth. Do you know, and if so, what is the usual business followed by each of the parties; and do you know of the sale of any goods and chattels, wares and merchandise by the said plaintiff to the said defendant, and, if so, when, where, what articles, and what was the value, if you are acquainted with the market value of such articles?

Lastly. Do you know any other matter or thing touching the matters in question, that may tend to the benefit of the plaintiff? If yea, declare as fully and at large as if you had been particularly interrogated thereto.

(*Annex documents, to be identified, if any.*) JOHN DOE, *Plaintiff.*

Cross-interrogatories.

Interrogatories to be administered to the said A. B., by way of cross-examination:

First. How frequently have you seen the said Richard Roe write, and under what circumstances?

Second. Are you familiar with the usual market value of the articles mentioned in the fourth interrogatory of the plaintiff?

These interrogatories will be framed according to the circumstances of the case.

Assent of parties to interrogatories.

We, the undersigned, parties to the action named in the annexed commission, hereby consent and agree that the interrogatories hereto annexed may be propounded to the witness therein named, by the commissioner to whom the commission is directed.

JOHN DOE, *Plaintiff.*
RICHARD ROE, *Defendant.*

Settlement of interrogatories by justice.

I hereby certify that I have settled the within interrogatories and cross-interrogatories, and that I approve of the same. E. F., *Justice.*

Commissioner's summons to witness.

Erie County, *ss:* Whereas the undersigned has received a commission, issued by E. F., a justice of the peace of the town of Watervliet, in Albany county, directed for the examination of A. B., a witness in an action depending before the said justice, between John Doe, plaintiff, and Richard Roe, defendant, you, the said A. B., are therefore required to be and appear before me, the said commissioner, at my office, at No. , in street, in the city of Buffalo, on the 10th day of April, 1865, at ten o'clock in the forenoon, then and there to be examined, and to testify the truth, according to the best of your knowledge, for and on behalf of the plaintiff, (or the defendant) and herein you are not to fail. Dated March 30th, 1865.

JAMES SMITH.

Commissioner's subpœna to witness.

Erie County, *ss:* To A. B., greeting: In the name of the people of the State of New York, you are commanded to appear personally before the undersigned, a commissioner duly appointed and empowered to examine witnesses in a certain action now depending before E. F., a justice of the peace of the town of Watervliet, in Albany county, between John Doe, plaintiff, and Richard Roe, defendant, at my office, at No. , in street, in the city of Buffalo, on the tenth day of April, 1865, at ten o'clock in the forenoon, then and there to be examined as a witness in said action, and to testify the truth, according to your knowledge, for and on behalf of the plaintiff (or defendant), under and by virtue of a commission issued for that purpose. Hereof fail not. Given under my hand, at the city of Buffalo, this 30th day of March, 1865. JAMES SMITH

Oath to be administered by commissioner to witness.

You do swear (or affirm) that the answers to be given by you to the interrogatories proposed to you by the commissioner here present, to execute a commission directed to him, issued by E. F., a justice of the peace of the town of Watervliet, in Albany county, in a certain action there depending before him, between John Doe, plaintiff, and Richard Roe, defendant, shall be the truth, the whole truth, and nothing but the truth.

Caption of deposition.

Deposition of A. B., a witness produced, sworn and examined on oath, on the 10th day of April, 1865, at my office in the city of Buffalo, by virtue of a commission issued by E. F., a justice of the peace of the town of Watervliet, in Albany county, to me, James Smith, directed, for the examination of A. B., a witness in an action depending before the said justice, between John Doe, plaintiff, and Richard Roe, defendant.

The said A. B., being duly sworn, deposes as follows: To the first interrogatory he says. (Give the answer of the witness fully.)

To the second interrogatory he says. (Give the answer.) A. B.

Subscribed and sworn before me, this
tenth day of April, 1865,

JAMES SMITH, *Commissioner.*

Indorsement of an exhibit.

On the tenth day of April, 1865, at the execution of a commission issued by E. F., a justice of the peace of the town of Watervliet, in Albany county, for the examination of A. B., a witness in a certain action depending before the said justice, between John Doe, plaintiff, and Richard Roe, defendant, the within paper writing, marked "A," was produced and shown to the said A. B., a witness sworn and examined, and by him deposed unto at the time of his examination as a witness under such commission.

JAMES SMITH, *Commissioner.*

Return to commission.

I, James Smith, the commissioner appointed by the within commission, do hereby make return thereto, and certify, that in pursuance thereof, I did, on the tenth day of April, 1865, diligently examine A. B., the witness within named, on the interrogatories and cross-interrogatories hereto annexed, on oath publicly administered by me to the said A. B., and that I caused said examination to be reduced to writing, and to be subscribed by the said A. B., which examination is hereto annexed.

Dated, Buffalo, April 10th, 1865.

JAMES SMITH, *Commissioner.*

Where a commission is duly received by mail, by the justice who issued it, the legal presumption will be that the commissioner deposited it in the post-office, as required by the statute, although there is nothing on the envelope, or elsewhere, showing such fact. *Hall* v. *Barton*, 25 Barb., 274. The correct practice, however, will be to indorse a certificate of the mailing upon the envelope. And it may be in the following form:

Certificate of mailing.

Deposited in the post-office at Buffalo, and the postage thereon paid by me, on the 10th day of April, 1865.

JAMES SMITH, *Commissioner.*

Where a commisson is returned by an agent, his affidavit as prescribed by statute, that he received it from the hand of the commissioner, and that it has not been opened or altered since he received it, is indispensable, unless waived by consent. A commission returned by express, and unaccompanied by such affidavit, is inadmissible, although that method of returning it was expressly authorized by the commission. *Dwinelle* v. *Howland*, 1 Abb., 87.

When the commission is returned by an agent, the proof required may be stated in the affidavit in the following form:

Affidavit of agent.

JUSTICE'S COURT.

John Doe
v.
Richard Roe.

ALBANY CITY AND COUNTY, *ss:* A. B. being duly sworn, says, that on the 10th of April, 1865, he received the packet now delivered by him to E. F., the justice who issued the same, from the hand of James Smith, (a counselor-at-law) of Buffalo, who is the commissioner, as deponent is informed and believes, named in the commission inclosed in the said packet, and that the same has not been opened or altered since deponent received it.

Subscribed and sworn before me, this 10th day of April, 1865, — A. B.

E. F., *Justice.*

The precedents which have been given are sufficient to assist in the discharge of the duties of issuing, executing and returning a commission. Such changes as are necessary, may be readily made. A brief notice will now be taken of some of the rules which relate to commissions.

The interrogatories and cross-interrogatories must, necessarily, embrace every subject which is material to the prosecution or the defense of an action, and, therefore, no precedent will be of any use further than as an illustration of the manner in which they ought to be framed. The questions contained in the interrogatories ought to conform to the rules of evidence as much as though the witness were to be examined in court at the trial. Either party is permitted to insert any question which he may choose, if it is pertinent to any of the issues, or if the evidence which it will elicit will be admissible on the trial. It is not possible, in every case, to frame particular questions which shall be adapted to the purpose of eliciting all the information which a witness may possess, since the party may not be fully informed as to how much the witness knows upon the matters in litigation. And the witness may know material facts about which the party has no knowledge whatever. For this reason, the law permits either party to put a general interrogatory as in the precedents given. And any evidence which is given under such general interrogatory, is as competent as that which is given in response to a particular question. *Percival* v. *Hickey*, 18 Johns., 257, 289; *McCarty* v. *Edwards*, 24 How., 236. When the interrogatories are settled by the consent of the parties, they may agree to waive all objections as to the form of the questions, or as to the competency of witnesses, or of specified items or qualities of evidence. And if it is expressly stipulated that certain objections are reserved, and may be made at the trial, it will be presumed that all other objections were intended to be waived, and, therefore, no others can be raised on the trial. *Morse* v. *Cloyes*, 11 Barb.,

100. What objections may be taken on the trial will be discussed in a subsequent place.

When the parties do not agree to the interrogatories, they must submit them to the justice for settlement. See form, *ante*, 568. And any question pertinent to the cause may be inserted in the interrogatories.

When the commission has been made out and signed by the justice, and the interrogatories have been drawn and settled, either by agreement of parties, or by the decision of the justice, the interrogatories ought to be annexed to the commission, and the papers sent to the commissioner. The papers may be sent by mail, or by express, or in any other manner which the parties may agree upon. But, the papers ought to be sent by mail, unless the parties agree to some other mode, and the person who applies for the commission is bound to pay the expense of mailing them.

A commission issued by a justice of the peace is to be executed in the same manner as a commission issued by a court of record. (Vol. I, 68, § 171.) And the statute which relates to the execution and return of commissions which are issued by courts of record is as follows: 3 R. S., 676, § 16, 5th ed.

"The persons to whom such commission shall be directed or any one of them, unless otherwise expressly directed therein, shall execute the same as follows:

"1. They or any one of them, shall publicly administer an oath to the witnesses named in the commission, that the answers given by such witnesses to the interrogatories proposed to them shall be the truth, the whole truth, and nothing but the truth;

"2. They shall cause the examination of each witness to be reduced to writing, and to be subscribed by him, and certified by such of the commissioners as are present at the taking of the same;

"3. If any exhibits are produced and proved before them, they shall be annexed to the depositions to which they relate, and shall in like manner be subscribed by the witness proving the same, and shall be certified by the commissioners;

"4. The commissioners shall subscribe their names to each sheet of the depositions taken by them; they shall annex all the depositions and exhibits to the commission, upon which their return shall be indorsed; and they shall close them up under their seals, and shall address the same when so closed, to the clerk of the court from which the commission issued, or to the clerk of the county in which the venue shall be laid, as shall have been directed on the commission at his place of residence;

"5. If there is a direction on the commission to return the same by mail, they shall immediately deposit the packet so directed in the nearest post-office;

"6. If there is a direction on the commission to return the same by an agent of the party who sued out the same, the packet so directed shall be delivered to such agent.

"A copy of this section shall be annexed to every commission authorized by this article."

A deposition may be valid and may be read in evidence, although the oath to the witness was not administered by such commissioner, if the oath was administered by a person of competent authority, and if at the place where the commission was executed, the laws prohibited the commissioners from administering an oath. *Lincoln* v. *Battelle*, 6 Wend., 476.

Where nothing appears to the contrary, the court will presume that the oath was publicly and regularly administered. *Halleran* v. *Field*, 23 Wend., 38; *Williams* v. *Eldridge*, 1 Hill, 249. The statute requires that the examination shall be reduced to writing, but it does not require the commissioner to do the writing, and, therefore, he may employ a clerk for that purpose. And each witness must subscribe his name at the end of the evidence given by him, which must be certified by the commissioner, *ante*, 571, § 16, sub. 2. When exhibits are produced and proved before the commissioner, they must be annexed to the deposition to which they relate, and they must be subscribed by the witness, and certified by the commissioner. When the certificate clearly identifies the exhibit referred to, the courts will not permit a technical objection to prevent its introduction in evidence.

The exhibit in one case was a bill of sale, and the witness duly sworn and examined, and the commissioner certified upon it, that on the day of the execution of the commission, the exhibit "was produced and shown to the said James Meighan (the witness), a witness sworn and examined, and by him deposed unto at the time of his examination as a witness under such commission," and this was held to be a sufficient certificate. *Hall* v. *Barton*, 25 Barb., 274, 277. In an other case the exhibits were two notes which were respectively marked A, and B. They were referred to by the witnesses as being thus marked; a copy of each was also given, with a statement that the witnesses had written their names upon each note, and all this appeared in the depositions.

The return of the commissioners, among other things, stated "that the witnesses Clark and Lee, testified as above written; that such testimony was subscribed by the witnesses, who, also, in the presence of the commissioners, signed their names on the back of the notes attached to their testimony, which notes were produced and shown to them." This was held to be sufficient. *Brumskill* v. *James*, 1 Kern., 294. The commissioners are required to subscribe each sheet of the depositions taken by them, and to annex all the depositions and exhibits to the commission. *Ante*, 571, § 16, sub. 4.

In every case in which a justice issues a commission to examine a witness, he must direct the manner in which such commission shall be returned.. If this is not done, the depositions cannot be read in evidence. *Smith* v. *Randall*, 3 Hill, 495; 3 R. S., 675, § 15, 5th ed. This direction as to the manner of returning the commission will be valid though indorsed on the interrogatories

instead of the commission. *Hurd* v. *Pendrigh*, 2 Hill, 502. So it will be sufficient if the body of the commission contains an explicit direction as to its return, although there is no direction indorsed upon the back of it. *Hall* v. *Barton*, 25 Barb., 274. But such direction must be signed by the justice, or the depositions cannot be read in evidence. *Crawford* v. *Loper*, 25 Barb., 449. A neglect by the commissioners to deposit the commission and depositions in the post-office immediately, as required by the statute, will not prevent the depositions from being read. The statute is merely directory to the commissioner upon this point. *Halleran* v. *Field*, 23 Wend., 38. So, the sending of a copy of the section of the statute with the commission is a matter merely directory, and if the commission is properly executed, the omission will do no harm, and the depositions will be admissible. *Hall* v. *Barton*, 25 Barb., 274; *Williams* v. *Eldridge*, 1 Hill, 249. If the commission and depositions are received by mail, the presumption will be that they were properly mailed as required by the statute, although there is no indorsement on the envelope showing that fact. *Ib.; Brumskill* v. *James*, 1 Kern., 294.

Where the commission is executed by the proper person, a mistake in the name of the commissioner, as stated in the caption to the depositions, will not vitiate. A plaintiff in an action in a justice's court gave notice of an application for a commission to take the testimony of a witness. The commission was to have been directed to one C.; but on settling the interrogatories, the parties agreed to substitute one K., as a commissioner, in the place of C.; and the justice inserted the name of K., in the commission, and the commission was, in fact, executed and returned by K., but the justice inadvertently omitted to strike the name of C. out of the caption to the interrogatories where it had been inserted pursuant to the notice. This was held not to invalidate the commission, and that the depositions were admissible in evidence. *Hall* v. *Barton*, 25 Barb., 274. The commissioner ought to be careful to require the witness to answer all of the interrogatories, either on the direct or on the cross-examination. And if the last general interrogatory is not answered the depositions will not be admissible in evidence, unless the objection is in some manner waived. *Brown* v. *Kimball*, 25 Wend., 259.

In courts of record the commission is usually returned to the clerk of the court, and therefore sub. 4 of § 16, *ante*, 571, provides for such a course. But in a justice's court, there is no such clerk, and the commission must be returned to the justice himself, and the directions ought to be direct and explicit upon that point. For, if no directions are given as to its return, the depositions will be inadmissible, as has been seen, *ante*, 572. Where the commission is executed out of this state, a summons is a proper process for requiring the attendance of the witnesses. See Form, *ante*, 568. But, when the commission is to be executed within the limits of this state, a subpœna is a proper process; and the commissioner has the same power to issue a subpœna to compel

attendance, and to swear witnesses that justices of the peace have in civil actions. Laws 1841, chap. 138, § 2; Vol. I, 68, § 173. Either party may examine the adverse party on a commission in the same manner as any other witness. Vol. I, 33; Code, § 390. In the absence of any evidence as to the form of the oath administered by the commissioner to the witness, it will be presumed to be regular, *ante*, 572. But, where the form of the oath is returned, and it is clearly not such as the statute requires, the depositions cannot be received in evidence. This was so held, where the oath administered to the witness was "that he should true answers make to the interrogatories read to him;" instead of an oath to tell "the truth, the whole truth, and nothing but the truth." *Whitney* v. *Wyncoop*, 4 Abb., 370. It is not necessary to annex an original paper to a commission. A copy may be made and annexed, and the original produced at the examination and identified by the witness. *Commercial Bank of Pennsylvania* v. *Union Bank of New York*, 19 Barb., 392; *S. C.* affirmed, 1 Kern., 203; *Brumskill* v. *James*, 1 Kern., 294. The return to a commission ought to be made upon the commission itself, as the statute requires. And it has been held that an omission to do so would render the depositions inadmissible as evidence. *Fleming* v. *Hollenback*, 7 Barb., 271. But the rule is now well established, that a return is equally as valid when made upon any of the papers annexed to the commission, as when made upon the commission itself. *Pendell* v. *Coon*, 6 E. P. Smith, 134; *Hall* v. *Barton*, 25 Barb., 274; *McCleary* v. *Edwards*, 27 Barb., 239; and see *Hurd* v. *Pendrigh*, 2 Hill, 502.

The powers of a commissioner are limited, and he must comply strictly with the statutory requirements. But the construction, as has been seen in the cases cited, is not so strict as to defeat the object in view, and the ends of justice. By examining the provisions of the statute, and following their directions explicitly, no errors need be committed. The amount of fees and disbursements which are allowed on issuing a commission, and for its execution and return, will be found in the statute. Vol. I, 65; § 154. If a commission issued by a court of record is defectively executed, the court may order it to be returned to the commissioner so that he may amend it. *Keeler* v. *Vanderpool*, 1 Code Rep. N. S., 289. In the case just cited, the names of the witnesses were incorrectly stated, and the commission was returned for correction. This power is as important in a justice's court as in any other, and in a proper case it may be exercised, if the granting of such a motion does not extend the time beyond the limits of the justice's power of adjournment. Either party may take as many commissions as may be necessary, as, for instance, where he has witnesses in two different places which are at a distance from each other. And the commissions may be all taken out at the same time, or at separate times. If a commission is issued, and before its return, it is discovered that the evidence of an other witness is material, a commission may be taken for the

purpose of obtaining his evidence. Such an application, however, will not be looked upon with favor, if the party was aware of the importance of such evidence and of its existence at the time when the application for the first commission was made. And so when the commissioner has refused to require an answer to cross-interrogatories because the party who framed them desires to withdraw them without the consent of the other party, the commission will be returned for the purpose of taking such answers. *The Union Bank of Sandusky* v. *Torrey*, 2 Abb., 269. Where a commission has been executed and returned, the courts will not order a returning of it to the commissioner for the purpose of enabling a witness to modify his testimony, especially when the change will be to contradict a witness who has died since the execution of the commission. *Raney* v. *Weed*, 1 Barb., 220. The evidence which is taken on a commission may be offered and used in evidence on the trial of the cause by either party; and every objection to the competency or credibility of a witness so examined, or to the competency or relevancy of any question put to him, or of any answer given by him, may be made in the same manner and with the like effect as if such witness were personally examined at such trial. 3 R. S., 677, § 23, 5th ed.

An objection that interrogatories are leading, is an application to the discretion of the court, and the ruling of the justice will be conclusive upon the question. *Ante*, 504. And it is now well settled that leading questions may be put to a witness on the trial, in the discretion of the court. See Leading questions, *ante*, 504. The depositions must be read in evidence before they constitute a part of the testimony in the cause. If there is any objection to the competency of the witness examined on such commission, the objection must be made when the deposition is offered as evidence, and before it is so received. If any question is improper as it is framed in the interrogatory; or if any answer is incompetent, improper, irrelevant, or illegal evidence, an objection must be taken to it at the time of reading the depositions in evidence. *Ocean Insurance Company* v. *Francis*, 2 Wend., 65, 71; *Fleming* v. *Hollenback*, 7 Barb., 271; *Williams* v. *Eldridge*, 1 Hill, 249; and see *Morse* v. *Cloyes*, 11 Barb., 100. The parties have a right to appear by counsel on the execution of a commission. *Union Bank of Sandusky* v. *Torrey*, 2 Abb., 269. Neither party can withdraw cross-interrogatories on the execution of the commission, unless by mutual consent, *Ib.* A witness who is examined on commission is bound to answer every interrogatory and cross-interrogatory; and he will not be permitted to shield himself from a cross-interrogatory by a reference to an answer given to a direct interrogatory. *Ib.; Willis* v. *Welch*, 2 Code Rep., 64; *Union Bank of Sandusky* v. *Torrey*, 5 Duer, 626; *S. C.*, 2 Abb., 269. A party has the same right to an answer to a cross-interrogatory on a commission that he has to have an answer to a question put on cross-examination, when the examination is an oral one. But it has since been held at general term that it is not a valid objection

that cross-interrogatories in a commission offered in evidence, are not all answered, where it appears that some of them, in whole or in part, are answered by a reference to previous answers, where the latter are full and explicit. *McCarty* v. *Edwards*, 24 How., 237. When the witness to be examined, cannot speak English, the depositions must be taken and returned in English, by means of an interpreter. *Belmore* v. *Anderson*, 2 Cox's Ch. Cases, 288. The signature of the commissioner will be judicially noticed, whether the name is written in full or is abbreviated. *Williams* v. *Eldridge*, 1 Hill, 249. The several papers which are to be annexed to each other may be fastened by a wafer, or some similar tenacious substance. A tape and seal are not indispensable. *Ib.*

A whole deposition will not be suppressed because a portion of the answers are objectionable. And when an objection is made to a deposition, such objection must be confined to the objectionable portions of it, for if it is made to the whole deposition, when a portion of it is proper, the objection will fail because it is too extensive. *Commercial Bank of Pennsylvania* v. *Union Bank of New York*, 1 Kern., 203; *S. C.*, 19 Barb., 391. The witness must answer the interrogatories himself, and he will not be permitted to read his answers from a written statement made by his counsel, for the alleged reason that owing to a dizziness of the head of the witness, he could not intelligently answer the interrogatories otherwise. *Creamer* v. *Jackson*, 4 Abb., 413. Answers which have been taken in that manner cannot be given in evidence. *Ib.* A party is not compelled to introduce a deposition in evidence; and if, after a witness has been examined on commission, and its return to the justice, the witness should return so that his attendance can be procured at the trial, he may be sworn and examined orally on the trial instead of introducing his deposition as evidence. *Fisher* v. *Dale*, 17 Johns., 343, 345. A party may waive a commission by going to trial before its return, without any objection, or any motion to adjourn for that purpose. *Brain* v. *Rodelicks*, 1 Caines, 73. A party who has caused a deposition to be taken, does not necessarily, by offering parts of it in evidence, bind himself to read it all, or make answers which are irrelevant or incompetent, admissible. *Gellatly* v. *Lowery*, 6 Bosw., 113, 122. The opposite party may, however, read the entire deposition as evidence if he chooses. *Ib.* Taking the evidence on commission reduces the statements of the witness to writing, and a party may introduce as much of it as he chooses, precisely as he may elect what questions he will ask on an oral examination of a witness. And the opposite party may introduce the balance of the deposition upon the same principle that he may cross-examine a witness in relation to statements made by him on direct-examination. If a party is examined as a witness on commission, his statements may be read as admissions, even if his answers would not be admissible, by way of cross-examination, if he were an ordinary witness. *Gellatly* v. *Lowery*, 6 Bosw., 113, 122; *Forrest* v. *Forrest*, 6 Duer, 102. An answer which is

not responsive to an interrogatory may be objected to on the trial by either party, and the answer must be struck out. *Lansing* v. *Coley*, 13 Abb., 272.

CHAPTER II.

GENERAL RULES RELATING TO TRIALS.

In ordinary cases the place for the trial is specified in the process, or is fixed by the justice at the time of granting an adjournment. If the trial takes place on the return day of the process, and in the absence of the defendant, the cause must be tried at the place specified in the process, or the judgment will be erroneous. *Stewart* v. *Meigs*, 12 Johns., 417; *Case* v. *Van Ness*, 1 Johns. Cas., 243. So, if issue is joined, and the cause is adjourned for trial, and the defendant does not appear on the adjourned day, the cause must be tried at the place specified. But when both parties appear, either on the return of process or at an adjourned day, the justice may adjourn the cause to a more convenient place of trial, if it is within a reasonable distance and within the same town. *Morrell* v. *Near*, 1 Cow., 112. This may be done by the justice whether the parties assent or dissent; and if they accompany him to the place of trial without objection, consent will be presumed. *Ib.* It has been seen that on the return of process, the justice must wait one hour for the appearance of the parties, unless they sooner appear. *Ante*, 217. The same rule applies to the adjourned day; and a justice must, in all cases, wait one hour before proceeding to trial on an adjourned day, unless the parties sooner appear. *Sherwood* v. *Saratoga & Washington Railroad Co.*, 15 Barb., 650; *Stafford* v. *Williams*, 4 Denio, 182; *Shufelt* v. *Cramer*, 20 Johns., 309. So where a cause is held open to a particular time for some reasonable cause, as for the return of an attachment issued against defaulting witnesses, the justice must wait one hour for the parties before proceeding with the trial. *Clark* v. *Garrison*, 3 Barb., 372. And in such a case, if the justice proceeds with the trial in the absence of either party, before the expiration of the hour, his judgment will be erroneous, and will be reversed on an appeal. *Ib.* The justice must be careful to give correct information to parties in relation to proceedings pending before him. In one case a defendant appeared before a justice at the proper hour and at the proper place, on the return day of process. The defendant asked the justice to call the cause in which he was sued, but the justice informed him that no such cause was pending, and he thereupon left the court with his witnesses. The justice afterward found the papers in the cause, and adjourned it to an other day for trial, when the action was tried, but the defendant did not appear. This was held erroneous notwithstanding the plaintiff claimed that he had given the defendant notice of the trial, which the defendant denied. *Murling* v. *Grote*, 1 Hilt., 116; *S. C.*, 3 Abb.,

109. So where the defendant appeared at the proper time and place for the return of process, and the justice informed him that the action was discontinued, and the defendant thereupon left court, it was held that the justice could not afterward proceed with the cause in the absence of such defendant, on the ground that the constable had made a mistake in informing the justice that the cause was discontinued. *Tyler* v. *Olney*, 12 Johns., 378. A justice has no right to proceed before the expiration of the hour, upon the ground that he is informed by the plaintiff that the defendant does not intend to appear; and if he does so proceed and render a judgment, it will be error. *Beach* v. *McCann*, 1 Hilt.. 256. The justice may hold open a cause on the adjourned day, when a reasonable cause exists therefor. This subject has been already discussed. *Ante*, 343, 344. The witnesses ought to be sworn by the justice before whom the cause is pending. Vol. I, 53, §§ 98, 99. The justice before whom the trial is pending, cannot be sworn as a witness by an other justice, who administers an oath for that purpose. *Perry* v. *Weyman*, 1 Johns., 520; *Morss* v. *Morss*, 11 Barb., 510; *S. C.*, 1 Code Rep. N. S., 374; and see Vol. I, 55, § 109. But the parties may waive any such objection, and if they consent that the justice shall be sworn as a witness by some other justice; or that he may give his statements without being sworn at all; or if this is done without objection, the irregularity will be waived, and it cannot be reviewed on an appeal. *Reed* v. *Gillett*, 12 Johns., 296; *Blanchard* v. *Richly*, 7 Johns., 198; *Morss* v. *Morss*, 11 Barb., 510; *S. C.*, 1 Code Rep. N. S., 374. A plaintiff may discontinue his action at any time before a verdict is rendered, when the trial is by jury; or at any time before the cause is finally submitted to the justice for judgment. There may be many reasons why a plaintiff should prefer to withdraw his action. He may be disappointed by the non-appearance of his witnesses; the evidence may differ from what it was expected or represented to be; he may discover during the trial that important evidence exists which was unknown to him before the trial commenced; he may wish to impeach or contradict witnesses on the other side who have surprised him by untrue or unexpected statements; he may discover that he has omitted to perform some act which is important for the purpose of giving him a right of action; and when from any of these reasons or others of a similar nature, it is evident that a fair trial cannot be had, it is the right of the plaintiff to discontinue his action. By so doing he will, of course, subject himself to the costs of the action, and the payment of his own expenses. The plaintiff may withdraw his action at any time before the jury have actually rendered their verdict, even after their verdict has been found, and the jury have returned into court for the purpose of declaring their verdict in open court. Vol. I, 55, § 110, sub. 5; *Platt* v. *Storer*, 5 Johns., 346. The right of the plaintiff to withdraw his action is not affected by the nature of the defense interposed. And though a defendant may interpose the defense of a set-off,

and establish its truth so as to entitle him to a judgment in his favor if the cause were actually decided, this will not prevent the plaintiff from discontinuing his action if he elects to do so. *Bidwell* v. *Weeks*, 2 Hilt., 106. And, where a plaintiff fails to appear on the adjourned day, the justice must render a judgment of nonsuit; he has no right to hear the evidence of the defendant proving a set-off, and then render a judgment in his favor against the plaintiff. *Norris* v. *Bleakley*, 3 Abb., 107; *S. C.*, 1 Hilt., 90. The non-appearance of the plaintiff on the return day of process, or on the adjourned day, is equivalent to a withdrawal of the action. And the statute so treats it, by requiring the justice to render a judgment of nonsuit against a plaintiff who so fails to appear, Vol. I, 55, § 110. Nonsuits are either voluntary or compulsory. They are voluntary where a plaintiff intentionally withdraws his action when he is present in court; or where he intentionally omits to be present and answer to his action when it is called. A nonsuit is compulsory when it is granted against the wishes and consent of the plaintiff, and on motion of the defendant. The subject of voluntary nonsuits has been already sufficiently noticed; and the following cases will relate to compulsory nonsuits.

The motion must in all cases be made by the defendant, before the cause is finally submitted to the justice or jury for a final decision. After a cause has been actually submitted to a jury for their decision, upon a question of fact, the justice has no right to take the cause from them and nonsuit the plaintiff. *Young* v. *Hubbell*, 3 Johns., 430. And since the jury are made judges of questions of law, as well as of fact, there is no reason why the same rule ought not to be applied when a question of law has been finally submitted to the jury. After a cause has been completely tried, and submitted to a justice for his adjudication upon the merits, it is too late to move for a nonsuit. *Elwell* v. *McQueen*, 10 Wend., 519; *Peters* v. *Diossy*, 3 E. D. Smith, 115. A motion for a nonsuit is usually decided at once on the trial. This, however, is not the invariable rule. If the cause is tried before a justice, without a jury, and a motion for a nonsuit is made before the final submission of the cause to the justice, and the decision of the motion is reserved, he may subsequently render a judgment of nonsuit, which will be as valid as though rendered on the trial at the time of making such motion. *Seaman* v. *Ward*, 1 Hilt., 52.

When a motion is made for a nonsuit, the defendant should state fully and distinctly the grounds of his motion. In one case the grounds were stated thus, "that the plaintiff had shown no right to recover;" and also, "that the evidence did not entitle the plaintiff to recover under the complaint in this cause." The motion was denied, and on an application for a new trial, the court said: "The motion for a nonsuit was properly denied. The first ground upon which the defendants relied was, that the plaintiff had shown no right to recover. This was entirely too

general and indefinite. The ground relied upon should have been so specifically stated that the court and the opposite counsel might understand the real point which the party intended to raise. This is due to the court, to enable it to determine the question intelligently. It is also due to the opposite party, that he may, if he can, obviate the objection by further evidence." *Trustees of St. Mary's Church* v. *Cagger*, 6 Barb., 576, 581; *Castle* v. *Duryea*, 32 Barb., 480; and see *Underhill* v. *Pomeroy*, 2 Hill, 603; 7 Hill, 388.

This rule, however, applies to those cases only in which a defendant wishes to raise a question as to some particular defect in the proofs of the plaintiff; which defect the plaintiff might perhaps be able to supply if the precise objection or defect were specified. But when the defendant relies upon the ground, that the plaintiff cannot recover upon the whole case, because the entire evidence and the law applicable thereto will not authorize a recovery, no other objection than a general one need be taken. In such a case the objection is specific, for it apprises the plaintiff that the defendant will insist that upon the whole merits of the case there is no legal right of action. A defendant ought to be careful to ascertain that a general objection is sufficient, before he rests his cause upon it. And in every case in which he relies upon the ground, that some particular fact or state of facts has not been proved, which ought to be proved to make a case, the particular defects ought to be specifically stated.

A motion for a nonsuit is generally made at the close of the plaintiff's evidence in chief, and after he has rested his cause. This is the proper time to make the motion, when it is founded upon defects in the proofs on the plaintiff's part. But, this is not the only time when the motion can be properly made; for a nonsuit may be granted on the whole case after the entire evidence is closed. *Rudd* v. *Davis*, 7 Hill, 529; *S. C.*, 3 Hill, 287; *Fort* v. *Collins*, 21 Wend., 109; *Jansen* v. *Acker*, 23 Wend., 480. It is very rarely the case, however, that a nonsuit can be granted upon the whole evidence in the case. There will almost always be some conflict in the evidence upon some question of fact, and, in that case, the question must be submitted to the jury, if one is impanneled to try the action. Justices are frequently in great doubt whether a nonsuit ought to be granted; and in some cases the question is so nicely balanced, that none but a discriminating, accurate and experienced mind can promptly and correctly dispose of the motion. In all cases of doubt, it is best to err on the safe side by denying the motion. And whenever there is any conflict in the evidence, upon a question of fact, the cause must be submitted to the jury, if there is one impanneled, instead of granting a nonsuit. *Thompson* v. *Dickerson*, 12 Barb., 108; *Ernst* v. *Hudson River R. R.*, 32 Barb., 159; *McGrath* v. *Same*, Id., 144; *Russell* v. *Cronkhite*, Id., 282; *Smith* v. *Tiffany*, 36 Barb., 23.

If, however, there is a material defect in the proof on the part of the plaintiff, so that he is not entitled to recover, or if, on the

whole evidence in the case the plaintiff cannot recover, and there is no conflict in the evidence, so that the question can be disposed of upon undisputed facts, a nonsuit may properly be granted. *Carpenter* v. *Smith*, 10 Barb., 663; *Haring* v. *N. Y. & Erie R. R.*, 13 Barb., 9; *Fox* v. *Decker*, 3 E. D. Smith, 150; *Beirne* v. *Dord*, 4 Duer, 69; *Morrison* v. *N. Y. & N. H. R. R. Co.*, 32 Barb., 568; *Sheldon* v. *Hudson River R. R.*, 29 Barb., 227; *Stuart* v. *Simpson*, 1 Wend., 376; *Demyer* v. *Souzer*, 6 Wend., 436; *Rudd* v. *Davis*, 3 Hill, 287.

Whenever the case is such, that a court would set a verdict aside, on the ground that it was unsupported by evidence, or was contrary to it, a nonsuit may be granted. *Ib.* And whenever a nonsuit may be demanded, as a matter of right, it is error to refuse it if a motion is properly made for that purpose. *Lomer* v. *Meeker*, 11 E. P. Smith, 361. Where the uncontradicted evidence in a case establishes the defense of usury, it will be error to refuse a nonsuit if it is demanded. *Ib.* That the jury might choose to discredit unimpeached evidence, which is not incredible on its face, is no reason for submitting it to their consideration. *Ib.* But if a nonsuit is asked, at the close of the plaintiff's evidence, on the ground of a defect in the proofs, the court ought to permit the defect to be supplied, if the plaintiff offers to give the necessary evidence. *Lewis* v. *Ryder*, 13 Abb., 1. A refusal to receive the evidence will be sufficient ground for reversing the judgment. *Ib.* And where the evidence has been closed, and the cause summed up on the part of the defendant, a new trial has been granted because of a refusal to receive material evidence at that stage of the cause. *Mercer* v. *Sayre*, 7 Johns., 306.

When a motion is made for a nonsuit at the close of the plaintiff's case, on account of a defect in his proofs, the defendant must be careful that he does not subsequently supply the defect; for if he does, the error in refusing the nonsuit will be waived. *Colegrove* v. *Harlem & New Haven Railroad*, 6 Duer, 383; *Mayor of New York* v. *Mason*, 1 Abb., 344; *Hyland* v. *Sherman*, 2 E. D. Smith, 235; *Schenectady & Saratoga Plank Road Co.* v. *Thatcher*, 1 Kern., 102. If the defect in the proof is supplied by either party during the trial, that will be sufficient. *Ib.* A nonsuit may be granted as to some of the defendants, and refused as to the others. The application is in the nature of a nonsuit, although it is in form a motion by some of the defendants to be discharged. In an action for a tort where there are several defendants, if there are some of the defendants against whom no evidence is given, they are entitled to be discharged at the close of the plaintiff's case, and this is a matter of right, not a mere discretionary power of the justice. *McMartin* v. *Taylor*, 2 Barb., 356; *Dominick* v. *Eacker*, 3 Barb., 18. The same rule applies when the action is joint and several, so that there may be a recovery against some of the parties even if no cause of action is proved against the others, as in the case of an action against the makers and indorsers of a note, &c. But when the

cause of action is joint, and not several, nor joint and several, the recovery must be sustained against all of the parties, or it cannot be maintained against any. In the case of joint debtors there is not usually much difficulty. See title Joint debtors. In an action for a tort to personal property, the nonjoinder of a co-plaintiff, who was a tenant in common with the plaintiff, may be objected by way of nonsuit at the trial, when the objection appears on the face of the complaint. *Rice* v. *Hollenbeck*, 19 Barb., 664. But see *Tripp* v. *Riley*, 15 Barb., 334, which holds that the objection must be taken by way of answer in abatement. In the last case, however, the tenants in common had divided the property, and the plaintiff was permitted to recover for the conversion of his portion of the property. A misjoinder of plaintiffs is a ground of nonsuit at the trial. *Ackley* v. *Tarbox*, 29 Barb., 512; *Spencer* v. *Wheelock*, 11 Leg. Ob., 329. A nonsuit may be granted in an action of replevin in the same manner as in other actions. *Woodburn* v. *Chamberlin*, 17 Barb., 446; *Gale* v. *Hoysradt*, 7 Hill, 179. Where a plaintiff is nonsuited and he brings an appeal, the defendant may rely upon any fact which appears in the case, to show that the action was not maintainable. *Newcomb* v. *Clark*, 1 Denio, 226. If the decision is correct upon any ground, it is of no consequence that the justice put the decision upon untenable grounds. *Ib.; Munro* v. *Potter*, 34 Barb., 358; and see *Pepper* v. *Haight*, 20 Barb., 429. A mere nonsuit is not a bar to a new action. *Coit* v. *Beard*, 33 Barb., 357; *Elwell* v. *McQueen*, 10 Wend., 519; *Seaman* v. *Ward*, 1 Hilt., 52.

In a court of record, a dismissal of the complaint, with a judgment thereon, in an action between the same parties where the merits were inquired into, will be a bar to a subsequent action for the same cause, especially if the action is such a one as would have been tried in a court of equity under the former practice. *Bostwick* v. *Abbott*, 40 Barb., 331; and see Vol. I, 954.

Where the action is founded upon a tort for the wrongful taking and conversion of the plaintiff's property, and there is an entire failure to prove that the taking was wrongful, or that there was any fraudulent intent on the part of the defendant, the plaintiff ought to be nonsuited if a proper motion is made for that purpose. *Ransom* v. *Wetmore*, 39 Barb., 104. In such a case, the plaintiff cannot at the close of the case, elect to waive the tort and recover as upon a contract. *Ib.* The court will not grant an amendment which will change the entire nature and form of the action, as by changing the complaint from tort to contract, when the motion is not made until after the entire case is closed. *Ib.*

There are several matters relating to the discretion of the justice which will be noticed elsewhere. The recalling of witnesses, the adjournment of the cause, and numerous other similar matters, are matters of common occurrence whether the trial is with a jury or without one. If any matter of defense has arisen since the last adjournment, the defendant may interpose it by

way of answer. And such answer may be put in at any time before the verdict is rendered, or before the cause has been submitted finally to the justice. *Broome* v. *Beardsley*, 3 Caines, 172. This answer is as applicable to a justice's court as to a court of record. *Ressequie* v. *Brownson*, 4 Barb., 541; *West* v. *Stanley*, 1 Hill, 69.

CHAPTER III.

TRIAL WITHOUT A JURY.

A trial is the judicial examination of the issues between the parties, whether they be issues of law or of fact. Code, § 252, Vol. I, 24.

After the service and return of process, an issue is usually joined by the parties. And after both parties have appeared, an issue must be joined before an adjournment can be had, unless the defendant neglects or refuses to plead, by putting in a demurrer or an answer. *Ante*, 350. In case the defendant does not appear and join issue, the plaintiff must still put in his complaint in the action, the truth of which must be proved in the same manner as though a denial had been interposed by an answer. So, if the defendant does appear and join issue, and adjourn the cause to a future day, at which time he does not appear, there will be an issue to try. When no answer is put in by the defendant, there is not, in strictness, any issue to try. But the law does not recognize any defaults in actions in justices' courts. And, when no answer is interposed, the plaintiff is required to substantiate his case by competent evidence or he cannot recover a valid judgment. Vol. I; 10; Code, § 64, sub. 8; *Perkins* v. *Stebbins*, 29 Barb., 523. The evidence must also be sufficient to warrant the judgment, and if there is a total want of evidence, or a material defect in the proofs, the judgment will be reversed on an appeal. *Carter* v. *Dallimore*, 2 Sandf., 222; *Swift* v. *Falconer*, 2 Sandf., 640; *Alburtis* v. *McCready*, 2 E. D. Smith, 39; *Howard* v. *Brown*, 2 E. D. Smith, 247; *Jones* v. *Pridham*, 3 E. D. Smith, 155; *McCollum* v. *McClave*, 1 Hilt., 141; *Perkins* v. *Stebbins*, 29 Barb., 523. But this rule does not extend further than to require a plaintiff to prove his case, in the same manner as though a general denial had been interposed. The plaintiff is not bound, therefore, to negative any affirmative defense which a defendant might have set up by answer; and for that reason, no proof need be given to avoid the statute of limitations, or to show that payment has not been made, or to establish any other fact which would be sufficient to answer an affirmative defense had one been interposed. *Humphrey* v. *Persons*, 23 Barb., 313.

The rule is the same when the defendant has appeared and answered at the return of process, by putting in a general denial, and also setting up an affirmative defense. If he does not appear at the trial, and prove the truth of his affirmative defense, the

plaintiff will not be required to prove anything more than is put in issue by the general denial. As to the affirmative defense, the burden of proof is on the defendant, and until he gives some evidence of its truth, the plaintiff is not required to negative such defense by proofs. *Humphrey* v. *Persons*, 23 Barb., 314; *Lefferts* v. *Hollister*, 10 How., 383. There are instances, however, in which the defense may be established by the plaintiff's evidence. For instance, an action is brought upon a promissory note which is barred by the statute of limitations, and this appears from the note itself. In such a case, if the defendant appears and pleads the statute as a defense, as he is required to do, Vol. 1, 13, Code, § 74, no proof of the truth of the defense need be given. And although the defendant does not appear at the trial, the defense must be allowed, unless some proof is given by the plaintiff to show that the demand has been continued in force, or that it has been revived or renewed in some legal manner. *Penfield* v. *Jacobs*, 21 Barb., 335; *Walrod* v. *Bennett*, 6 Barb., 144.

The rules in relation to the trial of issues of law, has been noticed when treating of demurrers. *Ante*, 332 to 334. When no defense is interposed by the defendant, or when a defense is interposed, the action must be tried if the plaintiff requires it. When no issue is joined, the cause must be tried by the justice without a jury. But if an issue has been joined, either party may demand that the cause be tried by a jury. Vol. I, 51, §§ 81, 82, 83. If neither party requires a jury, the justice must try the cause without one. *Ib.* In such a case the justice performs the functions of both court and jury. As a court he determines the competency of witnesses, and of the evidence offered, and he also determines all the other questions which arise in relation to the conduct of the trial. And all such matters are to be decided in the same manner as though a jury had been impanneled. Acting in the capacity of a juror, he is required to decide all questions of fact which may arise upon the pleadings and the evidence.

This mode of trial has some advantages over a trial by jury. If the justice is careful to take full notes of the evidence, which, as a matter of duty he ought to do, he will be able to know with certainty what the evidence is which was given on the trial. He also has an other important advantage in the discharge of his duty; he has four days for deliberation, during which time he can carefully weigh and compare the entire evidence. And in cases of doubt, he can advise with some able and impartial legal adviser who can render valuable assistance. Under such circumstances, a justice ought to be able to discharge the duties of his office, in such a manner as to comply with the requirements of the statute, which declares that it shall be his duty "to hear the proofs and allegations of the parties, and to determine the same according to law and equity, as the very right of the case may appear." Vol. I, 51, § 81.

There is one difficulty, however, which besets a justice on every trial, whether with or without a jury; and that relates to questions arising as to the admissibility of evidence. Causes are frequently tried by the parties themselves, and sometimes with the aid of an inexperienced lawyer, or by some person who is not skilled in the law, and at other times by zealous and learned counsel. When a cause is tried by the parties, or by inexperienced counsel, it is to be expected, as of course, that much irrelevant, incompetent or illegal evidence will be offered, and a most earnest effort will be made to secure its admission by the justice. On the other hand, competent and legal evidence will be objected to; and between the two difficulties, a justice will be most fortunate indeed if he succeeds in rejecting the illegal, while he admits the legal and competent evidence. No general rules can be given which will render a justice much service in such a case. If he would hope to understand his duty fully, he can learn it in no other way than by a careful study of the rules of evidence. And to many persons who are called upon to discharge the duties of a justice, such a study is impossible. An intelligent justice may, however, be able to learn enough of the general principles of evidence to enable him to decide most questions correctly. See Evidence, *ante*, 361 to 545.

The first point which a justice should clearly understand is, that in relation to the issues which he is called upon to try. An examination of the pleadings will generally determine this question. After ascertaining what issues are to be tried, the evidence ought to be confined to the proof or the disproof of those issues, or of such new matter as answers or qualifies them. The plaintiff is entitled, on introducing his evidence in chief, to prove such facts as establish the truth of the allegations in the complaint. After he rests his cause, the defendant is entitled to prove such matters as disprove the plaintiff's case; and also to prove such other matters as legally tend to establish the defense set up in the answer. After the defendant has rested his case, the plaintiff is entitled to introduce evidence to disprove the defense, or to explain and qualify it.

What facts and circumstances are relevant and competent evidence frequently perplex the most skillful, and a justice must exercise his best judgment upon such questions as arise for his decision. When it is doubtful whether evidence is admissible, it is the usual practice to receive it, if the party offering it insists upon its reception. This, of course, is understood to apply to those cases in which the justice has real and sincere doubts upon the question. For, a justice is not by any means authorized to admit evidence which he is satisfied is inadmissible, however much its reception may be urged by the party offering it. When evidence is offered, and its admission is objected to, the justice ought carefully and fully to write out in his minutes both the offer and the objection. He will thus see clearly what is offered and what is objected, and can then decide intelligently; and if a

return is required of him, he can return truly and clearly the offer and the objections, with his ruling thereon.

A justice cannot, like a juror, be challenged and set aside by a defendant. And although a justice may be related to the plaintiff, or may be interested in the result of the action, or may be unduly partial to the plaintiff, he cannot be prevented from trying the cause. But, the rights of a defendant are not lost or jeoparded in consequence. An appeal from the judgment rendered will correct all such improprieties. And when the facts do not appear in the return, the proof may be made upon affidavits, or by oral evidence, when error in fact is assigned. When a justice is disqualified from acting, see *ante*, 21 to 28. Any objection which exists why the justice ought not to try the cause, should be made before the trial is commenced, or before it is closed, if the party knows of the objection. So, when a defendant desires to make an objection to a recovery, on the part of the plaintiff, because of a defect in the proofs, or because of the illegality of the evidence, the objection must be taken on the trial, if the objecting party is present at the trial. *Westbrook* v. *Douglass*, 21 Barb., 602; *Jencks* v. *Smith*, 1 Comst., 90, and cases cited; *Austin* v. *Burns*, 16 Barb., 643. But, if the defendant does not appear at the trial, he may urge objections to the legality of the evidence, upon an appeal taken from the judgment. *Northrup* v. *Jackson*, 13 Wend., 85; *Squier* v. *Gould*, 14 Wend., 159; *Finch* v. *McDowall*, 7 Cow., 537; *Clark* v. *Van Vrancken*, 20 Barb., 278; *Perkins* v. *Stebbins*, 29 Barb., 523; *Davidson* v. *Hutchins*, 1 Hilt., 123. On the other hand, any objection to the competency of a juror must be taken in the court below, and a failure to appear and take the objection will be a waiver of it. *Clark* v. *Van Vrancken*, 20 Barb., 278; and see *Eggleston* v. *Smiley*, 17 Johns., 133. So objections to the form of pleadings will be waived by non-appearance in the court below. *Stafford* v. *Williams*, 4 Denio, 182.

If a plaintiff intends to submit to a voluntary nonsuit, it must be done before the cause is finally submitted to the justice. If it is not done before that time, and the cause is submitted to the justice for his decision upon the merits, he is bound to render a judgment upon the merits; and he is not authorized to grant a nonsuit at a subsequent time, on the ground of a defect in the proofs. An intentional omission to render a judgment in such a case, would be indictable as a misdemeanor, since a justice is always indictable for an intentional omission of any of the duties of his office. *People* v. *Coon*, 15 Wend., 277; *People* v. *Brooks*, 1 Denio, 457.

If a justice should render a judgment of nonsuit, instead of a final judgment upon the merits, that would not change the legal rights of the parties, because the law will construe the judgment of nonsuit as a final judgment, and will bar any subsequent action upon the original cause of action. *Elwell* v. *McQueen*, 10 Wend., 519; *Hess* v. *Beekman*, 11 Johns., 457. If the justice's

docket shows a judgment of nonsuit, it will be conclusive upon that point, because parol evidence is not admissible to show that the cause was submitted to him on the merits, and the judgment would not be a bar to an other action. *Brintnall* v. *Foster*, 7 Wend., 103. So if a justice should omit to render any judgment whatever, the mere submission of the cause to him would not bar a subsequent action for the same cause. *Young* v. *Rummell*, 5 Hill, 60; *S. C.*, 7 Hill, 503. Where a nonsuit is granted upon a given state of facts, and upon an appeal, the judgment of nonsuit is reversed and set aside, the decision establishes the right of the plaintiff to recover upon proof of a similar state of facts upon a subsequent trial. *Buell* v. *Trustees of Lockport*, 4 Seld., 55. The credibility of witnesses must be decided as a question of fact, and a nonsuit cannot be ordered on the ground that the plaintiff's witnesses are not entitled to credit. *Merritt* v. *Lyon*, 3 Barb., 110.

The decision of a justice upon a question of fact, is treated in the same manner as the verdict of a jury. *Harpell* v. *Curtis*, 1 E. D. Smith, 78. In deciding a question of fact the justice should always remember the rule which throws the burden of proof upon the party who holds the affirmative of the issue in question. When the complaint is met by a denial of all its allegations, the burden of proof is on the plaintiff, and there ought to be a preponderance of evidence in his favor before he is entitled to recover. A doubtful case, or a mere possibility from which it may be conjectured that he has a cause of action, will not answer. If there are doubts, the advantage which arises from them goes for the benefit of the defendant. *Ante*, 545. If the evidence is conflicting, it is for the justice to weigh the credit of the witnesses, and all the circumstances of the case, before he can decide where the balance of proof lies. See *ante*, 525 to 545. So, when the complaint is admitted, either expressly, or by implication by not denying it, and the defendant relies upon an affirmative defense, the burden of proof is then thrown upon him, and before he can succeed in the action, he must establish such defense as clearly as a plaintiff is required to do when a denial is interposed to the complaint. The rules by which the credit of witnesses is to be determined, will be found *ante*, 525 to 545.

The trial of a cause before a justice alone, is conducted substantially like a trial before a jury. And after the evidence is closed, both parties have a right to be heard in relation to their views of the evidence and the law of the case. This is a right which cannot be denied to either party, and if it is, it will be error. And if a justice enters up judgment while one of the parties is summing up the cause, it is an error for which the judgment will be reversed. *Prentiss* v. *Sprague*, 1 Hilt., 428. There may be cases which seem to be so plain that argument will not change the opinion of the justice, and yet he may entertain a most erroneous impression of the case. And even when the

party arguing is entirely mistaken, he still has a right to be heard, for no man is to be condemned criminally, nor affected materially in his interests or rights by a court of law, without first having an opportunity for a full and a fair hearing. "He who decides a cause without hearing both parties, though his decision may be just, is himself unjust." 4 Bla. Com., 283, note 5; *Bagg's case*, 11 Coke, 99, b.; *King* v. *Gaskin*, 8 Term, 209. After hearing the evidence and the arguments which may be made by the parties or their counsel, the justice must proceed to decide the cause. For this purpose he has four days during which he may deliberate. And when the parties expressly stipulate that the justice may take more than four days during which to render judgment, the agreement is valid. *Barnes* v. *Badger*, 41 Barb., 98; and see Judgment. The first point to which he should turn his attention is to ascertain and determine what facts have been established on the trial. No question of law can arise until the questions of fact are settled, for questions of law are always founded upon facts conceded by the parties, or established by a trial. The justice should first examine whether the plaintiff's allegations have been admitted, or established by the evidence. If they have, then the legal questions relating to such facts may be decided. If such facts have not been conceded nor proved, the plaintiff's case will generally fail for want of proof. But even if a plaintiff has established all the allegations in his complaint, it does not follow that he will, in all cases, be entitled to a judgment in his favor. For it may happen that the defendant has interposed a defense which concedes the truth of the allegations in the complaint, but answers them by showing new matter which constitutes a perfect defense. And, therefore, when an affirmative defense is set up, and the plaintiff's case is admitted or proved, it will then become necessary to examine the evidence to see if the defense is proved. If it is then the legal questions applicable to it will arise. But if such defense is not proved or admitted, the defendant will fail for the same reason that a plaintiff does not succeed when he does not prove his case. A plaintiff may have a complete reply to the defense interposed, either by way of denial or by new matter; and if it consists of new matter, he must prove it affirmatively, as in the case of any other affirmative matter. After thus examining the whole issues and the evidence bearing upon them, the justice will decide the questions of fact. And next he will turn his attention to the rules of law which are applicable to the facts so found; and when he has examined the whole matter as to the evidence and the law, he will render such judgment as his judgment and conscience declare is consonant to justice and law.

CHAPTER IV.

TRIAL BY JURY.

SECTION I.

GENERAL PRINCIPLES.

Either party may demand a trial of the action by jury, if such demand is made in proper time and manner. It is too late to call for a venire if the trial of the cause has already been commenced before the justice alone. Vol. I, 51, § 83. But it is only questions of fact that can be tried by a jury. An issue of law arising upon a demurrer to a pleading, must be determined by the justice. *Ante*, 330. There must be an issue of fact joined, before a jury can be called or impanneled. For, though it is not indispensable that an issue should be joined to authorize a justice to proceed and take the evidence on the part of the plaintiff, and render a judgment, *ante*, 584, yet an issue of fact is indispensable to a jury trial. Vol. I, 51, § 83. *Manny* v. *Dobie*, 3 Caines, 219; *Mead* v. *Darragh*, 1 Hilt., 395. In one case a return on an appeal showed that the defendant did not appear on the return of the summons; that no pleadings were put in; that the justice received a statement of facts by a person who claimed to be an attorney of the defendant; that no witnesses were examined; and that on these facts a judgment was rendered in favor of the plaintiff, and it was held that the judgment was erroneous. *Heidenheimer* v. *Lyon*, 3 E. D. Smith, 54. When an issue of fact has been joined, a trial by jury is a matter of right, if properly demanded. *Meech* v. *Brown*, 1 Hilt., 257: *S. C.*, 4 Abb., 19. And it is not necessary to take any exception to the decision of the justice if he refuses to issue a venire. *Ib.* The provisions of the statute as to trials by jury have been given in full, Vol. I, 51–54; §§ 81 to 103 inclusive, and they will not be repeated here. A venire may be demanded at any time after issue joined, and before the trial has actually commenced before the justice. It may be demanded by either party, and it will be deemed the process of the party who first demanded it, notwithstanding both parties should demand that a venire should be issued. The statute requires a venire to command the constable to summon twelve good and lawful men, in the town where such justice resides, qualified to serve as jurors and not exempt from serving on juries in courts of record, who shall be in no wise of kin to the plaintiff or defendant, nor interested in the suit. Vol. I, 51, § 84. The statute relating to the qualifications of jurors in courts of record are as follows. They must be:

"1. Male inhabitants of the town, not exempt from serving on juries.

"2. Of the age of twenty-one years and upwards, and under sixty years old.

"3. Who are at the time assessed for personal property belonging to them in their own right, to the amount of two hundred and fifty dollars; or who shall have a freehold estate in real property in the county, belonging to them in their own right or in the right of their wives, to the value of one hundred and fifty dollars.

"4. In the possession of their natural faculties, and not infirm or decrepit.

"5. Free from all legal exceptions, of fair character, of approved integrity, of sound judgment and well informed." 3 R. S., 695; § 5, 5th ed.

"Every person residing in either of the counties of Niagara, Erie, Chautauqua, Cattaraugus, Allegany, Genesee, Orleans, Monroe, Livingston, Jefferson, Lewis, St. Lawrence, Steuben and Franklin, who does not possess either of the qualifications specified in the third subdivision of the last section, but is qualified in all other respects, and who shall have been assessed on the last assessment roll of the town for land in his possession which he holds under contract for the purchase thereof, upon which improvements shall have been made to the value of one hundred and fifty dollars, and who shall own such improvements, shall be deemed qualified to serve as a juror; and the town officers authorized to select and return jurors, may take the names of such jurors."

"Every person residing on the New Stockbridge tract, in the towns of Vernon and Augusta in the county of Oneida, and Lenox and Smithfield in the county of Madison, who shall be in possession of lands under a contract for the purchase thereof, and shall be worth one hundred and fifty dollars in personal property, or shall have made improvements on such lands to that amount, shall, if otherwise qualified according to law, be qualified to serve as a juror in any court holden before any justice of the peace within the town." 3 R. S., 696, § 6, 5th ed.

It will be seen that the statute requires that a person shall be assessed for the requisite amount of property before he is a competent juror. Above, § 5, sub. 3. But in the city of New York such assessment is not necessary, if the party possesses the other qualifications of a juror. 3 R. S., 697, § 14, 5th ed. Jurors must be residents of the town in which the justice resides, unless the action is between two towns, in which case the jurors must be summoned from other towns in the same county. Vol. I, 51, 52, §§ 84, 87. There are numerous classes of persons who are exempt from serving on juries, and the statute has provided general rules, as follows:

"The court shall discharge any person from serving on a jury, in the following cases:

"When it shall satisfactorily appear that such person is not, at the time, the owner, in his own right or in the right of his wife, of a freehold estate in real property, situated within the county, of the value of one hundred and fifty dollars, and is not the

owner of personal property to the value of two hundred and fifty dollars, and in the counties in the preceding fourteenth section, that such person is not possessed of the property qualification required;

"2. When it shall appear that such person is under twenty-one years of age, or over sixty years of age; or that he is not in the possession of any of his rational faculties;

"3. When there is any legal exception against such person;

"4. When such person is a non-commissioned officer, musician or private of any uniform company or troop, and is duly equipped and uniformed, according to law, and shall claim such exemption.

"The evidence of such exemption shall be the certificate of the commanding officer of the company or troop, that the person claiming the same is a member of such company, and is duly equipped and uniformed according to law. Such certificate must be dated within three months of the time of presenting the same, and the signature must be verified by oath. Every such certificate shall be filed with the clerk of the court to which it shall be offered;

"5. When such person is a member of any company of firemen, duly organized according to law;

"6. When such person is in the actual employment of any glass, cotton, linen, woolen or iron manufacturing company, by the year, month or season;

"7. When such person is a superintendent, engineer or collector of any canal authorized by the laws of this state, any portion of which shall be actually constructed and navigated;

"8. When such person is a minister of the gospel, or teacher in any college or academy, or when such person is or shall be specially exempted by law from serving on juries." 3 R. S., 713, § 99, 5th ed.

Among the persons who are thus specially exempted by law are the following:

"Every collector of tolls, the clerks of each collector, not exceeding two, having the collector's certificate that they are actually employed by him, and all superintendents of repairs, lock-tenders, inspectors of boats and weigh-masters, shall be exempted from the performance of military duty and jury service, while actually engaged in their respective employments on the canals, while the same are navigable." 1 R. S., 639, § 348, 5th ed.

"The superintendent and each of his deputies, and all persons employed in attendance upon any works for the manufacturing of coarse salt, shall be exempt from serving on juries, and from all military service, except in case of actual invasion or insurrection; and the commission or appointment in writing of any such officer or deputy, and the certificate of any owner or agent of any coarse salt manufactory, that any person is so employed or engaged in attending upon such manufactory, shall be evidence of the facts stated therein." 1 R. S., 680, § 236, 5th ed.

"The resident officers of the state lunatic asylum, and all

attendants and assistants actually employed therein during the time of such employment, shall be exempt from serving on juries, from all assessments for labor on the highways, and, in time of peace, from all service in the militia; and the certificate of the superintendent shall be evidence of the fact of such employment." 2 R. S., 887, § 26, 5th ed.

"All general and staff officers, all field officers, and all commissioned and non-commissioned officers, musicians and privates of the military forces of this state, shall be exempt from jury duty during the time they shall perform military duty." 1 R. S., 739, part of § 15, 5th ed.

The officers and men organized as guards of the Auburn or Sing Sing state prisons are exempt from jury duty so long as they continue to be members of such companies. 3 R. S, 1095, § 139, 5th ed. So of the firemen belonging to the fire company organized in the vicinity of Auburn. 3 R. S., 1097, § 153, 5th ed.

The keeper of every county or state prison, and all persons employed in any such prison, shall be exempted, during their continuance in office, from serving on juries and from military duty. 3 R. S., 1100, § 171, 5th ed.

Seventh day Baptists, and others who keep Saturday as the Sabbath, are exempt from serving on juries on Saturday. Laws 1847, ch. 349, § 1. So the keeper of every poor house or alms house, or other place provided by any city, town or county for the reception and support of the poor, are exempt from jury duty. 2 R. S., 855, § 95, 5th ed. An alien is not a competent juror. 3 R. S., 8, § 42, 5th ed.

Firemen who have served as such for five years in any city or village of this state are exempt from any jury duty thereafter. Laws 1848, ch. 188, § 1.

In New York city no fireman is exempt from serving on a jury unless he actually performs all the duties of a fireman, and produces a certificate from the foreman or other chief officer of his company, showing that he is a faithful and acting member. 3 R. S., 700, § 30, 5th ed.

Idiots, insane persons, and all others who are not in the possession of their natural faculties, and all persons convicted of an infamous crime, are incompetent jurors.

Courts, also, have power, in certain cases, to excuse some individuals from serving on a jury, although they may not have a right to be exempted absolutely by law. The statute provides:

"The court to which any person shall be returned as a juror shall excuse such juror from serving at such court, whenever it shall appear:

"1. That he is a practicing physician, and has patients requiring his attention; or,

"2. That he is a surrogate, or justice of the peace, or executes any other civil office, the duties of which are, at the time, inconsistent with his attendance as a juror;

"3. That he is a teacher in any school, actually employed and serving as such;

"4. When, for any other reason, the interests of the public, or of the individual juror, will be materially injured by such attendance, or his own health, or that of any member of his family, requires his absence from such court." 3 R. S., 714, § 101, 5th ed.

No constable ought to summon any person as a juror whom he knows to be exempt, or to be incompetent to serve on a jury. He is bound by his oath to discharge this duty, like all others, according to the best of his ability. And his process commands him to summon good and lawful men, who are not interested or related to either party.

Form of a venire.

COLUMBIA COUNTY,
TOWN OF KINDERHOOK, } *ss:*

The People of the State of New York, to any constable of said county GREETING: You are hereby commanded to summon twelve good and lawful men of the said town, qualified to serve as jurors, and not exempt from serving on juries in courts of record, who shall be in no wise of kin to John Doe, plaintiff, or Richard Roe, defendant, nor interested in the suit, to appear before me, the undersigned, a justice of the peace in the said town and county, at my office in said town, on the 26th day of June, 1865, at one o'clock in the afternoon, to make a jury for the trial of a civil action now depending between the said parties before me, and then and there to be tried. And have you then and there the names of the jurors you shall summon, together with this precept. Given under my hand at Kinderhook, this 24th day of June, 1865.

JAMES MILLER, *Justice.*

Return to a venire.

By virtue of the within venire, I have personally summoned as jurors the several persons in the annexed list. Dated June 26th, 1865.

A. B., *Constable.*

Six jurors is the number which the law intends as a full jury for the trial of an action in a justice's court. The statute provides that the parties may agree upon a less number of jurors; and it implies that such agreement is to be made before the venire is issued, since it declares that the venire need not require any greater number of jurors to be summoned than double the number agreed upon to try the cause. Vol. I, 52, § 86. But such an agreement will be equally valid, although not made until the time of impanneling the jury. *Carman* v. *Newell*, 1 Denio, 25; *Keeler* v. *Delavan*, 4 Barb., 317.

Any irregularity in the impanneling of a jury may be waived by the parties. And, where a cause was tried before issue was joined, for want of an answer, but the defendant litigated the cause, and introduced evidence on the trial, this was held to be a waiver of the irregularity. *Keeler* v. *Delavan*, 4 Barb., 317; *Dayharsh* v. *Enos*, 1 Seld., 531.

So the parties may waive any irregularity in the manner of summoning the jurors, or any question as to the competency of the individual jurors. *Tallman* v. *Woodworth*, 2 Johns., 385; *Kittle* v. *Baker*, 9 Johns., 354; *Phinney* v. *Earle*, 9 Johns., 352.

This waiver may be in express terms, or it may be implied from the act of going on with the trial without making any objection. *Watkins* v. *Weaver*, 10 Johns., 107. And every objection to the competency of a juror will be waived by neglecting to appear at the trial and taking the objection there, since the objection cannot be made for the first time on an appeal from the judgment. *Clark* v. *Van Vrancken*, 20 Barb., 278; and see *Eggleston* v. *Smiley*, 17 Johns., 133.

The justice is required to deliver the venire, or to cause a delivery of it to be made, to some constable of the county, who is disinterested between the parties, and against whom no reasonable objection shall have been made by either party. Vol. I, 52, § 88.

If a constable has been employed to act, or has acted, as an agent or attorney in respect to the claim or matter in controversy, he cannot be employed to summon a jury to try such claim. Vol. I, 52, § 85. The language of the statute is broad, and it is also imperative that such a constable shall not be employed to summon the jury. Any constable may properly act as an agent or as an attorney for a plaintiff in his attempt to obtain what he believes to be his just due. But a constable who has been so employed would be apt to have quite too much feeling and interest in the matter to summon a jury with entire impartiality. If a constable appears and acts as advocate for either party at the trial, he cannot serve the venire. Vol. I, 44, § 42, and *ante*, 224, Appearance.

A justice ought not to deliver a venire to a constable for service until the parties have had a proper opportunity to make all reasonable objections to such officer. *Rice* v. *Buchanan*, 41 Barb., 147. And where a venire was issued by a justice, on the demand of the defendant, out of court, and in the absence of the plaintiff, and was delivered to a constable without the knowledge of the plaintiff, or any notice to him of the application therefor, it was held that the justice did right to set aside the venire and the panel of jurors returned by the constable, on a motion made by the plaintiff for that purpose; and that he was authorized to issue a new venire in the place of the one thus set aside. *Ib.*, and see *Mead* v. *Darragh*, 1 Hilt., 395. If either party desires to take out a venire between the time of the joining of issue, or of adjournment, and the time of trial, he ought to be required to give the opposite party a reasonable notice of the time and place of making such application to the justice. *Ib.* The case of *Rice* v. *Buchanan*, already cited, will well repay a careful perusal by those interested in the question.

As to what is a reasonable objection to a constable within the meaning of the statute, no precise rule can be laid down. But, if either party can show, or if it is evident to the justice, in any

manner, that any particular constable has a feeling of enmity or unfriendliness towards one of the parties, or a feeling of friendliness and interest in favor of the other, then such constable ought not to serve the venire.

There is now, and there always has been too much indifference on the part of justices as to the manner in which this duty is discharged by constables. Nothing is more conducive to justice and to a fair and impartial administration of the law, than to see that all the proceedings are conducted by honest and impartial officers. No person of any experience as an attorney or counselor has failed to see, and to feel, at times, that partiality and partisanship had its influence in selecting the jury. And the only safe and reliable remedy for such evils must be found in an intelligent and an upright magistracy.

The statute imperatively commands the constable to execute a venire fairly and impartially; and, not only that, he is forbidden to summon any person whom he has reason to believe biased or prejudiced for or against either of the parties. Vol. I, 52, § 89. It is a part of the justice's duty to select a constable who will strictly comply with the commands of the statute.

When either of the parties can state any reasonable ground of objection against a particular constable, the venire ought not to be given to him, but to some other officer against whom neither party can have any just grounds of objection. The statute does not require that either party should state his objections under oath. But every person who makes an objection in good faith will be entirely willing to swear to the truth of his statements. A refusal to state the objection on oath, would naturally excite the suspicions of a justice, while a full and fair statement of the facts and reasons might carry conviction that the objection was a valid one.

Form of Oath.

You do swear that you will answer truly all such questions as shall be put to you, in relation to the reasons why A. B. should not execute the venire in this cause.

After hearing a full statement of these reasons, the justice must decide whether the venire shall be delivered to the officer objected to. And he ought to remember that the very fact of objecting to a constable may have a tendency to create a prejudice in the mind of the officer against the objecting party. And, in these cases, if the justice doubts the impartiality of the constable, the better way will be to give the process to some other officer. More has been said upon this subject than might seem necessary. But the experienced members of the legal profession, and the judges who have frequently been called upon to review the judgments rendered in justices' courts, will not complain that too much has been said, especially if some of the evils may be remedied as a consequence of the suggestions here made.

If a constable willfully and corruptly summons a packed or

partial jury, in violation of his duty as an officer and in violation of the statute, and of the rights of the injured party, he is indictable for the misdemeanor.

The several jurors must be summoned personally, and the constable must make a list of the persons summoned, which he must certify and annex to the venire, and return to the justice with the venire and his return thereon. Vol. I, 52, § 89. This list of jurors may be written on the back of the venire, if there is sufficient room for that purpose; or it may be written upon a separate piece of paper, and then attached to the venire. The service of the venire may be made either by reading or by stating its contents to each of the persons summoned as a juror.

The jurors should be summoned at such a time as to give them a reasonable opportunity for attending; and care should be taken to state distinctly the name of the justice who issued the venire, as well as the time and place of trial.

If a trial by jury is demanded by either party, and a venire is issued, the cause must then be tried by a jury, unless it is waived by the party who made such demand, with the consent of the other party. For, after a jury has been called for and summoned, either party may insist that the trial shall be by jury. This is evident from the fact that either party may demand a jury at any time before the trial has actually commenced. Vol. I, 51, § 83. And to insist upon a trial by the jury summoned at the request of the opposite party, would be a valid demand of a jury trial.

A jury trial may be waived by consent even after a jury is summoned.

A party who calls for a jury may waive or forfeit his right to it by his own conduct. If the venire is delivered to a defendant instead of a constable, and the party suppresses the venire, and he does not appear at the trial, nor does any jury appear, this conduct is equivalent to a waiver of a jury trial, and the justice may proceed, and try the cause without any jury. *Coon* v. *Snyder*, 19 Johns., 384. In such a case, however, the justice may issue a second venire, if the first one is mislaid, kept, or withheld by the party who called for it, and to whom it was delivered. *Day* v. *Wilber*, 2 Caines, 134, 137. And when it does not appear that the party has improperly suppressed the venire in such a case, the justice is bound to issue a new venire, if the defendant demands it, and to try the cause without a jury, under objection to that course, would be error. *Sebring* v. *Wheedon*, 8 Johns., 460. But where a defendant demanded a venire, which was issued, but the jury did not appear at the proper time, nor was the venire returned, and the defendant demanded a nonsuit for that reason, but he did not demand a new venire, and the justice proceeded to the trial of the cause without a jury, this was held to be proper. *Blanchard* v. *Richly*, 7 Johns., 198.

In an other case the defendant demanded a jury, and a venire was issued. At the trial but five jurors answered, the sixth one being unable to attend on account of his sickness. The defend-

ant refused to try the cause with five jurors, and objected to a new venire, and he also refused to have a talesman called. And at his request the five jurors were dismissed by the justice. The plaintiff insisted upon an immediate trial, but the defendant objected to that, and asked an adjournment. The justice offered to grant the adjournment upon terms which the defendant rejected. The defendant insisted upon a jury trial, but only on an adjourned day. The justice offered the defendant a new venire returnable forthwith, which was refused. The justice then proceeded to the trial without a jury, and this was held to be proper, and that the conduct of the defendant amounted to a waiver of a jury. *Babcock* v. *Hill*, 35 Barb., 52.

The parties may, by consent, dispense with a jury at any time before a verdict is rendered. And where a jury cannot agree upon a verdict, the parties may submit the cause to the justice, who may render judgment upon the evidence given before him on such jury trial. Vol. I, 54, § 102.

A justice cannot, in any case, require that a cause shall be tried by a jury. That is a right which the statute confers upon either of the parties, but not upon a justice. And even when a jury has been demanded and summoned, and the jurors have appeared, the parties may consent to waive a jury, because they may waive any benefit which the statute has given to them, if they so elect. In such a case the justice must dismiss the jury, and try the cause himself, for he has no more power to insist upon retaining a jury against the consent of the parties, than he had to order a jury without their request.

After the return of the venire with a list of jurors summoned, the first duty of the justice is to call over the list of jurors, and to write down the names of such as appear, and to note the names of those who do not appear. The names of the jurors who appear are to be written on several and distinct pieces of paper, as nearly of one size as may be, and the constable, in the presence of the justice, shall roll up or fold such pieces of paper as nearly as may be in the same manner, and put them together in a box, or some convenient thing. Vol. I, 52, § 90. In ordinary cases the justice then draws out the names of six of the persons so summoned as jurors, whose names have been so put in the box, or other thing. Vol I, 51, § 91. If any of the persons so drawn are challenged, and set aside, on motion of either party, the justice must continue drawing until a sufficient number is obtained against whom no objection is made. If the parties have agreed to try the cause with less than six jurors, the justice will draw until the agreed number is obtained. The persons so drawn, in either case, will be the jury for the trial of the cause. If a sufficient number of jurors cannot be drawn from the written number, on account of the incompetency of the persons drawn, or on account of challenges made by either or both of the parties, the justice may supply the deficiency by directing the constable to summon any of the bystanders or others, who are competent

to serve as jurors, and against whom no cause of challenge may appear. A *tales* is a supply of such men as are necessary to make up a deficiency of jurors. Such supplementary men are called *talesmen*, and are commonly taken from the bystanders or persons in court. A tales may be awarded if one only of the regular jurors appears; and it is said that at common law a jury might be composed entirely of talesmen. *Denbawd* v. *Woodley*, 10 Coke, 102. Either party has a right of challenge against any person who may be drawn in either mode, if the cause of challenge is a legal one. And he may use his peremptory challenges without any cause if he is so inclined. When the venire is not returned by the constable to whom it was delivered, or when a full jury has not been obtained from the panel returned, together with the talesmen summoned from the bystanders, the justice must issue a new venire. Vol. I, 53, § 93. The jurors who have been selected will be retained, and the justice must hold open the court while the new venire is being served, and until the return of the jurors so summoned. The qualifications of the jurors must be the same as those summoned upon the original venire. The venire, however, will differ somewhat in its form from the ordinary venire. For, instead of commanding the constable to summon twelve jurors, it will direct him to summon "*two good and lawful men*," &c. (or such other number as is needed), "*to make so many of a jury*," &c. A new venire may be issued from time to time, as frequently as may be necessary, in order to procure a full jury of competent persons. If a venire is not returned, or if it is quashed on account of partiality in the constable, or if there are no persons who appear, or if so many are challenged and set aside as to prevent the drawing of a full jury, and sufficient talesmen are not present, the justice must issue a new venire. Such second venire will be deemed the process of the party who demanded the first one. *Day* v. *Wilber*, 2 Caines, 134, 137. The jurors who appear upon a second or subsequent venire are not balloted for as is done upon the first venire. As their names are called either party may challenge them according to law, and if no challenge is interposed the juror will take his place as a juror.

Of challenges.] The law furnishes every facility for securing an impartial trial by jury. And if a jury has been improperly and unfairly selected, the entire panel may be set aside. So, if either of the jurors is incompetent, or if there is legal cause why he should not sit as a juror, he may be rejected. Such objections ought, however, to be taken at the earliest opportunity. And a challenge to the array, or to individual jurors, must be taken before the jury is sworn.

The manner of making a challenge is to state, orally, to the justice the precise grounds of objection, whether made to the array or to an individual juror. It will be convenient, as well as proper, for the justice to take down the objection in his minutes. This question is to be immediately tried.

A challenge to the *array* is an exception to the whole panel of

jurors, on account of partiality or corruption in the constable who summoned the jury.

A challenge to the *polls* is an exception to any one or more of the individuals returned as jurors on the ground that they are not competent jurors, or that they are not indifferent between the parties.

A *peremptory* challenge is the right which the law gives for setting aside a person without giving any reason whatever, except the will of the challenging party.

A challenge *for cause* is one in which the party shows the cause or reason why a panel ought to be quashed or a juror ought not to sit.

A *principal* challenge is one in which, if the facts alleged are true, it is sufficient in law of itself, without leaving anything to the conscience or discretion of the triers.

A challenge *to the favor* is where no principal challenge can be made, but an objection is raised that the juror is not indifferent, or that the officer who summoned the jury is not impartial, which questions are to be left to the decision of the triers.

Challenge to the array.] A challenge to the array may be either a principal challenge or a challenge to the favor. The grounds of challenge are very numerous. Though the more common grounds of principal challenge to the array are the following: It is a ground of principal challenge to the array that the opposite party nominated any of the jurors summoned; that the constable is the servant, counselor or attorney, or acts as advocate of the opposite party, Vol. I, 52, § 85; Id., 44, § 42; that the constable is interested in the result of the cause, when that interest is adverse to the challenging party; that an action is pending between the constable and the party challenging, if the action implies malice, such as assault and battery, slander, intentional trespass, or injury to real or personal property, and the like cases; that there is a relationship by consanguinity between the constable and the opposite party within the ninth degree, or even however remote the relationship may be. So, relationship by affinity is a principal ground of challenge. So, it is a principal cause of challenge that the constable permitted any person to make the panel, for it is the duty of the officer to do this without any interference on the part of any person whatever. A principal challenge will be sustained whenever the facts show clearly that there is such a partiality as is inconsistent with a fair trial, by reason of a partial or improper selection of jurors. A challenge to the array for favor is founded upon the same principle that a challenge to the favor is sustained when made as to an individual juror. If the constable is biased or partial to one party, or is unfriendly, or in litigation with the other, or if there are any reasons why he is not indifferent between the parties, the challenge ought to be sustained, and the array quashed, so that a new jury may be summoned by one whose impartiality is unquestioned.

A challenge to the polls is an exception to the jurors individually, whether they were summoned upon the original venire, or as talesmen, or upon a new venire. The same causes which are good ground of principal challenge to the array are equally valid as against any individual juror. The statute has provided as to the competency of jurors in certain cases: "No inhabitant of any town, city or county shall be disqualified as a juror or witness in any cause brought to recover any penalty or forfeiture, on the gound that such penalty or forfeiture is to be applied for the benefit of such town, city or county, or for the benefit of the poor thereof; nor shall any officer, on such ground, be disqualified from serving any process for the summoning of a jury in such cause." 3 R. S., 865, § 2, 5th ed.

"In penal actions for the recovery of any sum it shall not be a good cause of challenge to the jurors summoned, or to any officer summoning them, that such juror or officer is liable to pay taxes in any town or county which may be benefited by such a recovery." 3 R. S., 718, § 124, 5th ed.

"On the trial of every action in which a town shall be a party, or be interested, the electors and inhabitants of such town shall be competent witnesses and jurors, except that in suits and proceedings by and against towns no inhabitant of either town shall be a juror." 1 R. S., 837, § 4, 5th ed.

The causes of principal challenges to the polls are numerous. And, first, it is always a principal challenge to the polls that the juror is not competent because he is not such a juror as the statute requires. The statutory qualifications will be found in the statute. *Ante*, 589, 590, §§ 5 and 6. It is a principal cause of challenge that a juror does not possess the property qualification required by the statute, or that he is an alien, *ante*, 590, 592; that he is under the age of twenty-one, or over the age of sixty years; that he is an idiot or a lunatic. A person in a state of intoxication is unfit to discharge the duties of a juror, and the justice may, on his own motion, set aside such a juror and refuse to swear him. *Bullard* v. *Spoor*, 2 Cow., 430. But a matter which merely *exempts* a person from serving on a jury, for some reason personal to the juror himself, is not a cause of challenge by the parties, if he is otherwise legally qualified. And it is sometimes said that a person who is thus exempt cannot refuse to sit if there are not jurors enough without him, provided he has been summoned and appeared. This is quite strange, if true. A party who is *legally exempt* from jury duty cannot claim his exemption if he appears in court! It may be that he has appeared there for the express purpose of claiming his exemption, and for showing that he has good grounds therefor. If the statute clearly and explicitly *exempts* him from serving on a jury, no court has a right to compel him to perform jury duty. See *ante*, 590, 591, § 99. There may be cases in which a justice has a discretionary power to excuse a person from serving as a juror, and in which, if he refuses to discharge such juror or exempt him,

he may be required to serve on a jury. *Ante*, 592, 593, § 101. But even in such cases, the statute declares that the court shall excuse such juror when the facts are shown which excuse him.

It is a good ground of principal challenge to a juror, that he is a tenant of the opposite party. *Hathaway* v. *Helmer*, 25 Barb., 29. So, it is a good ground of principal challenge that the juror has expressed an opinion upon the question in controversy. *Blake* v. *Millspaugh*, 1 Johns., 316; *Lord* v. *Brown*, 5 Denio, 345. A juror who has formed an opinion upon a statement of facts made to him by one of the parties, is not competent. *Rogers* v. *Rogers*, 14 Wend., 131. But a mere hypothetical expression of an opinion, which is founded upon mere rumor, stands upon different grounds. And where a juror had expressed an opinion that one of the parties was in the wrong, but he stated, at the same time, that he had no personal knowledge of the matter, and that if the reports of the neighbors were correct the defendant was wrong, and the plaintiff right, this was held not to be a ground of principal challenge. *Durrell* v. *Mosher*, 8 Johns., 445. But when a juror has formed a decided opinion upon the questions in the case, he is not an impartial and competent juror. A juror was called and was challenged for principal cause. He was sworn as a witnesss, and testified, on his direct examination, that he had formed an opinion and expressed it; but, on his cross-examination, he said that he had no fixed opinion, none which could not be removed by evidence. He was held incompetent, and the court said: "His mind was preoccupied with an opinion upon the issues to be tried, which it would require evidence to remove; and that, upon principle and by all the cases, incapacitated him for a juror." *Camcemi* v. *People*, 2 E. P. Smith, 501, 505. Relationship, either by consanguinity or by affinity, is a cause of principal challenge. *Ante*, 24. And whenever it is evident, from the facts admitted or proved, that the juror is interested in the result of the action, or that there is a clear and certain bias in his mind in favor of one of the parties, from whatever cause, that is sufficient to disqualify him from serving as a juror.

Challenges to the polls for favor may arise from so many causes that it is not possible to enumerate them. A juror ought to be above all exception as to his impartiality. The law does not intend that a cause shall be tried by any juror who is not entirely indifferent between the parties. His fairness and impartiality, ought to be above all suspicion. There is no general rule which declares what particular acts or things are such evidence of favor or partiality as to disqualify a juror. The feelings, the affections and the prejudices of men are so various, and so easily influenced by circumstances, that it is peculiarly a question for the triers, on all the evidence, whether the juror stands indifferent between the parties. Where a juror is an intimate friend of one of the parties, and a stranger or an enemy to the other, he would scarcely be called entirely indifferent. So, if one of the parties and the juror are interested in the result of pecuniary affairs

between them, as where the juror is indebted to the party, or the party to the juror. Or, if there is an intimate family relation existing between the party and the juror; or, if there is a personal enmity or a family dispute, in all such cases it is a question for the triers to determine whether such facts do not furnish evidence of the impropriety of permitting such a person to occupy a seat as a juror. It is not necessary to show clearly that a juror is partial, interested, or that he has a feeling in favor of the success of one of the parties in order to set him aside. If the evidence is such that it raises a fair and reasonable doubt in the minds of the triers whether the juror is indifferent, he ought to be set aside. *Smith* v. *Floyd*, 18 Barb., 522; *Freeman* v. *People*, 4 Denio, 35, 9. A hypothetical opinion is not a ground of principal challenge, but on a challenge to the favor, the triers may find that such a juror is not indifferent. *Ib.* And if the justice should instruct the triers, as a matter of law, that a hypothetical opinion does not disqualify a juror, it will be error. *Ib.* The question, in such a case, is one for the triers, on all the evidence given to them. It is for the justice to decide what evidence shall be given, but it is for the triers to determine the question whether the juror shall try the cause. *Ib.* It is no impeachment of a juror to decide that he is not indifferent. There may be such an intimate friendship or so close a relationship, between one of the parties and a juror as to render the latter an incompetent juror, and yet that is no discredit to the person set aside. The influence of such relations is excedingly great, and many times it is not appreciated by the person who is most influenced in consequence. The declaration of Lord COKE is a most salutary one: "The rule of law is, that the juror must stand indifferent, as he stands unsworn."

Time of making a challenge.] Until a full jury of six persons have appeared no challenge can be taken, either to the array or to the individual jurors. *King* v. *Edmonds*, 4 Barn. & Ald., 471; *Vicars* v. *Langham*, Hob., 235; 2 Hawk., c., 43, § 1. In such a case a sufficient number of talesmen ought to be summoned to complete the number required. *Ib.* The parties may waive the enforcement of this rule if they choose. And, in common practice, it is not insisted upon, but the challenge to the array is made upon the return of the venire; and the individual jurors are frequently challenged as they are called to take their seats, if challenged at all. If there are several grounds of challenge, either to the array or to the polls, the causes of challenge must all be stated at once, or those not stated at first will be waived. A party is not permitted to try one ground of challenge, and, if that fails, then to interpose an other and then try that, and thus try the matter by piecemeal. If one party challenges a juror and he is found indifferent, this will not prevent the opposite party from challenging the same juror, in the same manner as though he had not been previously challenged. The order of making challenges is important. A challenge to the array cannot be

taken after a challenge to the polls. *Mayor of New York* v. *Mason*, 4 E. D. Smith, 143, 152, 153; Co. Litt., 158, *a*. A challenge to the array may be made at any time before one of the jurors is sworn, and a challenge to the polls may be made any time before the challenged juror is sworn. *Ib.;* Penning. on Small Causes, 170. After a juror is sworn it is too late to challenge him; and any objection to him is waived, even when the defendant does not appear at the trial. *Clark* v. *Van Vrancken*, 20 Barb., 278; *Eggleston* v. *Smiley*, 17 Johns., 133.

It is immaterial which of the parties makes his challenge first. And if the parties disagree upon that point, it is a question for the justice to settle. In strictness, the party who makes the first challenge is bound to complete his challenges before the other party commences. But this rule cannot be so applied as to prevent both parties from having an opportunity of challenging either of the jurors called. Suppose that a defendant should challenge several jurors, and that finally six jurors were empanneled who are entirely satisfactory to him; the plaintiff may then challenge any or all of the six jurors, and if some of them are set aside on his challenge, then other jurors must be called to supply the deficiency in the panel. The plaintiff may challenge any of the new jurors thus summoned, until a full jury is obtained, when the defendant will be entitled to challenge any of the new jurors then called. And so each party may alternately continue his challenges, until he has had an opportunity of objecting, at some time, to each of the jurors called. In ordinary cases there is no strictness as to the practice on this point, and either party challenges such jurors as he deems objectionable, without regard to the question whether the opposite party has finished his challenges or not. The important object to be attained, is to secure to each party a full opportunity for making all legal challenges.

The challenges of the party who first challenged will be entitled to be first tried. A challenge, whether in writing or by parol, must be in such terms that the court can see, in the first place, whether it is for principal cause or to the favor, and so determine by what forum it is to be tried; and, secondly, whether the facts, if true, are sufficient to support that challenge. Again, the challenger must state why the juror does not stand indifferent; he must state some facts or circumstances which, if true, will show either that the juror is positively and legally disqualified; or which create a probability or suspicion that he is not, or may not be, impartial. In the former case, the challenge would be a principal one, triable by the court; in the latter, it would be to the favor, and submitted to triers. *Freeman* v. *The People*, 4 Denio, 32, opinion; *Mann* v. *Glover*, 2 Green's R., 195; and see *Pringle* v. *Hulse*, 1 Cow., 432. When the facts are stated, the opposite party may take issue as to their truth, by denying them. If denied, it is a question to be decided upon the evidence; if admitted, it is a mere question of law for the court to decide, as it would a question raised by a demurrer. *The People*

v. *Vermilyea*, 7 Cow., 108. An erroneous decision upon the law as to the competency of a juror may be corrected on an appeal. *Ib.; The People* v. *Freeman*, 4 Denio, 10; *Hathaway* v. *Helmer*, 25 Barb., 29.

A principal challenge, either to the array or to the polls, must be tried by the justice alone, upon such evidence as may be given; or upon a demurrer to a challenge, which is an admission of the facts stated in the challenge. If witnesses are sworn, the oath may be as follows:

Oath to witness.

You do swear that you will answer truly all such questions as may be put to you in relation to the challenge now depending and on trial.

On the trial of a challenge to a juror, such juror may himself be called as a witness to testify as to his competency to sit as a juror. And he may be asked whether he has formed or expressed an opinion in relation to the merits of the cause, or in favor of one of the parties. *Pringle* v. *Hulse*, 1 Cow., 432; *The People* v. *Vermilyea*, 7 Cow., 108 So, he may be examined as to having formed an opinion, which, if he had done, would disqualify him, although he had not expressed such opinion. *The People* v. *Mather*, 4 Wend., 230. Not only may a principal challenge be tried by the justice, but, if the parties choose, they may also try a challenge to the favor in the same manner, instead of calling triers. *Ib.* And if the evidence upon the question is given before the justice without calling triers, he may decide upon the competency of the juror, and his decision will be final. Trying the question thus, without calling for triers, is a waiver of them. *Ib.* A juror may be required to testify as to any facts which affect his competency, except such as would tend to his infamy or disgrace, or subject him to punishment or to a penalty. He may be asked whether he is a freeholder or not, or any other question as to his qualifications which the statute requires. *Ogden* v. *Parks*, 16 Johns., 180; *Fenwick* v. *Parker*, 3 Code Rep., 254.

Oath to juror.

You do swear that you will answer truly all such questions as may be put to you in relation to your competency as a juror in this action between A. B., plaintiff, and C. D., defendant.

A challenge to the array for favor in the constable is triable by triers, who are to be appointed by the justice. An admission of the truth of such facts would, of course, require the quashing of the array. A denial of the facts is to be tried by the triers appointed, who may be taken from the panel returned, or from any of the indifferent bystanders. *Gardner* v. *Turner*, 9 Johns., 260. If the triers find the challenge true, and that the constable is *not indifferent*, the panel will be *quashed;* but if, on the other hand, it is found that the constable is *indifferent*, the panel will be *affirmed*, and the balloting for jurors will proceed. If

the panel is quashed, the justice ought to issue a new venire to some other constable who is indifferent, unless the parties agree to waive a jury.

Oath to triers on challenge to array for favor.

You do swear that you will well and truly try this issue of challenge to the array of jurors in this action, in which A. B. is plaintiff, and C. D. is defendant, and a true finding make according to evidence.

Oath to triers on challenge to polls for favor.

You do swear that you will well and truly try, and truly find whether J. K., the juror challenged, stands indifferent between A. B., who is plaintiff, and C. D., who is defendant in this action, in which this challenge is now to be tried.

If a challenge is made to the polls for favor, the challenging party states to the justice that A. B., the juror called, is not indifferent between the parties for which cause he challenges him. The grounds of objection ought to be stated. *Ante*, 603. If the opposite party denies the allegations, an issue is joined which must be immediately tried.

If a juror is challenged before any one of the panel is sworn, two triers are to be appointed and sworn for that purpose. See above for the form of oath. After being sworn, the triers hear the evidence and decide and report to the justice whether the challenge is true. If the juror is found indifferent he is sworn, and he and the two triers try the competency of the next juror challenged, who, if found indifferent, is also sworn as a juror. And as soon as two jurors are found indifferent, and are sworn as jurors, the triers must be discharged; and any subsequent challenges must be tried by the two jurors so found indifferent and first sworn. If two jurors are sworn without objection before any challenge is made, they are sworn as triers in all cases, but if one is sworn without challenge, and the next juror called is challenged, two triers must be appointed and sworn, who, with the first juror, constitute the triers. After a second juror is found indifferent and sworn, the two triers must be discharged. As to the rule of setting aside jurors, see *ante*, 600 to 603.

When a principal challenge is improperly overruled by a justice, it is an error for which the judgment will be reversed. And proceeding with the trial is no waiver of the objection. *Hathaway* v. *Helmer*, 25 Barb., 29. Challenges for principal cause, and to the favor, having been disposed of, it is important to notice an other kind of challenge now permitted. It may be that there is no sufficient ground of challenge, or it may be that the justice or the triers decide that a juror is indifferent when he really is not. In such cases, it is important that the juror may be set aside. And for that reason either party may now, by statute, challenge two jurors peremptorily.

"Upon the trial of any issue or issues of fact joined in a civil action, each party shall be entitled peremptorily to challenge two

of the persons drawn as jurors for such trials." Laws 1847, ch. 134, § 1.

"Nothing in this act contained shall be deemed to prevent any challenges heretofore allowed, either to the array of jurors or to individual jurors." *Ib.*, § 3.

No resort to this challenge will be proper until the other methods have failed. And it is best not to exercise the right of peremptory challenge until the last moment when it can be properly made, since it is difficult to anticipate who may be drawn upon the jury. And those jurors who are most objectionable, and who cannot be set aside upon the ordinary challenge, are the persons whom it may be most desirable to challenge peremptorily. Challenges ought to be made with caution and for good reason; and when once made, it is important that they should be sustained. A challenge made against a juror naturally affects his feelings as to the result, even when he is a fair and just man. And, although he may subsequently try the cause with fairness and justice, he will, in most cases, not feel quite so indifferent as though no challenge had been made.

When a sufficient number of competent jurors appears, and the appropriate number has been selected to try the cause, the next step will be to swear them. The manner of administering the oath may be in the usual form or by affirmation. Vol. I, 53, § 94. The oath may be administered to the jurors separately, or several may be sworn at a time.

Form of juror's oath.

You do swear well and truly to try the matter in difference between A. B., plaintiff, and C. D., defendant, and, unless discharged by the justice, a true verdict to give according to evidence.

After the jury have been sworn, they are ready to hear the case upon the merits. And when the case is of any importance it is usual, as well as advantageous, to open or state the case to the jury.

The party who has the affirmative of the issue is entitled to open the case to the jury; to introduce his evidence first; to introduce his evidence in reply; and to sum up the cause last to the jury. As to the right to begin, or as to which party holds the affirmative, see *ante*, 413, 414. If the pleadings are extensive or complicated, or if the evidence is likely to be voluminous or contradictory, a full, clear and accurate statement of the case will be of great service to the justice in determining questions relative to the admissibility of evidence; and it will also aid the jury in readily comprehending the bearing and effect of each part of the evidence as it is introduced.

The party opening the case should state the nature of the action; the issues which have been joined, or which will be tried; the facts and circumstances of the case; and the substance of the evidence to be adduced, and its effect in proving the case stated. It is proper, also, to notice the grounds of defense stated in the

answer, and the effect of the defenses if established. So it is equally proper to state the nature of the evidence which will be offered in reply by way of disproving the case set up by the opposite party. It is only a general view of the case that should be given in opening; the details will be more appropriate as they appear from the lips of the witnesses. And candor, as well as policy, dictates that an opening should never exceed the strict truth as to the real facts to be subsequently proved by the witnesses. A party may omit to state all the material facts of his case in the opening, but this will not prevent him from giving evidence as to all the material points in the case, merely because it was omitted in the statement of the case. *Nearing* v. *Bell*, 5 Hill, 291.

After opening the case, the party holding the affirmative proceeds to introduce his record evidence, or to call his witnesses. The opposite party may object to the competency of the witness, and the court must decide as to the validity of the objection. See title Evidence, as to competency of witness. If no objection is made to the witness, or if the objection is overruled, he is then sworn.

The statute prescribes the form of oath. Vol. I, 53, § 90.

Form of oath to witness.

You do swear that the evidence you shall give relating to the matter in difference between A. B., plaintiff, and C. D., defendant, shall be the truth, the whole truth, and nothing but the truth.

The party who calls a witness first proceeds to examine him; after which the opposite party is entitled to cross-examine him; and he may then be re-examined for the purpose of explaining his cross-examination. See *ante*, 477 to 488.

The number of witnesses to be called and sworn is usually limited by the discretion of the party calling them. There are some cases in which the courts have occasionally limited the number of witnesses to be sworn on each side as to some collateral question, or as to a mere matter of opinion. *Sizer* v. *Burt*, 4 Denio, 426; *Anthony* v. *Smith*, 4 Bosw., 503; *Ward* v. *Washington Ins. Co.*, 6 Bosw., 229; *Spear* v. *Myers*, 6 Barb., 445; *Nolton* v. *Moses*, 3 Barb., 31. But when a witness is called for the purpose of testifying to facts which are material upon the main issues to be tried, it is difficult to see upon what principle such witnesses can be rejected. It is true that the calling of a large number of witnesses may protract a trial, but that is a small matter when compared with a result which may deprive a party of justice and of his legal rights. The safe rule will be not to reject a witness who is offered to prove material facts upon the main issues in the case. *Eakin* v. *Brown*, 1 E. D. Smith, 37. If a party wishes to object to the introduction of witnesses on the opposite side, on the ground that a great many witnesses have been already called, he ought to admit that the fact sought to be

proved is true. *Ib.* As each witness is called, any objection as to his competency must be made. And so, when a witness has been sworn, and is giving his evidence, any objection to the questions put to him, or as to the relevancy, competency, or legality of his answers, must be taken, or they will be waived.

The right to object, and the manner of taking objections, will be discussed in a subsequent place. See Objections. If any record evidence is to be introduced, or any depositions of witnesses, it must be introduced as a part of the plaintiff's case, unless it is intended as a matter in reply.

Regularly and strictly, the party who opens the case must exhaust his testimony on his side before he rests the cause. And, technically, no evidence, except in reply to the evidence of the opposite side, will be admissible after resting the cause. *Ante*, 477. This is a matter, however, which is entirely within the discretion of the justice. See Discretion. And it is very seldom, indeed, that the rule is enforced. Either party is quite liable to overlook some material matter, and if he desires to correct the mistake, or to supply the omission, at any time before the evidence is closed, it is usually permitted by the justice.

If a justice intends to enforce the strict rule, he ought to give the parties notice of that fact at the commencement of the trial; and not only that, but the same rule must be applied to both parties, so that when either rests his side of the case, he waives the right to introduce any evidence which was properly admissible at the time of resting. It is proper for a justice to require the parties to conform to the proper rule, as nearly as it can reasonably be done, since it promotes order and convenience in the trial of the cause. But that is ordinarily the extent to which the rule should be enforced in justices' courts. And the rule should never be so enforced as to deprive either party of substantial justice, and a fair trial. If parties willfully omit to introduce their evidence in proper time and order, for the purpose of gaining some advantage over the opposite party, they, of all persons, would have least cause to complain of an enforcement of the strict rule.

Defense stated and evidence.] After the plaintiff has introduced all his evidence and rested his case, the defendant may move for a nonsuit, if the case is one in which the case ought not to be submitted to the jury, or ought not to be heard and decided upon the merits by the justice, if no jury is called. As to nonsuits, see *ante*, 579, 580. If the nonsuit is refused, the defendant, or the party not holding the affirmative of the issue, opens his side of the case. When this is done by the defendant, his proper course is to state the nature of his defense, and the evidence which will be introduced to sustain it. He may also explain how it will be affected by the evidence in reply.

In ordinary cases, each party ought to be limited to a statement of his own side of the case, and an explanation of the claims made by the opposite side. The defendant has no right to sum up the cause while opening his own case. Such is not

the object or the intention of an opening by either party. *Ayrault* v. *Chamberlain*, 33 Barb., 229, 233, 234, 235. In the case last cited, it was held that the court had a right to limit the plaintiff's counsel to a statement of his own side of the case, and that he could not state the evidence which would be given in reply.

After opening his case, the defendant proceeds to call his witnesses and swear them, in the same manner as the plaintiff did. And any objections to witnesses or to evidence must be made as the cause progresses, and as either is offered.

After the defendant rests his case, the plaintiff introduces such rebutting evidence as he may wish to offer. The term "rebutting evidence" may not be clear to every person. It means not merely evidence which contradicts the defendant's witnesses, and corroborates those of the plaintiff, but evidence in denial of some affirmative case or fact which the defendant has endeavored to prove. *Silverman* v. *Foreman*, 3 E. D. Smith, 323, 324. But rebutting evidence may also be introduced by way of avoidance of the defendant's case. Suppose that the defendant should set up in his answer and attempt to prove a set-off, or a release. The plaintiff would be entitled to prove that the claim by way of set-off had been paid, or that the release was obtained by fraud, and this would be strictly rebutting evidence.

If the oath is improperly administered to a witness, or if he gives his evidence without being sworn at all, this will not be an error which will reverse the judgment, unless an exception is properly taken at the time. *Blanchard* v. *Richly*, 7 Johns., 198; *Reed* v. *Gillet*, 12 Johns., 296.

The subject of evidence, including the rules for the examination of witnesses, has been explained. *Ante*, 361 to 545. After the entire evidence has been introduced, and both parties have rested their case, the cause is submitted to the jury or to the justice without comment, or it is summed up. The just administration of the law is greatly facilitated by an appropriate summing up. It is not intended to give an extended discussion upon the method of performing this important duty in a cause. But a few suggestions will be made which may be of service to some of the younger members of the profession. In every cause there are two branches, either of which may be most important in some particular case. The first relates to the facts in the case, and the second relates to the rules of law applicable to those facts when settled. In some cases the law of the case is conceded, or at least not disputed, but the conclusion as to facts is denied; in such a case the questions of fact become the most important part of the case. In other cases the facts of the case are undisputed, or are so clearly in favor of one side that it becomes principally important to determine the law of the case. A careful practitioner will endeavor to fully understand both of these branches of every case which he tries. In a court of record, where the presiding judge invariably charges the jury

as to the law, it is not necessary or customary to argue the questions of law to the jury, since they are bound to take the law from the court as delivered to them in the charge. So, a justice of the peace has a right to charge a jury as to the law; and, in that case, the jury are as much bound to follow his directions as to the law, as a jury is in a court of record. But, in ordinary cases, the justice does not assume to exercise his rights in this respect, and the cause is submitted to the jury, if one is called, upon all the questions in the case, whether of fact or of law. When either party has the just side of the case, nothing is more important to him than a proper presentation of his case to the jury, or to the justice when he sits in their stead. A clear, accurate, and comprehensive statement of a case is frequently sufficient of itself to determine the questions of fact. And this is especially true when the evidence is not complicated or contradictory, and the issues are few and simple. But sometimes there are cases in which a vast amount of evidence is given; the evidence itself is conflicting and unsatisfactory; there are numerous issues involved, each of which is thus embarrassed; and in many instances the evidence upon the main issues is so nearly balanced as to perplex the best jurors. In such cases, an able presentation of the case to the jury is at once a service to them, as well as to the party in whose behalf it is done. Neither general rules nor particular instructions will enable all persons to discharge this duty with equal ability. It is a natural endowment which some persons possess, and in which they excel without study and without especial effort. But this does not prevent some general hints from being of service to others.

And, in the first place, a jury ought to be clearly and fully informed as to all the issues involved in the case. When they know what the plaintiff alleges, and what portion of these allegations is denied, they can see what evidence is relevant to such issues. If any of the material allegations in the complaint are admitted, it is important that this should be clearly understood, and that no proof is necessary as to such allegations. So, where the entire complaint is admitted, and an affirmative defense is relied upon, the jury should be informed of that fact, and that no proof need be given to establish the truth of the complaint.

When the answer puts in issue the entire complaint, the plaintiff will be required to prove all the facts upon which he relies for a recovery. And the evidence ought to be so arranged and presented as to enable the jury to say with certainty whether the plaintiff has maintained such issues. And if, besides such general denial, affirmative defenses are also set up, the burden of proof is upon the defendant to establish their truth. If the proof is conflicting or doubtful, care ought to be taken in explaining and applying the evidence, so that each part of the evidence shall have its just influence upon the result.

No pleading by way of reply is permitted in a justice's court;

but any evidence which either controverts the defense by way of denial, or by way of confession and avoidance, is admissible.

This brief view of the matter shows that either of several issues may be the turning point in the case. If the complaint is admitted, either by not denying it, or by an express admission, the defendant will be required to prove the truth of his affirmative defense, or he will fail in the action. But it may be that the answer admits the truth of the complaint, and that the plaintiff in turn admits the matter set up as an affirmative defense in the answer, and that the plaintiff relies upon showing that there is a perfect answer to the defense, by way of new matter in reply. In that case the real burden of proof would be upon the plaintiff, to show the truth of the matter relied upon as a reply.

After the issues are clearly presented to the jury, the evidence which bears upon them will next be a subject of discussion. And the most essential service which can be rendered to a cause, is to point out fully and clearly all the evidence which bears upon each of the material issues to be tried. Eloquence and energy and earnestness are valuable qualities; but the logic of established and indisputable facts will weigh conclusively with an honest and an intelligent jury.

The rules by which the value of evidence is determined will be noticed under the title Evidence. When there are questions of law involved in the determination of the case, and there is a dispute as to the law, it will be necessary to discuss the legal questions before the jury. And, in doing this, the first step will be to show how the legal question arises and to what issues it is applicable.

There can be no question of law until the facts are settled. And, when the facts are in dispute, every legal question must of necessity be discussed hypothetically. In discussing legal questions, whether before the court or before a jury, each party is entitled to see and examine the authorities cited by the opposite party. And, in summing up, the party who holds the affirmative is bound to furnish his authorities to the other party before he sums up on his side, so that he may be able to examine and discuss their relevancy or their value before the jury. If such authorities are not furnished at the proper time, the party demanding them is not deprived of his rights, for he will be entitled to discuss the authorities cited after the summing up of the affirmative side of the case. In the trial of the cause and during the summing up, the same course of practice and of courtesy should be observed that would characterize the conduct of a lawyer at the circuit. Respect for the court and jury, and gentlemanly deportment of counsel towards each other, is of the highest importance, even in a justice's court. This court has long been the school in which the most eminent lawyers have taken their first lessons. And, since the extension of its jurisdiction, it is becoming one of the most useful courts in the state. He who adds to its dignity and usefulness is a public benefactor.

But each person has a personal interest in this matter; for if there were no other reason why he should observe the proprieties of professional duty, there is one which must arrest his attention and command his respect. If an unfair, technical, frivolous, disrespectful and ungentlemanly course is pursued in these courts, the effects of such practices will be certain to exhibit themselves at the circuit, where they will meet with a proper correction.

These remarks are not made because the profession generally indulges in such conduct, but because it is intended to suggest what kind of conduct it is desirable to avoid, so that the profession shall never hold a lower position than the exalted one which it now maintains in the estimation of society.

Charging the jury.] A justice may charge a jury, or he may decline to do so; and his refusal is not a ground of appeal. *Delancy* v. *Nagle*, 16 Barb., 96. If he assumes to charge them as to the law, and he errs in his charge, that will be error. *Trustees of Penn Yan* v. *Thorne*, 6 Hill, 326; *Chapman* v. *Fuller*, 7 Barb., 70; *Stroud* v. *Butler*, 18 Barb., 327; *Pettit* v. *Ide*, 12 Abb., 44. When he charges the jury at all, he must discharge the duty fully, and he cannot then refuse to charge any proper matter at the request of either party. For, by assuming to charge at all, he undertakes to do all that a judge of a court of record could be required to do by way of charge. And, therefore, if he charges incorrectly, or if he refuses to charge a proper matter on request, either will be error.

It is to be wished that every justice of the peace was qualified to charge juries properly. Much injustice would be thereby prevented; and, in many cases, the costs of expensive appeals would be avoided. In charging a jury, the justice should aim at presenting all of the issues involved in the case, and should call the attention of the jury to all the important portions of the evidence which has been given on the trial. By taking notes of the arguments of counsel in summing up, the justice can ascertain what points each party deems material, and then, by adding his own views, he can generally present the whole case with fairness and correctness. There is one advantage which will result from the practice of charging a jury. Not only will questions of fact be quite as properly settled, but on all questions of law there will be a full and fair opportunity to reserve all legal points for settlement upon an appeal. If the charge is affirmative, and is erroneous, an exception to the charge will clearly present the question for review. So, if the justice refuses to charge upon a point on which he ought to charge as requested, an exception to his refusal will save the rights of the party on appeal. When the entire questions, both of fact and of law, are submitted to the jury, it is frequently impossible to determine with certainty whether the case was decided upon a question of fact or upon a question of law. If the jury disposed of the case upon a question of law, their decision may be reviewed. But if it was decided upon a question of fact, that is generally conclusive. And since it is not

always easy to ascertain upon which ground the jury proceeded, there is sometimes a failure of justice in consequence, though this matter is of less importance since the amendment of the Code, which allows a new trial in the county court.

There are some incidents of the trial which have not been mentioned, that may properly be noticed in this place:

There is occasionally a defect in the proofs or a surprise at some unexpected evidence, which operates unfavorably to one of the parties. In such a case, a juror may be withdrawn by consent, or the entire jury may be discharged and the cause adjourned, if both parties agree. But the party who has the advantage from such a state of facts does not usually consent to such an arrangement, because he prefers to retain the advantage which he thus possesses. It is said that the justice may withdraw a juror in such cases, and still retain the cause for trial, whether the parties consent or not. 2 Cow. Treat., 351, 3d ed. There are cases in which a justice may suspend or delay a trial for a short time. *Ante*, 343. But the withdrawal of a juror is equivalent to discharging the jury before the cause is tried, and before they have rendered a verdict. This is a right which is not given in express terms by any statute relating to justices' courts. And it is difficult to see upon what authority such an act could rest for its support. The statute, it is true, confers all necessary powers which are possessed by courts of record. But such a power can scarcely be called a necessary one. It might be a convenience to one of the parties, but that is not sufficient. A second adjournment would frequently be of great convenience to a plaintiff, but it will not be contended that it can for that reason be granted. An adjournment cannot be granted after the trial has commenced, unless by the consent of the parties. *Pollock* v. *Ehle*, 2 E. D. Smith, 541; *Matthews* v. *Fiestel*, 2 E. D. Smith, 90; *Montfort* v. *Hughes*, 3 E. D. Smith, 591. And such an adjournment for thirteen days was held ground for reversal of the judgment, and the reason assigned was that no power exists to adjourn a cause when it is half tried. *Aberhall* v. *Roach*, 3 E. D. Smith, 345; *S. C.*, 11 How., 95, and see *ante*, 343, 344.

The discharge of a jury and an adjournment of a cause against the consent of one of the parties, after the cause has been partially or wholly tried, is not within any of the powers conferred upon a justice. The utmost that the courts have tolerated in this respect is, to permit a justice to hold open his court, and suspend the trial for a short time, to enable a party to procure an absent witness. But even in that case, the time allowed is quite brief, and twenty hours was held to be an unreasonable time to hold open for the purpose of enabling a party to get a witness who was twenty miles distant. *Ante*, 343, 344.

There is an other class of cases in which a justice has a discretion to exercise. The parties occasionally omit, by accident, to introduce all their evidence before the close of the trial. And they sometimes discover the existence of important evidence

after the close of the evidence, but before the cause has been finally submitted to the justice or the jury. In such a case the justice may permit the introduction of the evidence, even after both parties have declared the case closed. *Burger* v. *White*, 2 Bosw., 92; *Dunckle* v. *Kocker*, 11 Barb., 387. And the rule has been extended so far that the justice may receive further evidence on an adjourned day to which the cause was postponed for summing up, when the trial had taken place on a former day. *Heidenheimer* v. *Wilson*, 31 Barb., 637. The court held that, in such a case, the trial was not closed until the cause was summed up and submitted for final judgment; and that, until that time, it was discretionary with the justice whether to receive further evidence. To open a case for further evidence after it has once been declared closed, cannot be claimed as a matter of right. The justice may grant or refuse the application, and his decision is final. And, in deciding the question, the justice ought to be governed by the principle that the granting or the refusing of the motion is to be for the furtherance of justice, and for no other purpose.

If the witnesses on both sides are all still present, so that they may any of them be recalled if necessary, it will be pretty much a matter of course to allow the evidence. But if the witnesses of the opposite party have left court so that they cannot be recalled; or if the evidence offered will be a surprise upon the opposite party, so that he cannot meet it by evidence which he may have, but which is not at that time within his reach, the justice will scarcely feel that it would be just to open the cause for the advantage of one party, when it would operate as an injury and injustice to the other. The decision of the justice will not be reviewed unless the circumstances show a gross disregard of the rights of one of the parties. It must appear that the justice acted upon the ground that he had a discretion, and that he decided accordingly. For, if the justice should refuse to receive evidence in a case upon the sole ground that he erroneously supposed he had no power to receive it, his judgment would be reversed. *Russell* v. *Conn.*, 6 E. P. Smith, 81; *Beach* v. *Chamberlain*, 3 Wend., 366; *Packer* v. *French*, Hill & Denio, 103; *McElwain* v. *Corning*, 12 Abb., 16; *Regina* v. *Pilkington*, 2 Ell. & Bla., 546; *Mercer* v. *Sayre*, 7 Johns., 306.

When such evidence is material, and its admission will be an advantage to the party offering it, the justice should admit it unless its reception would do an injustice to the opposite party by way of surprise, or from inability to meet it with counter evidence which is not then available. After a jury has been empanneled and sworn the justice has no right to permit some of the jurors to be withdrawn and others substituted in their place, unless both parties consent. *Cook* v. *Ritter*, 4 E. D. Smith, 253. If this is done, and no objection is made at the time, the parties will be presumed to have assented to the change. *Ib.*

It has been seen, *ante*, 581, that one of several defendants may

be discharged in an action for a tort, when there is no evidence against him. But this rule does not authorize a justice to strike out the name of one of the defendants, on his motion, for the alleged reason that there is a misjoinder of defendants, and that a joint action cannot be maintained against all of them. *Montfort* v. *Hughes*, 3 E. D. Smith, 591. So a justice has no power to compel a substitution of parties in an action. An action against the trustees of a school district does not abate by reason that the term of office has expired; but if it did, that would not authorize the justice to compel a substitution of the new trustees, though this might be done by consent of all the parties. *Colegrove* v. *Breed*, 2 Denio, 125; and see *Manchester* v. *Herrington*; 6 Seld., 164. A nonsuit ought not to be granted until the whole evidence in the cause is properly before the court, where the motion is not made at the close of the plaintiff's case. A plaintiff proved a *prima facie* case and then rested his cause. The defendant then proved an affirmative defense, and immediately at the close of his evidence moved for a nonsuit. The justice refused to grant it until after the plaintiff had an opportunity to introduce his evidence in reply to the defense, and this was held to be the correct practice. *Carland* v. *Day*, 4 E. D. Smith, 251.

In courts of record, the court may strike out a complaint, answer, or reply, if a party refuses to be examined as a witness. Vol. I, 35; Code, § 394. But this provision does not apply to a justice's court. Vol. I, 2; Code, § 8; Id. 11, § 64, sub. 15. And a justice has no power to strike out any pleading on account of the refusal of a party to be examined as a witness. *Mayor of New York* v. *Mason*, 1 Abb., 344. So, when a complaint or answer is defective, because it does not state facts sufficient to constitute a cause of action, or a ground of defense, and it is not demurred to, but the cause proceeds to trial, the justice cannot dismiss the complaint, nor disregard the answer for that reason. *Wooster* v. *Chamberlin*, 28 Barb., 602; *Hilliard* v. *Austin*, 17 Barb., 141; *Turck* v. *Richmond*, 13 Barb., 533; *Smith* v. *Mitten*, 13 How., 326. If no demurrer is interposed to the pleading, and a substantial case or defense is established by the evidence, that will be sufficient to require the cause to be disposed of on its merits. *Ib.*

When a witness is under examination, and he is suddenly taken ill, the justice may suspend the trial a reasonable time, to enable him to recover sufficiently to complete his examination. And the party producing him as a witness, must see that he is present in court, so that he may be cross-examined by the opposite party, or his evidence will be struck out. *Clements* v. *Benjamin*, 12 Johns., 299. But if a witness is partially examined, and the cause is then adjourned by consent of parties, and the witness dies before the adjourned day, his evidence cannot be struck out, but is to be considered as a part of the evidence in the cause, even though the right of cross-examination should be lost. *Forrest* v. *Kissam*, 7 Hill, 463; reversing *S. C.*, 25 Wend., 651.

If irrelevant evidence is offered, the justice may reject it on his own motion, even though no objection be taken to it; *Farmers' and Manufacturers' Bank* v. *Whinfield*, 24 Wend., 420; *Keeler* v. *Delavan*, 4 Barb., 317. And irrelevant evidence ought clearly to be rejected when an objection is interposed to it by one of the parties. But if irrelevant evidence is received under objection, the opposite party is entitled to explain, contradict, or answer it by counter evidence. *Ward* v. *Washington Ins. Co.*, 6 Bosw., 229. By receiving the evidence under objection, the justice decides that it is competent, and this is sufficient to authorize the opposite party to rebut it by evidence. *Ib.* If irrelevant evidence is offered and received without objection, it is discretionary whether to receive contradictory or explanatory evidence in answer to it. *Farmers' and Manufacturers' Bank* v. *Whinfield*, 24 Wend., 420; *Keeler* v. *Delavan*, 4 Barb., 317.

After a jury has been empanneled and sworn, they ought to have a place assigned to them which is separate and distinct from all other persons. And during the progress of the trial, no persons ought to be allowed to talk or communicate with them unless by the permission of the court. And, above all other things, the justice ought to require the strictest order and quiet to be observed; the proceedings ought to be so conducted that the jurors shall have an opportunity of hearing every word that is given as evidence; not only that, but there ought to be such rules adopted as shall prevent anything from distracting the attention of the jury from the proceedings at the trial.

If any of the parties or their friends should attempt to produce any influence upon the jury by improper manifestations of satisfaction at some of the evidence and proceedings, and of dissatisfaction with other proceedings, the justice ought promptly and firmly to restrain such conduct. And if a proper admonition should fail of its effect, a commitment for a contempt of court will most effectually remove the cause.

Improper conduct of this character is most severely censured by the courts. *Conrad* v. *Williams*, 6 Hill, 444, 452. At the latter page the court said, "It is not to be tolerated that men should go into such a place and manifest their feelings, prejudices or passions, for the purpose of exerting an influence upon those who sit in judgment upon the rights of parties." Where a party had been guilty of grossly improper conduct towards the justice on the trial, the court expressed itself thus: "The powers of magistrates are ample to repress and punish such behavior in any stage of the cause, whether proceeding from a party, his counsel, or a bystander. Vol. I, 73, § 199, and self respect, as well as a due regard for the administration of justice, imperiously demand that they should be used, and order enforced with a firm and steady hand. Justices may at all times rely upon the countenance and favor of this court, in the due command and vigorous enforcement of good order while conducting their proceedings; and, as all necessary powers have been conferred upon them for

this purpose, they should know and feel that they alone are justly responsible for its observance. We cannot commend the forbearance of the magistrate in the instance before us, and would have been better satisfied if he had repressed the disorderly behavior of the party at once, when admonition failed, by fine, or commitment, or both." *Onderdonk* v. *Ranlett*, 3 Hill, 323, 328, 329.

The justice has a right to restrain the summing up of the cause within its proper limits.

If evidence has been offered on the trial, and rejected by the justice as incompetent or illegal, counsel have no right to comment upon such evidence as though it were in the case. *Mitchell* v. *Borden*, 8 Wend., 570.

There ought to be the largest latitude allowed to counsel in summing up a cause; but there is no reason for tolerating them in discussing matters entirely foreign to the cause. "The merits of a cause can only be rightly determined by a fair and unprejudiced consideration of the evidence, uninfluenced by any extraneous considerations calculated to excite the passions and warp the judgment. As it is a rule of pleading that the issue should be on a material point, so it is an essential rule of evidence that the proof should be material and relevant to the issue. It is equally indispensable to the orderly course of judicial proceedings, and an impartial administration of the laws, that counsel on either side should not be allowed to lose sight of the evidence and the issues, and indulge in denunciations of a party based upon facts not proved, and which therefore should not be permitted to disturb that calm deliberation which it is the duty of jurors to bestow, and which the parties have a right to expect and demand." *Fry* v. *Bennett*, 3 Bosw., 202, 242. Bosworth, J.

If counsel indulge in such remarks in their summing up, where the evidence does not authorize it, the opposite party may object to the remarks, and if the justice refuses to restrain them, it will be error. A proper enforcement of this rule is sometimes indispensable, since it occasionally happens that an unscrupulous person attempts to supply a want of evidence by the most unjust denunciations and charges or insinuations against parties and witnesses, when there is no evidence to warrant their course of conduct.

After a case is closed, and it has been submitted to the jury, they may render a verdict immediately without retiring from court, if they are already unanimous as to their verdict. But ordinarily such is not the practice. A semblance of deliberation is at least a propriety, and it is only in the plainest cases, or when a jury is acting under some strong impulse, that a verdict is rendered without retiring for deliberation. A trial must be closed and submitted to a jury on a week day and not on Sunday. In one case a trial was commenced on Saturday and it was continued until two o'clock in the morning of Sunday, when it was submitted to the jury, and they rendered their verdict about three o'clock A. M. This was held irregular, and the judgment reversed.

Pulling v. *The People*, 8 Barb., 384; *Butler* v. *Kelsey*, 15 Johns., 177. In such cases, the cause ought to be adjourned over to Monday, when the trial could be legally completed. When a jury retires to deliberate upon their verdict, a constable must be sworn to attend them. Vol. I, 53, § 100. If this is omitted, the judgment will be reversed. *Douglass* v. *Blackman*, 14 Barb., 381. And if it appears that the jury retired from court for deliberation, it must also appear affirmatively that a constable was sworn to attend them, or the judgment will be erroneous, for no intendment will be indulged that a constable was sworn. *Coughnet* v. *Eastenbrook*, 11 Johns., 532. It must expressly appear, however, that the jury retired from the court before it is necessary to show that a constable was sworn. *Hatch* v. *Mann*, 9 Wend., 262; *Fink* v. *Hall*, 8 Johns., 437. If the jury are left alone in the room in which the trial was held, a constable must be sworn as in other cases. *Douglass* v. *Blackman*, 14 Barb., 381. It is in those cases only in which a verdict is rendered by the jury without leaving their seats, that the swearing of a constable can be dispensed with. *Ib.* If, however, the parties expressly agree that the jury may retire for deliberation without any constable to attend them, this waives the irregularity. *Tower* v. *Hewett*, 11 Johns., 134.

The statute prescribes the following oath to be administered to the constable. Vol. I, 53, § 100.

Form of oath to constable.

"You swear, in the presence of Almighty God, that you will, to the utmost of your ability, keep the persons sworn as jurors on this trial together in some private and convenient place, without any meat or drink except such as shall be ordered by me; that you will not suffer any communication, orally or otherwise, to be made to them; that you will not communicate with them yourself, orally or otherwise, unless by my order, or to ask them whether they have agreed on their verdict, until they shall be discharged; and that you will not, before they render their verdict, communicate to any person the state of their deliberations or the verdict they have agreed on."

A mis-recital of the oath will not be error, if accidental, and if no objection is made at the time of administering the oath. *Brownell* v. *Slocum*, 3 Johns., 430. So, the oath may be waived if the parties agree to it. *Tower* v. *Hewett*, 11 Johns., 134. And the waiver need not be express; it is sufficient if no objection is made at the time. *Howard* v. *Sexton*, 1 Denio, 440. The next subject for consideration is the conduct of the jury after being placed in charge of the constable. Purity in the administration of the law is one of its chief ornaments and advantages. But, after the most scrupulous care in the selection of jurors, and in the precautions observed for the purpose of placing jurors beyond the reach of improper influences, there will occasionally be an improper person upon the jury. They may have those qualifications which the statute requires; they may be intelligent; they may be influential and earnest; they may have attended carefully to the evidence as it was given; but if they

lack impartiality, and are obstinate in the pursuit of their own particular views, whether right or wrong, they are not useful jurors.

Firmness in an opinion honestly entertained is commendable; but it is important that the mind should be open to conviction if it can be shown that the previous opinion is erroneous.

The very nature of a jury requires a most careful exercise of the judgment, and of the willingness to assent to any correct view of the case, however much that may differ from any preconceived view of the matter.

An honest discharge of this duty is enforced by the sanctions of a solemn oath. And the very object of retiring to deliberate is to allow the influence of a full discussion and a comparison of different views to have a proper influence in arriving at the truth. No man is bound, nor ought he, to surrender his views when his judgment and his conscience declare that he is right. But it will be well to be certain that it is not the will, instead of the judgment and conscience, which controls the juror's action. A juror's duties are confined to his acts in relation to himself, and to his fellow jurors, and to the evidence and the law of the case, when no charge is given by the justice. Every act which can influence a juror in his conduct ought to be scrupulously avoided. Hence, it would be exceedingly improper for any person to sit upon a jury when he has made a bet as to the result of the action. In such a case his interest and his duty, under his oath, would be in direct conflict, which would destroy his impartiality as a juror.

Reading newspapers in the jury room is not illegal, though such a practice would tend to protract a trial unnecessarily. If the newspaper, however, contains comments upon the proceedings of the particular trial, and are calculated to produce an improper result, they ought not to be read by the jurors. In justices' courts the trials are usually so brief that newspapers are seldom found in the jury room; but in some protracted trials at the circuits, and even in justices' courts, the jurors make a newspaper supply the place of society.

After a jury have retired to deliberate upon their verdict, they ought to continue together until their verdict is made, and until they return into court. And during that time they ought not to have any communication with strangers in relation to the case, nor upon any other subject, without the permission of the court. A separation of the jury will sometimes be considered a sufficient ground for setting aside the verdict; though this is not done when it appears that no improper influence has resulted from it. *Anthony* v. *Smith*, 4 Bosw., 503. It would be highly censurable for a juror to attempt to inform the successful party what verdict had been found, before it was openly delivered in court; yet a mere attempt has been held not to be a sufficient ground for setting aside the verdict. *Fash* v. *Byrnes*, 14 Abb., 12. A constable is sworn not to interfere with the deliberations of a jury,

and he violates his oath if he does so; but the fact that he urged the jurors to give a verdict in favor of the successful party is not a sufficient ground to reverse the judgment, especially when the jurors told him to mind his own business, and when the jurors all swear that they paid no attention to his remarks. *Baker* v. *Simmons*, 29 Barb., 198; and see *Taylor* v. *Everett*, 2 How., 23. But the least interference by a party with the jury will be good ground for setting aside a verdict rendered in his favor. *Reynolds* v. *Champlain Transp. Co.*, 9 How., 7; *Coster* v. *Merest*, 3 Brod. & Bing., 272; *Oliver* v. *Trustees, &c., of Springfield*, 5 Cow., 283. In the case last cited the jurors had leave to bring in a sealed verdict, and to separate whenever the verdict had been agreed upon. They fraudulently pretended that they had agreed upon a verdict, and thus induced the constable to permit them to separate; when they went into a public bar-room, where the case was much talked about. They then returned into court, and informed the court that they had not agreed upon their verdict; whereupon, after explaining certain testimony upon which the jury had disagreed, the judge sent them out again for further deliberation, though the plaintiff objected; and the jury found a verdict for the defendant, which was set aside as irregular. But, where leave was given to bring in a sealed verdict, and the jury actually agreed upon their verdict and separated for the night, and in the morning, upon polling the jury, one of them dissented from the verdict, when the jury were again sent out, and he then assented to the former verdict, this was held to be regular. *Douglass* v. *Tousey*, 2 Wend., 352. A jury have no right to determine a verdict by lot, and where ballots were placed in a hat, and some of the ballots were marked *prize* and others blanks, and it was agreed that if more prizes than blanks were drawn, then the plaintiff should have the verdict, otherwise it was to be for the defendant, the drawing resulted in favor of the defendant, when he had the verdict, which was set aside as irregular. *Mitchell* v. *Ehle*, 10 Wend., 595.

So it would be irregular to determine the amount of a verdict by lot. In one case the jury fixed the amount of the verdict, by requiring that each juror should mark the amount of his verdict, and that the amount fixed by each should be added together, and the amount thus found divided by six, which should be the amount of the verdict without alteration. This was held to be erroneous, and the judgment reversed. *Harvey* v. *Rickett*, 15 Johns., 87. If such a course is adopted for the purpose of comparing views, but without any agreement to abide by the amount found as the verdict, the verdict will be permitted to stand. *Dana* v. *Tucker*, 4 Johns., 487. But it would be error to charge a jury, on a question of values, that if there was a difference of opinion of the witnesses on that subject, and the witnesses were of equal integrity and capacity to judge, they might then arrive at the average of their estimates by adding together their several estimates and dividing the aggregate by the number of witnesses,

and that they might take the quotient as the value of the property; that they were under no obligation to do so, but it was legal for them to resort to this method in arriving at the value, if, after in this way they had ascertained an amount, they were satisfied it was the value of the property, and thought proper to adopt it as such. *Thomas* v. *Dickinson*, 2 Kern., 364.

Every verdict is founded upon matter of fact and matter of law. If the justice charges the jury as to the law, they will have nothing to do but to determine the questions of fact and to apply the law as it is laid down to them by the court. But, when no charge is given to them, they must, of necessity, determine first what the facts are, and then declare the law and apply it to the facts found. And in such a case they will be permitted to judge what the law is as well as to determine the questions of fact. *McNeil* v. *Scoffield*, 3 Johns., 436.

It is now well settled that the justice may permit a jury, on retiring for deliberation, to take with them any deposition or written instrument which has been properly proved and introduced in evidence. *Howland* v. *Willetts*, 5 Seld., 171; *S. C.*, 5 Sandf., 219. But they are not permitted to take out with them the minutes of testimony of one of the counsel without consent. And, where this was done, and the verdict was in favor of the party whose counsel's minutes were taken, the judgment was reversed. *Durfee* v. *Eveland*, 8 Barb., 46. In such a case the presumption will be that the counsel delivered the minutes to the jury. *Ib.*

The jury have no right to examine a witness by themselves, even though he had been sworn and examined on the trial. If they are in doubt as to what the evidence is upon any question, they should inform the court; and, in that case, the witness will be recalled, or, more correctly, the justice will state the evidence to them as he has taken it upon his minutes of the trial. *Blackley* v. *Sheldon*, 7 Johns., 32. If the justice's minutes are not full and accurate, the best method will be to recall the witnesses upon the particular questions as to which information is desired. But both parties ought to be notified, and have an opportunity of being present at such a re-examination; and, if they have the opportunity, but refuse to avail themselves of it, the justice may still permit the examination, even if it takes place in the jury room. *Henlow* v. *Leonard*, 7 Johns., 200.

A justice has no right to send his minutes of the evidence to the jury, at their request, unless the parties consent; and the error will be sufficient to reverse the judgment rendered. *Neil* v. *Abel*, 24 Wend., 185. So, after a jury has retired, the justice has no right to go into the jury room for the purpose of informing them what the evidence is upon any point, or to give them any other information whatever, unless the parties consent in express terms. *Moody* v. *Pomeroy*, 4 Denio, 115; *Taylor* v. *Betsford*, 13 Johns., 487; *Bunn* v. *Croul*, 10 Johns., 239; *Benson* v. *Clark*, 1 Cow., 258. If the parties are notified, and they do

not go into the jury room, but the justice does so on the mistaken supposition that the parties were following when they were not, this will not be error if the justice refuses to say anything to the jury, and he immediately leaves the room because the parties were not present. *Keeler* v. *Lockwood*, Hill & Denio, 137. And it has been held that, where the jury sent for the justice, and the defendant consented that the justice might go and see what they wanted, such consent gives the justice a right to read his minutes in explanation of the evidence for the information of the jury. *Hancock* v. *Salmon*, 8 Barb., 564. The permission of the defendant that the justice should enter the room, is an implied consent that he may give such information as is desired, or would have been proper if the parties had been present. *Ib.*

In courts of record the judge will not permit a jury to see a treatise on the law, even if the parties consent; because the jury can state the point upon which they desire information, and it will be furnished by the court. *Burrows* v. *Unwin*, 3 Carr. & Payne, 310.

But where the justice does not charge the jury, nor instruct them as to the law, no such rule exists. And every facility ought to be furnished to the jury which the circumstances of the case will permit. If authorities have been cited by counsel on the argument, there is no reason why the jury should not be permitted to examine them if they wish to do so. Certainly they will not be much more likely to go astray with all the aids they can get, than they would if they groped their way by chance.

While the jury are out of court, or are deliberating in their room, they ought not to hold communications with any third persons; nor should either of them relate facts bearing upon the case, unless he was sworn as to them as a witness; for in the event that he was not sworn, his statements would naturally have some influence with the jury; and this would deprive one party of a right to cross-examine him, to rebut it by other evidence, or to have his statements sanctioned by an oath. And it is equally improper for jurors to listen to the statement of strangers. In one case the court said: "Jurors seem not to be aware of the gross impropriety of conversing with other persons about the case on trial before them. Hardly any act can be more reprehensible. Jurors are sworn to try the case according to the law and the evidence. That is not evidence to which the juror listens out of court, where there is no opportunity to meet it, and no chance for cross-examination; and yet it influences the mind, tends to the grossest wrong and injustice, and is a violation of the most sacred obligations of a juror." *Nesmith* v. *Clinton Fire Ins. Co.*, 8 Abb., 141, 147.

It is desirable that juries should agree in every case if that is possible, since it saves the parties much trouble and expense. But in some cases the character of the evidence is such that the several jurors cannot agree in their views in relation to it. And

in such a case, if the jury cannot agree upon a verdict, they ought to notify the justice of that fact. On their return into court, it will be proper to state to the justice what difficulties are in the way of agreeing upon a verdict. And if any explanation as to the evidence will be of service, the justice ought to give it, and then send the jury out for a further deliberation.

So, if the difficulty arises as to a question of law, the justice ought to explain it to them as well as he is able, allowing either party an exception as to his instructions if they desire to take one. The duties of a court towards a jury are well expressed by a learned judge, in the case of *Green* v. *Telfair*, 11 How., 260, 262: "A judge may also keep the jury together as long as, in his judgment, there is any reasonable prospect of their being able to agree; but beyond this, I do not think he is at liberty to go. An attempt to influence the jury by referring to the time they are to be kept together, or the inconvenience to which they are to be subjected, in case they shall be so pertinacious as to adhere to their individual opinions, and thus continue to disagree, cannot be justified. A judge has no right to threaten or intimidate a jury in order to affect their deliberations. I think he has no right even to allude to his own purposes as to the length of time they are to be kept together. There should be nothing in his intercourse with the jury having the least appearance of duress or coercion. The jury, while all proper motives to induce them to agree upon a common result may be repeatedly and earnestly urged upon them, should be left to feel that they act with entire freedom in their deliberations. That, should they continue to disagree, they are not to be exposed to unreasonable inconvenience, nor to receive the animadversion of the court."

The foregoing remarks are peculiarly appropriate, not merely in relation to courts of record, but are still more carefully to be observed in a justice's court. When it is evident that further discussion between the jurors will be fruitless, the justice ought to discharge them. The length of time during which they ought to be kept out for the purpose of deliberating must necessarily be controlled by the particular circumstances of each case, and the law has confided a proper discretion to the justice in such a case. Vol. I, 54, § 102. If the jury is discharged, the justice is required to issue a new venire, returnable within forty-eight hours, unless the parties consent to submit the case to the justict upon the evidence already given. Vol. I, 54, § 102. The partiee may agree upon a different time for the return of the venires And if the justice proposes to make it returnable at a later day. than that specified by the statute, and neither party objects, when both are present and hear the proposition, their consent will be presumed. *Fiero* v. *Reynolds*, 20 Barb., 275.

The verdict.] A verdict is the opinion which is declared by a jury as to the *truth* of the matters of fact or law which are submitted to them for trial and decision. It is the unanimous determination of the jury, after hearing the case, the evidence,

the arguments of counsel, and the charge of the court, if one is given.

A general verdict is one by which the jury pronounce, at the same time, on the fact and the law, either in favor of the plaintiff or of the defendant.

A special verdict is one by which the jury find the facts of the case, and the law arising thereon is submitted to the court for decision.

In a justice's court, the verdict must be a general one in all cases, for the law does not authorize the finding of a special verdict in these courts; and the justice would have no power to render a judgment upon such a verdict even if it were found. *Wylie* v. *Hyde*, 13 Johns., 249. When the complaint claims double or treble damages under some statute the verdict ought to be general, but it should state whether it is found for single damages, or for the whole amount of double or treble damages, for, in the absence of such a statement, the legal intendment will be that the verdict was for the double or treble damages. *Livingston* v. *Platner*, 1 Cow., 175. Such damages must be claimed in the complaint, or the jury have no right to give them. *Brown* v. *Bristol*, 1 Cow., 176. If the jury find single damages in express terms, then the justice may add to their verdict such sum as will make double or treble damages, by multiplying the verdict by two or three, as the case may require. Sedg. on Dam., 571, marg. pag., and cases in note, 3d ed.

In actions of replevin the jury must find a general verdict for one party or the other as to the title or right to the possession of the property, and, in a proper case, must assess the damages at some specified sum. A verdict must be delivered in open court and publicly. Vol. I, 54, § 101. On the return of a jury into court for the purpose of rendering their verdict, the justice ought first to call the names of all the jurors, and if they all appear, the plaintiff should then be called to hear the verdict. If the plaintiff is absent, and no one appears for him, the verdict cannot be received by the justice. Vol. I, 54, § 101.

Before receiving a verdict a justice ought to be careful to ascertain that the plaintiff, or some one in his behalf, is present. And where a return stated that the justice called the plaintiff, and that some person not known to the justice answered, it was held irregular to receive the verdict, and the judgment was reversed. *Shove* v. *Raynor*, 3 Denio, 77. In such a case it *affirmatively* appears that some *unknown* person answers, when it ought to appear that the plaintiff or some person in his behalf appears and answers.

A judgment will not be reversed on the ground that the return is silent as to whether the plaintiff was called or not; if it is desired to raise that question the return ought to show *affirmatively* that the plaintiff was not called. *Warring* v. *Loomis*, 4 Barb., 485; *Baum* v. *Tarpenny*, 3 Hill, 75.

But if it is fairly to be inferred from the return that the plaintiff was not present, although this is not stated in express terms, the judgment will be reversed. *Douglass* v. *Blackman*, 14 Barb., 381.

If the plaintiff is actually present at the time of receiving the verdict, the mere omission to call his name will not be an error sufficient to reverse the judgment. *McEachron* v. *Randles*, 34 Barb., 301; *Oakley* v. *Van Horn*, 21 Wend., 305.

Before such an objection can be made available, it must appear from the return that the plaintiff was *absent*, and that no one appeared or answered for him. *Ib.*

A judgment which is rendered upon a verdict which was received in the absence of the plaintiff is not absolutely void, and it cannot be questioned collaterally, although it is erroneous and reversible upon an appeal. *Relyea* v. *Ramsay*, 2 Wend., 602. *Lamoure* v. *Caryl*, 4 Denio, 370, 373. And when the judgment in such a case is rendered in favor of the defendant, an appeal must be taken if the plaintiff would avoid the effect of the judgment, for he cannot question its validity in a collateral way. *Ib.* When the plaintiff does not appear, nor any one for him, the proper judgment for the justice to render is a judgment of discontinuance with the costs of the action. Vol. I, 55, § 110, sub. 5.

If the plaintiff appears, and the jurors are all present, the justice then asks: *Gentlemen of the jury, have you agreed upon your verdict?* To which the foreman of the jury will respond, *we have*, if a verdict has been agreed on. The justice next asks: *Whom do you find for?* To which the foreman answers, *we find for the plaintiff* (stating the sum), or *we find for the defendant.* And if a set-off has been proved, which the jury have allowed, so as to entitle the defendant to a judgment in his favor, the foreman will state the amount. In replevin actions, the foreman will state that they find for the plaintiff, or the defendant, and that the damages are assessed at a specified sum, which must be stated.

The justice will immediately note the verdict in his minutes, and after this is done, he will address the jury thus: *Gentlemen of the jury, listen to your verdict as it is recorded by the court. You say you find* (stating the verdict as it was rendered), *and so say you all.* Unless some of the jury then dissent, this will be the verdict in the action.

The mere form of the verdict is generally unimportant if it is substantially a verdict in favor of one party or the other. A verdict of "*no cause of action*" is very commonly rendered, and it is substantially a verdict for the defendant, and the justice should so enter it in his minutes and docket, which will be entirely regular. *Felter* v. *Mulliner*, 2 Johns., 181.

The justice is bound to render a proper judgment upon such a verdict, and it will bar a second action for the same cause, even though no judgment is rendered upon it. *Ib.*

In an action of trespass the jury found a verdict in favor of the defendant, for six cents damages, and six cents costs, and this was held to be a verdict for the defendant generally, rejecting the damages. *Goodenow* v. *Travis*, 3 Johns., 427.

A verdict in favor of a plaintiff, for a sum greater than he claims, or is willing to receive, is a mere formal defect, and the

plaintiff may remit the entire verdict or any portion of it, before judgment is rendered upon it by the justice. *Clark* v. *Denure*, 3 Denio, 319; *Barber* v. *Rose*, 5 Hill, 76; *Putnam* v. *Shelop*, 12 Johns., 435; Vol. I, 56, § 116.

So, where a verdict is rendered in favor of a defendant for a specified sum, when he is not entitled by law to recover any sum by way of damages, he may remit the amount found in his favor, and take a general verdict in his favor. *Burger* v. *Kortright*, 4 Johns., 414.

A verdict may be rendered, and a judgment entered in favor of a defendant, for a set-off which is proved on the trial, although the plaintiff does not prove any claim which is allowed in his favor. *Greenleaf* v. *Low*, 4 Denio, 168.

A justice has no power to open a judgment, nor to alter it, after his judgment has been once rendered, and entered in his docket. *People* v. *Delaware Com. Pleas*, 18 Wend., 558; *Appleby* v. *Strang*, 1 Abb., 143; *Hardy* v. *Seelye*, 3 Abb., 103; *S. C.*, 1 Hilt., 90; *Sperry* v. *Major*, 1 E. D. Smith, 361.

But when a judgment is taken by a plaintiff in the absence of the defendant, on the return day, the default may be opened by consent, and the cause tried. *Scranton* v. *Levy*, 4 Abb., 21; *S. C.*, 1 Hilt, 261.

At any time before a verdict is recorded, the jury may correct or amend it either in form or substance. This may be done upon their own motion, or at the suggestion of the justice. It may be done in open court, or they may retire to their room for that purpose.

In one case, the jury came into court with a verdict in favor of the defendant; but the verdict was written upon a piece of paper, which was handed to the justice, who read it, but did not publish it, and he then informed the jury that, in his opinion, they had mistaken the evidence, and he requested them to reconsider their verdict. The jury retired, and soon after requested the re-examination of a witness, which was granted in the presence of both parties, without objection by either; and, after deliberation, the jury rendered a verdict in favor of the plaintiff, for twenty-four dollars and forty-two cents, which was held valid. *Blackley* v. *Sheldon*, 7 Johns., 32.

At any time before a verdict is publicly delivered and recorded, any of the jurors may dissent from it, for until that is done it is not a final verdict. *Ib.*

And before that time, any juror may change his mind, and refuse his assent to the proposed verdict, even when it is a sealed one, which he himself has signed. *Root* v. *Sherwood*, 6 Johns., 68. In such a case, the justice may send the jury out again, to see whether they cannot agree upon a verdict, and if they do, the verdict will be regular. *Bunn* v. *Hoyt*, 3 Johns., 255.

The jurors must be unanimous, or there is no verdict. And, to ascertain whether the jurors are all agreed, either party has a right to poll the jury, at any time before the verdict is recorded.

Fox v. *Smith*, 3 Cow., 23. And the rule is the same, even where the verdict is a sealed one. *Ib.* To poll a jury is to examine each juror separately, after the verdict has been given, as to his concurrence in the verdict. And at the request of either of the parties, the justice is bound to poll the jury, which he does by calling each juror by his name, and asking him "*Is this your verdict?*" And when there are several defendants the form of question is the same. The defendant polling the jury, cannot require the justice to put the question in this form: "Is this your verdict against each and both the defendants?" *Labar* v. *Koplin*, 4 Comst., 547. At any time before the verdict is recorded either party has an absolute right to poll the jury, which it will be error to refuse. *Ib.* If, on polling the jury, they are unanimous, the verdict is recorded, and judgment rendered upon it. If any of them dissent from the verdict, the justice will either send them out to reconsider the case; or he will discharge them, if that, in his judgment, is the best course.

Where a jury retires late at night, and it is probable that they will be out some time, the justice may direct them to find a sealed verdict, whether the parties consent or not. *Green* v. *Bliss*, 12 How., 428. In such a case, strict practice requires that all the jurors should sign the verdict, since that is the rule in relation to sealed verdicts. *Ib.* But if such verdict is delivered to the court in the presence of the unsuccessful party, without objection, it will be valid. *Ib.* So, on polling a jury, if the answer of any juror is unsatisfactory, the objection must be taken at the time, or it will be waived. *Ib.*

The party who demands a venire is bound to pay the jurors their fees on their coming into court with a verdict, and before it is declared by them, or recorded by the justice.

It has been seen, *ante*, 617, that a jury cannot be sent out on Sunday, for the purpose of deliberating upon their verdict. But if the jury were sent out on Saturday night, and they do not agree upon a verdict until Sunday, the justice may receive the verdict even upon Sunday. *Hoghtaling* v. *Osborn*, 15 Johns., 119. But no judgment can be entered upon it until the next day, and if there is, it will be reversed. *Ib.*

There are several matters which are incident to jury trials, which may as well be noticed here as in any other place.

Questions of fact for jury.] Every question of fact which arises in the case upon the issues raised by the pleadings, must be determined by the jury upon all the evidence given on the trial. And whenever there is any evidence given which raises a question as to the existence of any fact or facts, the jury are the exclusive judges of the question. When there is evidence upon both sides of the question, it must be submitted to the jury for their determination, notwithstanding the fact that the preponderance of the evidence is decidedly in favor of one of the parties. *Carland* v. *Day*, 4 E. D. Smith, 251; *Robbins* v. *Dillaye*, 33 Barb., 78; *Ayrault* v. *Chamberlain*, 33 Barb., 229; *Cook* v. *Litchfield*, 2 Bosw., 138.

So, where there is a general denial of the complaint, and there is some evidence given by the plaintiff in support of his case, the question must be submitted to the jury, if the evidence is so far sufficient that a verdict in favor of the plaintiff would not be reversed because it was contrary to the evidence, or unsupported by it. *Gates* v. *Brower*, 5 Seld., 205; *Thompson* v. *Dickerson*, 12 Barb., 108; *Russell* v. *Cronkhite*, 32 Barb., 282; *McGrath* v. *Hudson River R. R.*, 32 Barb., 144; *Ernest* v. *Same*, 32 Barb, 159; *Borrodaile* v. *Leek*, 9 Barb., 611; *Kellogg* v. *Wilkie*, 23 How., 233. And, on the other hand, where the complaint is not denied, and an affirmative defense is set up, or where there is both a denial and an affirmative defense, if there is any evidence given by the defendant to establish the truth of such defense, the question must be submitted to the jury. *Thompson* v. *Dickerson*, 12 Barb., 108; *Gardner* v. *McEwen*, 5 E. P. Smith, 123; *Griswold* v. *Sheldon*, 4 Comst., 582.

The cases illustrative of these general principles are very numerous, and are extremely various as to the facts involved in the decision.

Where the law prescribes a particular measure of damages, the jury must follow it. But in actions for torts, and in all cases where the amount of damages is to be assessed upon all the evidence, the jury are the exclusive judges as to the amount of damages which shall be given, unless the sum should be so large and disproportionate as to furnish evidence of fraud, partiality, or some other improper motive in the conduct of the jury. *Tifft* v. *Culver*, 3 Hill, 180; *Cropsey* v. *Murphy*, 1 Hilt., 126; *Pierce* v. *Dart*, 7 Cow., 609. Or unless the sum is so small as to show gross injustice to the plaintiff, upon the uncontradicted evidence given on the trial. *Robbins* v. *Hudson River R. R. Co.*, 7 Bosw., 1. *Stephens* v. *Wider*, 5 Tiff., 351.

The credibility of witnesses is always a question for the jury. *Merritt* v. *Lyon*, 3 Barb., 110; *Leach* v. *Kelsey*, 7 Barb., 466; *Whiting* v. *Otis*, 1 Bosw., 420; *McLaughlin* v. *Barnard*, 2 E. D. Smith, 372; *Conrad* v. *Williams*, 6 Hill, 444. And the court below cannot take the question from them, nor can a court above, on an appeal, reverse their decision. *Ib.*

Fraud is a question of fact for a jury, where there is any evidence fairly tending to establish it, but whether the evidence tends to establish fraud, or not, is always a question of law for this court; *Erwin* v. *Voorhees*, 26 Barb., 130, 127; *Gage* v. *Parker*, 25 Barb., 141; Vol. I, 854.

Whether there has been a delivery and acceptance of goods in pursuance of a contract of sale, or whether the delivery was a conditional, or an absolute one, is a question of fact for a jury. *Smith* v. *Lynes*, 1 Seld., 41. So, a question whether a negotiable note was taken before or after due, or with or without knowledge of prior equities. *Clark* v. *Dearborn*, 6 Duer, 309; and so, whether a bill or note was taken as an absolute payment, or by way of collateral security. *Atlantic Fire Ins. Co.* v. *Boies*, 6 Duer, 583. So, as to

whether a sale was made with an intent to hinder, delay or defraud creditors of the vendor. *Brown* v. *Wilmerding*, 5 Duer, 220. So, whether consent was given to an act which would be a trespass but for the license. *Walter* v. *Post*, 6 Duer, 363. Where a contract was made on the 8th day of October, for the sale of a quantity of oats which were to be delivered "on or about the first of November next," and the oats were not delivered, it was held that the measure of damages was to be regulated by the price at the time when the oats ought to have been delivered, which must be within a reasonable time after the first of November; and the question of reasonable time is one of fact for the jury. *Kipp* v. *Wiles*, 3 Sandf., 585. So, when it is shown that money is delivered by one person to an other, it was a question for the jury, whether it was a payment or a loan of the money. *Morse* v. *Bogert*, 4 Denio, 108; *S. C.*, 1 Comst., 377. When there is a dispute between two persons as to the amount which is due from one of them to the other, and a certain sum is paid, it is a question for the jury whether that sum was paid in part or in full payment. *Pierce* v. *Pierce*, 25 Barb., 243. So, whether the payment and acceptance of money was a usurious transaction is for them to decide. *Carland* v. *Day*, 4 E. D. Smith, 251; *Robbins* v. *Dillaye*, 33 Barb., 78; *Ayrault* v. *Chamberlain*, 33 Barb., 229.

But, where there is no dispute as to the facts, it is a question of law whether a transaction is usurious. *Thomas* v. *Murray*, 34 Barb., 157; *Dunham* v. *Dey*, 13 Johns., 40. Whether services were rendered gratuitously, or with an expectation of compensation therefor, is for the jury. *Pendleton* v. *Empire Stone Co.*, 5 E. P. Smith, 13. So, whether a written contract for the sale of goods was delivered conditionally or absolutely. *Scott* v. *Pentz*, 5 Sandf., 572.

So, it is for the jury to say for whose benefit an accommodation note was indorsed. *Bridgeport City Bank* v. *Empire Stone Co.*, 30 Barb., 421; *S. C.*, 19 How., 51. So, where a principal is sought to be charged with the acts of his alleged agent, the question of authority in fact is for the jury. *Thurman* v. *Wells*, 18 Barb., 500.

So, as to whether a sealed instrument was executed and delivered at the time it bears date, if there is any evidence to rebut the legal presumption that it was so executed. *Genter* v. *Morrison*, 31 Barb., 155; *Elsey* v. *Metcalf*, 1 Denio, 323. So, it is a question of fact for a jury, whether material alterations in a written agreement were made before or after execution. *Pringle* v. *Chambers*, 1 Abb., 58. So, when an instrument has no date, the time of making it is a question of fact. *Coons* v. *Chambers*, 1 Abb., 165.

The question of negligence, when the facts constituting it are alleged to exist, either on the part of the plaintiff or of the defendant, is for the jury, if, on the evidence, it is contested or doubtful who was negligent. *Johnson* v. *Hudson River R. R.*, 6 E. P. Smith, 65; *S. C.*, 5 Duer, 21; *Vanderpool* v. *Husson*, 28 Barb., 196; *Brown* v. *New York Central R. R.*, 31 Barb., 385; *Bernhardt*

v. *Rensselaer & Saratoga R. R.*, 32 Barb., 165; *S. C.* affirmed, 23 How., 166; *Fero* v. *Buffalo & State Line R. R.*, 8 E. P. Smith, 209; *Brown* v. *Same*, 8 E. P. Smith, 191.

Whether a specific erection or building, or whether particular acts amount to a nuisance, is a matter entirely for a jury. *Morgan* v. *King*, 18 Barb., 277; *St. John* v. *Mayor of New York*, 6 Duer, 315. But if the facts are undisputed, it is then a question of law whether such facts amount to a nuisance. *Harlow* v. *Humiston*, 6 Cow., 189; *Updike* v. *Campbell*, 4 E. D. Smith, 570; *Dygert* v. *Schenck*, 23 Wend., 446; *Congreve* v. *Smith*, 4 E. P. Smith, 79.

Questions of law for the court.] Whether a witness is competent to be sworn, is a question of law for the court in all cases, whether the question is one relating to the legal capacity of the witness to be sworn, or for any other cause. *Prall* v. *Hinchman*, 6 Duer, 351. There are numerous cases of incapacity, such as idiocy, insanity, infancy, where the witness is of too tender years to comprehend the nature of an oath, and intoxication, where it is so gross as to incapacitate the witness. Some of these defects are temporary, and others are permanent.

So, too, it is always a question for the justice to decide, whether evidence which is offered is admissible; its competency or admissibility is for the court; its credibility or value, for the jury.

Where there is no question as to the facts, the construction of a written instrument is for the court, as for instance, the sufficiency of a notice. *Cook* v. *Litchfield*, 2 Bosw., 138; *S. C.*, 5 Seld., 279. So, where a chattel mortgage is fraudulent on its face, the justice must so hold it as a matter of law; and in that case, there is no question of fact to submit to a jury. *Edgell* v. *Hart*, 5 Seld., 213; *Williston* v. *Jones*, 6 Duer, 504; *Spies* v. *Boyd*, 1 E. D. Smith, 445. Whether a party has committed a fraud is a question for the jury upon such evidence as is introduced; but whether particular evidence which is offered tends to prove fraud is for the justice to decide. *Gage* v. *Parker*, 25 Barb., 141; *Erwin* v. *Voorhees*, 26 Barb., 127.

Those cases in which a justice is called on to decide upon the validity of written instruments, are, first, where the plaintiff sues upon some instrument, and the defendant insists that upon the face of the paper it is evident that, as a matter of law, there cannot be a recovery; and this objection is frequently, if not usually taken by way of motion for nonsuit, if it is the sole cause of action, or by way of objection to its introduction in evidence, when it is offered; or, secondly, when the defendant relies upon some similar instrument, by way of defense, as a set-off or otherwise, and the plaintiff objects to its introduction in evidence; or, thirdly, whenever either party offers in evidence a paper which, it is alleged, is not admissible because its invalidity or its incompetency appears upon its face. In all such cases, the justice is called upon to decide the questions as they arise. But, in the great majority of cases, the parties leave all the questions of fact

or of law to the jury, unless it is in the three classes of cases which have been just mentioned.

There is one other case in which a justice is called upon to decide upon the law relative to the whole case. When the defendant insists that there is a material defect in the plaintiff's proofs, or when he insists that upon all the facts proved, even if taken as true, there cannot be a legal recovery because the law will not authorize it, the defendant may insist upon a decision of this question by way of motion for a nonsuit. And, if the objection is well taken, the motion must be granted, or it will be error. See title Nonsuit.

After the evidence is all in, and the case is submitted to the jury, they will be authorized to decide all the questions involved upon the merits, whether of law or of fact, unless the justice shall elect to charge them as to the law; and, in that case, they are bound to follow the rules of law as laid down by the court in the charge given. But all questions of fact are exclusively for the jury, and the court has no right to instruct them how to find upon any question of fact. The law has made them sole judges of the questions of fact, upon such evidence as the court shall permit to be introduced before them on the trial.

If the jury err in deciding as to the law, when the whole case is submitted to them, this error can be corrected by an appeal. See title Appeal. But upon questions of fact, when the evidence is contradictory, or when the case turns upon the credibility of witnesses, and there is impeaching evidence, the general rule is that the verdict is conclusive. See title Appeal. When a judgment will be reversed because it is contrary to evidence, or is unsupported by it, see Appeal.

A verdict will cure every irregularity in the practice which is not objected to, as well as every defect in the pleadings, if a substantial cause of action or a good ground of defense has been established by the evidence. *Brown* v. *Harmon*, 21 Barb., 508; *Dias* v. *Short*, 16 How., 322.

Objections, exceptions, &c.] In the trial of every action it is very important that each party should protect his rights, and secure an opportunity for relief on an appeal, by making objections to every irregularity in practice, whether it relates to matters of process, pleadings, or evidence. If an objection is made in due time, and in regular and sufficient form, it will enable the objecting party to review the error complained of; but if no objection is made, or if it is not made in due time or manner, most important interests may be hazarded, if not altogether lost. The first step in the way of reserving a question is to state, orally, to the justice the precise objection which is urged, and if, after hearing the matter, the objection is overruled, then an exception is immediately taken, by stating to the justice, orally, that the party excepts to the ruling or decision of the justice. But, though objections are made orally, they are not to be left to the keeping of the memory. Every objection which is made ought to be one

in which the party has some confidence of its propriety. And the objection ought to be taken down in writing in the minutes of the party, so that the precise ground of objection will appear in writing. And it is the duty of the justice to take down every objection in writing, in his minutes, and precisely as it is made. If it is very lengthy, the substance of it may do; but the prudent course of every justice will be to note the objections just as they are made, or as nearly so as it can be reasonably done. The object of making an objection, where it is done in good faith, is to be able to have the objection returned on an appeal, and the justice cannot do this properly if he omits to take a correct note of the point made. The law is intended to guard every right of a party, and it is framed on the supposition that fairness will characterize the conduct of counsel on the trial of a cause, and, therefore, counsel are permitted to raise as many objections as they please on the trial. *Williams* v. *Eldridge*, 1 Hill, 249, 253. But this right cannot be abused by employing it as a means of wasting time, or of trifling with the court.

A justice ought always to regard an objection as made in good faith until he can clearly see that such is not the case. And this same rule applies to a cross-examination of a witness. A learned judge expressed himself as follows: "I have no doubt of the power of the court to restrain an abuse of the right of cross-examination, and to prevent an improper or vexatious delay in the progress of a trial; and where a party attempts, by frivolous and impertinent inquiries, to retard the course of justice, and needlessly occupy time, the court may correct the abuse by refusing to permit the party to continue the examination. Such a power is indispensable to the orderly conduct of a trial, and necessary to enable the court to bring the cause to a termination. It is, therefore, the duty of the court to exercise that power whenever the ends of justice clearly require its interposition. Not only so, I think the conduct of a party, or his counsel conducting such an examination, is a contempt of court, and might properly be punished as such. No doubt that if, after the court had thus restrained a frivolous and impertinent trifling with the administration of justice, the examining party should desist from such a course of inquiry, and propose or offer to propose a question or questions, clearly pertinent and proper, such questions should be received and propounded to the witness, even though the witness had been previously directed to leave the stand. But neither a party nor his counsel is at liberty to persist in a course of inquiry vexatious to the witness, tending to delay or embarrass his adversary, hindering the course of justice, or disrespectful to the court. The exercise of this power is a matter of some delicacy, and it should only be exercised in cases which *clearly* require its interposition, and, to some extent, that exercise must be regarded as resting in the sound discretion of the court. In order to enable the party to review the action of the court in such cases, he should, no doubt, be suffered to go far enough

in his examination to enable the court to see that his *course* of examination is improper, and that he is persisting therein. It could not be said that a single impertinent question warranted such an interference. And, for the same purpose of review, the examining party would be warranted in having a distinct ruling of the court upon a reasonable number of questions, though deemed by the court to be irrelevant, to the end that the party may enter his exceptions to the ruling, and that the appellate court may have an opportunity to see whether the exigency was such as to call the discretion of the court below into exercise. But to go beyond this, and hold that the party may consume the time of the court in receiving such questions and ruling upon their propriety, and noting exceptions to such rulings, would defeat the very power in question, and in its results be as oppressive, improper, disrespectful to the court, and subversive of the ends of justice as to suffer the questions to be propounded to the witness." WOODRUFF, J., in *Peck* v. *Richmond*, 2 E. D. Smith, 381, 382; and see *Onderdonk* v. *Ranlett*, 3 Hill, 323, 328, 329.

One of the most frequent objections heard in a justice's court is, that certain proposed evidence is irrelevant, immaterial, incompetent, illegal or improper. And it certainly is of the first importance to interpose a prompt, clear and sufficient objection to every kind of illegal or improper evidence. An omission to object is equivalent to a consent that it may be introduced. The objection must be made in an appropriate manner, and in the natural order of time. If a question is improper in form, the question itself ought to be objected to, and the particular objection as to its form pointed out. If the question is such as to show that a responsive answer would introduce illegal, incompetent or irrelevant evidence, then the question ought to be objected to on that ground, and also on the ground that such answer, if given, would be illegal, incompetent or irrelevant evidence, as the particular case may be.

When evidence is clearly illegal, and it bears upon a material issue in the case, its admission under a proper objection to it is an error which will reverse the judgment if rendered against the objecting party. *Williams* v. *Fitch*, 4 E. P. Smith, 546; *Erben* v. *Lorillard*, 5 E. P. Smith, 299; *Worrall* v. *Parmelee*, 1 Comst., 519; *Wilmot* v. *Richardson*, 6 Duer, 339, opinion; *Murray* v. *Smith*, 1 Duer, 413; *Whiting* v. *Otis*, 1 Bosw., 420, 424; *Ward* v. *Washington Ins. Co.*, 6 Bosw., 230; *Dresser* v. *Ainsworth*, 9 Barb., 619; *Penfield* v. *Carpender*, 13 Johns., 350; *Tuttle* v. *Hunt*, 2 Cow., 436.

There is a class of cases in which it has been held that the admission of irrelevant or improper evidence would not be a cause of reversal of the judgment, provided there was abundant competent evidence in the case to warrant the judgment, exclusive of the improper evidence. *Bort* v. *Smith*, 5 Barb., 283; *Spencer* v. *Saratoga & Washington R. R. Co.*, 12 Barb., 382; *Buck* v. *Waterbury*, 13 Barb., 116; *Andrews* v. *Harrington*, 19 Barb., 343; *Moore* v. *Somerindyke*, 1 Hilt., 199.

There may be cases in which it is entirely clear that improper evidence could not have influenced the result in the court below; and in such cases the decisions just referred to may be applicable. But in every case in which it is evident that the improper evidence may have influenced the result, the error will be a fatal one to the judgment. And in cases of doubt whether the improper evidence really affected the result, the reception of the evidence will be held erroneous. *Post*, 905.

When an irregularity is objected to, or when improper evidence is offered, the party objecting must fully, clearly and distinctly state the grounds of objection. A general objection may be sufficient in some cases, as for instance, where the objection could not have been obviated had it been specifically pointed out. *Merritt* v. *Seaman*, 2 Seld., 168. Where an objection is general, and the evidence is proper, but the mode of proving it is improper, the court will presume that the objection is not made as to the manner, but as to the matter, and the objection will be unavailing. *Bellows* v. *Sackett*, 15 Barb., 96. Where a written instrument is offered in evidence, and the objection is general, it will not reach a defect in the execution or acknowledgment of it. *Mabbett* v. *White*, 2 Kern., 442; nor as to the want of the subscribing witness. *Ranney* v. *Gwynne*, 3 E. D. Smith, 59; *Crooke* v. *Mali*, 11 Barb., 205.

So, where evidence is offered which is competent as to one of two defendants, but not as to the other, the objection by the latter must limit the objection to himself; for if it is general as to both defendants, it will be too broad, and will not be available as to the one who might have properly objected. *Black* v. *Foster*, 28 Barb., 387; *Fox* v. *Jackson*, 8 Barb., 355. But where there is a connected offer to prove several facts, some of which are admissible and some inadmissible, a general objection to the whole offer will be sufficient to sustain its exclusion by the court. *Hosley* v. *Black*, 26 How., 97. The time of making an objection is of much importance, and especially is this true when the opposite party could have obviated the objection had it been seasonably taken. And whenever the objection relates merely to matters of practice, either as to process, pleadings, the introduction of evidence, or the rulings of the court, the objection must be promptly presented or it will be conclusively waived. The court does not favor a deceptive, secret, or unfair mode of raising an objection; and, therefore, such objections as could have been fairly answered, if they had been seasonably made, will be disregarded on appeal if not specifically made below. *Coon* v. *Syracuse & Utica R. R.*, 1 Seld., 492; *Dayharsh* v. *Enos*, Id., 531; *Barnes* v. *Perine*, 2 Kern., 18; *Jencks* v. *Smith*, 1 Comst., 90; *Cowperthwaite* v. *Sheffield*, 3 Id., 243; *Bumstead* v. *Dividend Mut. Ins. Co.*, 2 Kern., 81; *Brown* v. *Cayuga & Susquehanna R. R.*, Id., 486; *Hunter* v. *Osterhoudt*, 11 Barb., 33; *Crooke* v. *Mali*, Id., 205; *Hubbard* v. *Russell*, 24 Id., 404; *Westbrook* v. *Douglass*, 21 Id., 602; *Fowler* v. *Clearwater*, 35 Id., 143; *Willard* v. *Bridge*, 4 Id., 361; *Peck* v. *Rich-*

mond, 2 E. D. Smith, 381; *Fairbanks* v. *Corlies*, 3 Id., 583; *Avogadro* v. *Bull*, 4 Id., 384. The foregoing are but a few of the very numerous cases upon this question.

Where the objection, however, is one which the opposite party could not have answered by further evidence, or by any act on his part, the objecting party may raise it, for the first time, on an appeal. *Tifft* v. *Tifft*, 4 Denio, 175; *Pepper* v. *Haight*, 20 Barb., 429; *Newcomb* v. *Clarke*, 1 Denio, 226.

Where there is no appearance by the defendant in the court below, he does not waive the right to object to illegal evidence which was introduced at the trial, and he may raise the question, for the first time, on an appeal. *Perkins* v. *Stebbins*, 29 Barb., 523; *Northrup* v. *Jackson*, 13 Wend., 85; *Squier* v. *Gould*, 14 Wend., 159; *Finch* v. *McDowall*, 7 Cow., 537; *Stafford* v. *Williams*, 4 Denio, 182, 184; *Warnick* v. *Crane*, Id., 460; *Davidson* v. *Hutchins*, 1 Hilt., 123; *McNutt* v. *Johnson*, 7 Johns., 18. So, where there is no appearance below by the defendant, he may insist that there is a material defect in the proofs. *Ib.* But, in such cases, if a good case is proved, no objection to the sufficiency of the pleadings can be taken, *Stafford* v. *Williams*, 4 Denio, 182; nor can any objection to a juror be taken, *Clark* v. *Van Vrancken*, 20 Barb., 278; and in one case it was held that the admission of illegal evidence was not a fatal error, if there was abundant valid evidence besides to sustain the judgment. *Buck* v. *Waterbury*, 13 Barb., 116.

Objections which go to the jurisdiction may always be raised on an appeal, even when there is no appearance below. *Tiffany* v. *Gilbert*, 4 Barb., 320; *Robinson* v. *West*, 11 Id., 309; *Willins* v. *Wheeler*, 8 Abb., 116; *S. C.*, 28 Barb., 669; *Cooper* v. *Ball*, 14 How., 295. And where the justice has no jurisdiction of the subject matter of the action, or where he is related to one of the parties, an appearance on the trial and a litigation of the cause, without mentioning the objection, will not prevent the party from raising the question upon an appeal, because express consent would not confer jurisdiction in such a case, and, of course, an implied consent by waiver would not be any better than an express consent for that purpose. *Post* v. *Black*, 5 Denio, 66; *Converse* v. *McArthur*, 17 Barb., 410; *Dudley* v. *Mayhew*, 3 Comst., 9; *Beach* v. *Nixon*, 5 Seld., 36; and see *ante*, 16, Jurisdiction. An erroneous ruling of a justice, in favor of admitting illegal evidence under exception, will do no harm if no illegal evidence is actually introduced under such ruling. *Howland* v. *Willetts*, 5 Seld., 170; *S. C.*, 5 Sandf., 219; *Vallance* v. *King*, 3 Barb., 548

When a ruling or decision is made by a justice upon any question raised by any objection, it is not important whether the justice assigns a correct reason for his decision; if the decision is right it will be sustained, however erroneous the reason assigned for it may be. *Gillespie* v. *Torrance*, 7 Abb., 462; *Munro* v. *Potter*, 34 Barb., 358; *Deland* v. *Richardson*, 4 Denio, 95.

A justice has power to strike out illegal evidence on a motion

for that purpose. *Heely* v. *Barnes*, 4 Denio, 73. But when evidence is received under an objection, it must be acted upon as a part of the evidence in the case, even though it be illegal. *Heely* v. *Barnes*, 4 Denio, 73; *Meyers* v. *Betts*, 5 Id., 81; *Penfield* v. *Carpender*, 13 Johns., 350; *Allen* v. *Way*, 7 Barb., 585. When evidence is offered and objected to, the justice must admit it absolutely, or not at all; he cannot admit it conditionally, unless the parties consent. *Haswell* v. *Bussing*, 10 Johns., 128; *Allen* v. *Way*, 7 Barb., 585. But the parties may, by express consent, receive the evidence, subject to a future decision as to its admissibility, and the evidence may, in that case, be taken conditionally. And express consent need not be shown, for if that course is proposed, and no objection is made, consent will be implied. *McKnight* v. *Dunlap*, 1 Seld., 537. Whenever any fact or state of facts is assumed below as true, such assumption will be held to be conclusive when the case is removed by appeal to an appellate court. When a matter is treated as a question of law in the court below, it cannot be urged on appeal that it was really a question of fact for a jury. *Barnes* v. *Perine*, 2 Kern., 18. So when a fact is assumed as proved at the trial, no allegation to the contrary can be heard on appeal. *Andrews* v. *Harrington*, 19 Barb., 344. So, in an action upon a chose in action, if no objection is made that the plaintiff has failed to show title to it, that will be conclusive on appeal. *Austin* v. *Burns*, 16 Barb., 643. A fact assumed to be conceded in the pleadings is conclusive after the trial below. *Munson* v. *Hegeman*, 10 Barb., 112. Where the defendant assumed that the plaintiff was a corporation, this was held conclusive upon appeal. *Kennedy* v. *Cotton*, 28 Barb., 59. So, an assumption that a plaintiff is a public officer is governed by the same rule. *Paige* v. *Fazackerly*, 36 Barb., 392. Whenever it is intended to raise a question as to the sufficiency of the evidence below, the objection must be distinctly and clearly taken before the justice, or it will be assumed that no objection is made on that account. *Westbrook* v. *Douglass*, 21 Barb., 602; *Austin* v. *Burns*, 16 Id., 643; *Jencks* v. *Smith*, 1 Comst., 90; *Smith* v. *Hill*, 22 Barb., 656; *Merritt* v. *Seaman*, 6 Id., 330; *Whitlock* v. *Bueno*, 1 Hilt., 72; *Cabre* v. *Sturges*, Id., 160; *Lee* v. *Schmidt*, Id., 537. But when there is no conflict in the evidence, nor any question as to its sufficiency, and the whole question relates to the right to recover, as a matter of law, upon all the evidence, no objection need be taken as to the sufficiency of the evidence. *Pratt* v. *Foote*, 5 Seld., 463.

The rejection of legal and competent evidence is always a fatal objection on an appeal. *Eakin* v. *Brown*, 1 E. D. Smith, 37; *Kendall* v. *Grey*, 2 Hilt., 301; *Bissell* v. *Marshall*, 6 Johns., 100. As we have already seen, *ante*, 631, general objections are usually unavailable. But great care is necessary in taking specific objections, for the reason that, when a specific objection is taken, it will be presumed that the party did not intend to raise any other questions than those specified, and all other objections which

might have been taken, but were not, will be deemed to be waived. *Sheldon* v. *Wood*, 2 Bosw., 269; *Newton* v. *Harris*, 2 Seld., 345; *Potter* v. *Deyo*, 19 Wend., 361; *Dunham* v. *Simmons*, 3 Hill, 609; *Smith* v. *Hill*, 22 Barb., 656. Objections are sometimes taken more broadly than is proper, and the objection thus fails altogether, when a proper objection would have been available, and sustained by the court. Where several letters or papers are offered in evidence, a general objection to them all will be useless, if any of the letters or papers are admissible. To secure a valid objection, it should be confined to the objectionable paper or letter. *Day* v. *Roth*, 4 E. P. Smith, 448; and see *McAllister* v. *Reab*, 4 Wend., 484; *S. C.*, 8 Id., 109. When evidence is offered which is admissible for one purpose, but not for an other, or when it is admissible as to one of the parties, but not as to an other, the objection must be confined to that purpose or person as to which it is not admissible, or the objection will be unavailing. *Black* v. *Foster*, 28 Barb., 387; *Fox* v. *Jackson*, 8 Id., 355; *Harris* v. *Panama R. R.*, 5 Bosw., 312; *Dunham* v. *Simmons*, 3 Hill, 609; *Richardson* v. *Wilkins*, 19 Barb., 510.

Offers to prove certain facts are sometimes made, and objected to by the opposite party, and ruled upon by the justice. When it is supposed that the offer will be overruled, it is generally made quite as broadly and strongly as the facts will warrant; though no reputable lawyer will make an offer to prove facts which he knows cannot be established by proof, if permitted to make the attempt. And when an offer is made in good faith, it must be done in such a manner as to show clearly what is offered, and that the evidence is competent and relevant. If the offer is ambiguous, or if it does not show that the evidence is relevant and competent, it will be insufficient. *Daniels* v. *Patterson*, 3 Comst., 47, 51. Objections and exceptions which are relied on must be specifically taken; and a general agreement that all the evidence shall be considered as objected to, will not be sufficient to raise particular objections upon an appeal. *Stephens* v. *Reynolds*, 2 Seld., 454.

An objection will be useless where the decision is one within the discretion of the justice; *Ford* v. *David*, 1 Bosw., 570; *Holbrook* v. *Wilson*, 4 Bosw., 65; *Hunt* v. *Hudson River R. R.*, 2 Duer, 482; *Roth* v. *Schloss*, 6 Barb., 308; *Brown* v. *McCune*, 5 Sandf., 224; *Watson* v. *Bailey*, 2 Duer, 509; *Phincle* v. *Vaughan*, 12 Barb., 215. An objection may be waived, although it may originally have been a valid one. If a nonsuit is moved for upon the ground of a defect in the evidence, when there really was such a defect, the introduction of evidence which completes the proof by either party, will cure the error of refusing to grant the motion at the time when it was made. *Kent* v. *Harcourt*, 33 Barb., 491; *Barrick* v. *Austin*, 21 Id., 241; *Breidert* v. *Vincent*, 1 E. D. Smith, 542; *Lambert* v. *Seely*, 2 Hilt., 429; and see *ante*, 579, 580, Nonsuit.

Of the justice's discretion.] There are many matters as to

which it is impossible to lay down any general rule for their disposition; and at the same time, it is necessary that there should be some decision of them. In such cases a large discretion is conferred upon the justice, in the belief that he will faithfully, fairly and equitably exercise it. The right to open and close the case to the jury, or to the justice in their stead, is not a matter of discretion, but of strict right, to be governed by legal rules. *Huntington* v. *Conkey*, 33 Barb., 218; *Ayrault* v. *Chamberlain*, 33 Id., 229; *ante*, 414.

But whether the pleadings shall be read to the jury, is a mere matter of discretion. *Willis* v. *Forrest*, 2 Duer, 310. If a portion of them is read, they must all be read if that is asked. And where a plaintiff read a portion of the answer, it was held that the defendant had a right to have the entire answer read. *Gildersleeve* v. *Mahony*, 5 Duer, 383. In a justice's court, either party should be permitted to read the pleadings to the jury; for it is important that those who are sworn to try the issues should know what those issues are. All relevant and competent evidence must be received if offered. But the order in which the proof shall be introduced is entirely within the justice's discretion. *Bedell* v. *Powell*, 13 Barb., 183. And after a plaintiff has given some evidence and rested his cause, and the defendant has introduced his evidence, the justice may, in his discretion, permit the plaintiff to go into evidence in relation to an entirely new cause of action, as to which no proof had been previously given, if it is a matter which is embraced within the pleadings. *Peckham* v. *Leary*, 6 Duer, 495. But the defendent will be entitled to rebut such proof by evidence, and to make any defense which he may have to it. So, after either or both parties have rested, the justice may permit new witnesses to be recalled upon points as to which evidence has already been given by both parties. *Anthony* v. *Smith*, 4 Bosw., 503.

A justice may grant, or he may refuse a suspension of the examination of a witness to enable him to look for a paper which is important, and which he had not been notified to produce at the trial. *Fairbanks* v. *Corlies*, 1 Abb., 150; *S. C.*, 3 E. D. Smith, 582.

If one party introduces irrelevant evidence, the justice may permit a cross-examination as to the same matters. *Keeler* v. *Delavan*, 4 Barb., 317. Still the justice is not bound to hear irrelevant evidence in answer to irrelevant evidence given on the other side without objection. *Farmers' and Manuf. Bank* v. *Whinfield*, 24 Wend., 420. But, if irrelevant evidence is decided to be competent, and it is admitted in favor of one of the parties under objection, the justice will be bound to permit the opposite party to prove the contrary, or to answer such evidence by evidence in answer or reply. *Ward* v. *Washington Ins. Co.*, 6 Bosw., 229.

Where both parties have given parol proof of the contents of a written instrument without objection, the justice may permit either of them to pursue the inquiry as to its contents, by parol. *Morss* v. *Stone*, 5 Barb., 516.

Upon questions relating to the characters of witnesses, the justice may limit the number of impeaching witnesses to be sworn on either side. *Spear* v. *Myers*, 6 Barb., 445; *Nolton* v. *Moses*, 3 Id., 31; *Green* v. *Brown*, 3 Id., 120. But the rule ought to be laid down at the commencement of the examination upon such questions; and it ought to be equal as to the parties. So, too, the number of witnesses may be limited, when they speak of mere matters of *opinion*. *Sizer* v. *Burt*, 4 Denio, 426. But this rule does not apply when the witnesses are called to prove facts in relation to material points upon the merits. *Ante*, 607.

When evidence is offered which, standing alone, does not seem relevant, the justice may require the party offering it to state how it is to be made material. *Adsit* v. *Wilson*, 7 How., 64; *Beal* v. *Finch*, 1 Kern., 135. So, a party may object to evidence which is apparently irrelevant, and require a statement of facts showing its relevancy. *Ib.*

Irrelevant evidence may be excluded by the justice on his own motion; he need not wait for an objection from the opposite party. *Cooper* v. *Barber*, 24 Wend., 105; *Corning* v. *Corning*, 2 Seld., 97. *Ante*, 616.

Whether leading questions shall be put to a witness is entirely discretionary with the justice. *Cheeney* v. *Arnold*, 18 Barb., 435; *Budlong* v. *Van Nostrand*, 24 Barb., 25; *Seymour* v. *Bradfield*, 35 Barb., 49. And this discretion will not be interfered with unless it is evident that it has been grossly abused. *Ib.* Whether a witness shall be recalled after he has left the stand, is entirely a matter of discretion. *Sheldon* v. *Wood*, 2 Bosw., 269; *Treadwell* v. *Stebbins*, 6 Id., 538; *Meakim* v. *Anderson*, 11 Barb., 216. And so of recalling a witness after the case has been declared closed as to the evidence. *Anthony* v. *Smith*, 4 Bosw., 503; *Chancel* v. *Barclay*, 1 E. D. Smith, 384; *Heidenheimer* v. *Wilson*, 31 Barb., 637; *Dunckle* v. *Kocker*, 11 Id., 387; *Burger* v. *White*, 2 Bosw., 92; *Silverman* v. *Foreman*, 3 E. D. Smith, 322; *Harpell* v. *Curtis*, 1 E. D. Smith, 78; *Stacy* v. *Graham*, 3 Duer, 445.

After a plaintiff has rested his cause, the justice may refuse to receive any further evidence on his side, except by way of reply. *Shepard* v. *Potter*, 4 Hill, 202. This rule, however, is scarcely ever enforced in a justice's court; and to refuse evidence to supply a mere formal defect in the plaintiff's evidence, even after he had rested his cause, will be sufficient ground to reverse the judgment. *Lewis* v. *Ryder*, 13 Abb., 1.

A witness will not be permitted to return to the stand merely to reiterate his statements, though the justice may allow it if he sees fit. *Hughes* v. *Mulvey*, 1 Sandf., 92, 95. This may sometimes be proper, as where there is a disagreement as to what the witness testified, or if it has not been taken down in the minutes; and see *ante*, 488. A witness may be recalled after the summing up of the cause has commenced, if the case is a proper one to require it, and the justice thinks it best to permit it. *Dunckle* v. *Kocker*, 11 Barb., 389. In the last case cited the witness was

recalled to state how he had testified upon a particular point; and see *Law* v. *Merrills*, 6 Wend., 268; and see *ante*, 488. After a cause has been submitted, and partially or wholly summed up, it ought to be a strong case which would induce a justice to permit a witness to be recalled, especially when a corrupt witness would see precisely how to shape his answers, after hearing the entire cause argued by counsel.

It is for the justice to determine how long he will hold open his court for the appearance of a witness who is absent; though the exercise of this discretion will be corrected when it has evidently been abused.

SECTION II.

PROCEEDINGS AGAINST A JUROR FOR NON-ATTENDANCE.

The statute provides that a fine may be imposed upon a juror who has been duly summoned, and who refuses or neglects to appear or to serve as such without a reasonable excuse therefor. Vol. I, 54, § 103. When a juror has been duly summoned, and he refuses to attend or to serve as the law requires, the justice ought to proceed with the trial without him; and after the completion of the trial, a summons should be issued by the justice requiring the juror to show cause why he should not be fined. A two days' summons will be proper. *Robbins* v. *Gorham*, 26 Barb., 586; *S. C.*, 11 E. P. Smith, 588. If this summons is returned, personally served, and the juror does not appear on the return day, at the proper time and place, the justice should then issue an attachment for the purpose of bringing such delinquent juror before him. *Ib.* The attachment may be made returnable forthwith, or at some short period, say two days; and it should be served in the same manner as an attachment against a defaulting witness. A non-appearance by a juror, or a refusal to serve as such in a proper case, is a contempt of court. *Ib.* And before proceeding to fine him, a summons may be issued and served on him for the purpose of giving him an opportunity to excuse his default. If he refuses to appear in obedience to the summons, the law gives a compulsory process by attachment, to compel his attendance. *Robbins* v. *Gorham*, 26 Barb., 586; *S. C.*, 11 E. P. Smith, 588. It is not necessary, however, for the justice to issue a summons for the purpose of notifying the juror to attend. *Ib.* The justice may issue a warrant in the first instance, and the process, though it should be in the form of an attachment, is in substance and legal effect a warrant. *Ib.* The validity of a conviction under this statute is not affected by the omission of a justice to enter in his docket the minute thereof made by him. *Ib.* If a summons is issued in the first instance, and the juror attends, in pursuance of its commands, and appears in the action, the justice may dispose of the matter of the fine upon the return of the summons. *Ib.* But if he does not appear, no action can be taken until the juror is actually present before the justice. *Ib.* There is no plaintiff in such a proceeding, for

it is not an action, but a summary proceeding; and the defaulting juror is allowed to excuse himself upon his own oath, or by other legal evidence. *Ib.* The statute does not, in terms, give a warrant or attachment, but it gives the power to impose a fine; and the power to punish, of necessity, gives the power to bring the delinquent before the court for punishment. *Ib.* The return of the constable that he had summoned the juror is *prima facie* evidence of a proper service, and if not traversed is conclusive evidence of the fact. *Ib.* On the return of the attachment, if the juror does not show a sufficient excuse for his non-attendance, the justice should proceed to impose a fine upon him, which cannot exceed ten dollars, nor be less than sixty-two cents, together with the costs. Vol. I, 50, § 75; Id., 54, § 103. The fine is collectible by execution against the property of the juror, if he has any liable to execution, and in default thereof he may be imprisoned. Vol. I, 50, 54, §§ 75, 76, 77, 78, 103; *Robbins* v. *Gorham*, 26 Barb., 586; *S. C.*, 11 E. P. Smith, 588. In the case last cited the court commended the conduct of a justice in enforcing the attendance of a juror by attaching and fining him for his non-attendance. The justice ought to draw up and sign the record of conviction, and copy it into his docket; but the omission to enter it into his docket will not affect its validity, as the statute is merely directory upon that point. *Ib.*

Summons against a defaulting juror.

ALBANY COUNTY, *ss:* The People of the State of New York, to any constable of said county, GREETING: We command you to summon Richard Smith to appear before the undersigned, a justice of the peace of the town of Bethlehem, in said county, at his office in the said town and county, on the 4th day of June, 1865, at ten o'clock in the forenoon, to show cause why he should not be fined, according to law, for his non-attendance as a juror before the said justice, at his said office in the said town, on the 1st day of June, 1865, in a certain cause there depending before the said justice, in which A. B. was plaintiff, and C. D. was defendant; and have you then there this precept. Given under my hand this 2d day of June, 1865.

J. WOOD, *Justice.*

Constable's return to summons.

On the 2d day of June, 1865, I did, at the town of Bethlehem, in the county of Albany, serve the within summons, personally, on Richard Smith, the juror named therein. Dated, Bethlehem, June 2d, 1865. Constable's fees, $.

TIMOTHY SHERROD, *Constable.*

Attachment to compel attendance of juror.

ALBANY COUNTY, *ss:* The people of the State of New York, to any constable of said county, GREETING: Whereas, it has been made to appear to the undersigned, a justice of the peace of the town of Bethlehem, in the county of Albany, by due and legal proof made before me, that Richard Smith was, on the 1st day of June, 1865, duly summoned as a juror, to appear before the undersigned, at his office in said town, at ten o'clock in the forenoon, to make one of a jury, to try a cause then depending before me, in which A. B. was plaintiff, and C. D. was defendant, and whereas said Richard Smith made default, and refused to appear or attend

as such juror at the time and place aforesaid; and whereas, on the second day of June, 1863, a summons in due form of law, was duly served upon the said Richard Smith, requiring him to appear before me at my office at the town aforesaid, on the fourth day of June, 1865, at ten o'clock in the forenoon, to show cause why a fine should not be imposed upon him for such non-attendance as a juror as aforesaid; and whereas, the said Richard Smith has neglected to appear and show cause why he should not be fined according to law, after due service of such summons, and due proof of the service thereof having been made before me, we command you to attach and take the body of the said Richard Smith and bring him forthwith (or on some specified day) before the said justice, at his office in the town aforesaid, to answer all such matters as shall then and there be objected against him, for having neglected to attend the trial of said action as a juror. And have you then and there this precept. Given under my hand this fourth day of June, 1865.

J. WOOD, *Justice.*

See also the form in *Robbins* v. *Gorham*, 11 E. P. Smith, 589, 590, which was sustained by the court of appeals.

Minute of conviction of a defaulting juror.

ALBANY COUNTY, *ss:* Be it remembered, that on this sixth day of June, 1865, Richard Smith is convicted before me, and fined the sum of ten dollars, besides two dollars costs for non-attendance as a juror before me at my office, in the town of Bethlehem, in the county of Albany, on the first day of June, 1865, in a certain cause then and there depending before me, in which A. B. was plaintiff, and C. D. defendent.

J. WOOD, *Justice.*

Execution against juror for fine and costs.

ALBANY COUNTY, *ss:* The People of the State of New York, to any constable of said county, GREETING: Whereas, Richard Smith was, on the 6th day of June, 1865, convicted and fined by the undersigned, a justice of the peace of the town of Bethlehem, in the county of Albany, the sum of ten dollars, besides two dollars costs, for non-attendance as a juror before the said justice, at his office in the town of Bethlehem, in the county of Albany, on the 1st day of June, 1865, in a certain cause then and there depending before me, the said justice, in which A. B. was plaintiff, and C. D. was defendant, a record of which conviction, and of the cause thereof, has been duly made and entered in the docket of the undersigned justice. And whereas the said Richard Smith has neglected to pay the said fine and costs, you are hereby commanded to levy the said fine and costs of the goods and chattels of the said Richard Smith; and for want thereof, to take and convey the said Richard Smith to the jail of said county, there to remain until he shall pay such fine and costs. And the keeper of said jail is required to keep the said Richard Smith in close custody in said jail, until the fine and costs aforesaid be paid, or until thirty days after the commencement of this imprisonment. Given under my hand, at Bethlehem, this 6th day of June 1865.

J. WOOD, *Justice.*

SECTION III.

CONTEMPTS OF COURT.

There is no doubt about the common law right to punish a contempt of court in certain cases; but, in this state, the statute

has expressly given authority in certain cases, and as expressly excluded it in all others. Vol. I, 73, § 199. Under this statute the only question will be, whether the act done or omitted is a violation of the statute. The punishment is also prescribed by statute. Vol. I, 73, § 200. No person can be punished for a contempt until he has had an opportunity to be heard in his defense. When the contempt is committed in the immediate presence of the justice, he may at once call upon the offender for his defense, without issuing any process for that purpose. If such person leaves the court before he can be called upon to make his defense, the justice may issue a warrant for his arrest. Vol. I, 73, § 201.

Warrant to arrest for a contempt.

ALBANY COUNTY,
TOWN OF BETHLEHEM, } *ss:*

The People of the State of New York, to any constable of the county of Albany, GREETING: We command you to apprehend Richard Peters, and bring him before J. Wood, Esq., one of the justices of the peace of the town of Bethlehem, in the county of Albany, at his office in said town, to show cause why he, the said Richard Peters, should not be convicted of a criminal contempt, alleged to have been committed on the 2d day of June, 1865, before the said justice, while engaged, as a justice of the peace, in judicial proceedings. Given under my hand, at Bethlehem aforesaid, this 2d day of June, 1865. J. WOOD, *Justice.*

This warrant should be delivered to any constable of the county for service; and the officer will proceed to execute it in the same manner that a civil warrant is executed. After the arrest of the person who committed such contempt, and his appearance before the justice, the latter should state distinctly to such offender the particular circumstances of the offense with which he is charged; and he should be called upon for his defense. The justice may reduce such statement to writing, which will be the more prudent course, since it will then be easy to show precisely what was alleged as the contempt. If the offender can show any facts which will excuse his acts from being considered as a contempt, the justice may discharge him; but if the excuse is unsatisfactory, or if he refuses to make any excuse, the justice will proceed to convict him of the contempt. No evidence is necessary in such a case, since the justice proceeds entirely upon such matters as occurred in his immediate presence. The object of punishing a contempt is to secure that invariable respect for the laws and for courts which must exist if the laws or if justice is to be properly administered by the courts. When a proper apology is offered, the justice may accept it, and omit to enforce the further proceedings. But when there is a refusal to apologize, and a persistence in contumacious conduct, the justice ought to enforce the law with a firm hand; and, if justice requires it, the punishment should extend to the full limits of the law. Vol. I, 73, § 200. In every case of a conviction for a contempt the justice must immediately make up a record of con-

viction, in which must be stated the particular circumstances of the offense, and the judgment rendered thereon, which must be subscribed by the justice, and filed in the county clerk's office within ten days after its date. Vol. I, 73, §§ 202, 203.

Record of conviction for a contempt.

ALBANY COUNTY, *ss:* Whereas, on this second day of June, 1865, while the undersigned, a justice of the peace of the town of Bethlehem, in said county, was engaged in the trial of an action (or other judicial act), in which A. B. was plaintiff, and C. D. was defendant, at his office in said town, in accordance with the statute in such case made and provided, Richard Perry did, willfully and contemptuously, interrupt me while engaged in the trial of said case, and did then and there conduct himself so disorderly and insolently towards the said justice, and, by making a loud noise and a great disturbance, did interrupt such proceedings, and impair the respect due to the authority of such justice; and, on being ordered by me, the said justice, to cease making such noise and disturbance, he, the said Richard Perry, refused so to do, but, on the contrary, he declared publicly and with a loud voice that I was a partial justice, and that no defendant ever received justice in a cause tried before me (or whatever the offensive words may be); and whereas, the said Richard Perry was immediately called upon by the said justice to answer for the said contempt, and to show cause why he should not be convicted thereof, and he, not showing any cause nor making any defense to said charge, nor excusing himself therefrom,* be it therefore remembered, that the said Richard Perry is adjudged to be guilty, and is convicted of the contempt aforesaid, before the said justice, and adjudged by the said justice to pay a fine of ten dollars, and be imprisoned in the county jail of said county for the term of five days, and until he pays such fine, or he is duly discharged from imprisonment according to law. Given under my hand this 2d day of June, 1865. J. WOOD, *Justice.*

In every instance the statement of the offense should be made with particularity and minuteness, so as to comply with the requirements of the statute. Vol. I, 73, § 202.

A precedent is useful merely as a guide in the matter, for the circumstances of each case will differ from any precedent, and from almost any other case. Two things should be constantly observed in drawing a record of conviction; one is, that the offense is clearly one within the meaning and intent of the statute, and the other is that the offense should be stated as nearly in the language of the statute as may be, with a circumstantial detail of the acts constituting the offense. If a warrant was issued for the arrest of the offender, for the purpose of bringing him before the justice, the record of conviction should recite that fact. After stating the facts showing the contempt, the recital in the record of conviction may show the arrest as follows: "And whereas, the said Richard Perry was brought before me upon a warrant duly issued by me for that purpose, and required to answer for the said contempt, and show cause why he should not be convicted thereof." Then, following this, continue the statement that no cause was shown, &c., as follows: "And whereas the said Richard Perry was thereupon required to answer for the said

contempt, and show cause why he should not be convicted thereof; and whereas the said Richard Perry did not show any cause, nor make any defense against the said charge; Be it therefore remembered," &c., as in the precedent.

Warrant of commitment for a contempt.

COUNTY OF ALBANY, } ss:
TOWN OF BETHLEHEM, }

The People of the State of New York, to any constable of said county, and to the keeper of the common jail of said county, GREETING: Whereas, &c., (recite the record of conviction so as to show the entire charge therein contained, omitting the conclusion of the record, which states the conviction in the following words: "Be it therefore remembered," &c., and then proceed as follows): And whereas, the said Richard Perry was thereupon adjudged to be guilty, and was convicted by me, the said justice, of the criminal contempt aforesaid, and was adjudged to pay a fine of ten dollars and be imprisoned in the county jail of said county for the term of five days, and until such fine is paid or he is discharged from imprisonment according to law.

Therefore you, the said constable, are hereby commanded to take, convey and deliver the said Richard Perry into the custody of the said keeper of the said jail; and you, the said keeper, are hereby required to receive the said Richard Perry into your custody in the said jail, and him there safely keep during the said term of five days, and until he pays the said fine, or is duly discharged according to law; hereof fail not. Dated this 2d day of June, 1865. J. WOOD, *Justice.*

The justice acts judicially in convicting any person of a contempt, and therefore no civil action can be maintained against him for making any such conviction. *Robbins* v. *Gorham*, 26 Barb., 586; *S. C.*, 11 E. P. Smith, 588. And if the fine is collected or the offender is imprisoned, no action lies against the justice, because his proceedings cannot be overhauled in such a collateral way. *Ib.*

The proceedings must, however, be regular on their face, and show a compliance with the requirements of the statute. *Ib.* Though the statute is merely directory as to entering the conviction of a defaulting juror into the docket. *Ib.* If the record of conviction shows jurisdiction, the statements contained in it are not traversable, and are conclusive in any action which may be brought against the justice. *Mather* v. *Hood*, 8 Johns., 44; *Robbins* v. *Gorham*, 26 Barb., 586; *S. C.*, 11 E. P. Smith, 588.

If the conviction is erroneous for the reason that the acts done or omitted do not legally amount to a contempt, the conviction may be reversed if the proper steps are taken for that purpose. *Mallory* v. *Benjamin*, 9 How., 419. The counsel of either of the parties cannot be compelled to produce in evidence a paper which came into his hands as counsel, by the delivery of his client; and a conviction for a contempt for such refusal will be erroneous. *Ib.* In such a case a refusal to produce the paper is not a *resistance* to a lawful order made by the justice, within the meaning of sub. 3 of § 199, Vol. I, 73.

SECTION IV.

PROCEEDINGS AGAINST A WITNESS FOR REFUSING TO BE SWORN.

The statute upon this subject will be found, Vol. I, 73, §§ 204, 205, 206. The proceedings for compelling the attendance of a witness have been already given. *Ante*, 555. The present proceedings relate exclusively to the case of a witness who is present in court and refuses to be sworn at all, or, if sworn, to answer any proper question which is put to him. Before a person can be punished for refusing to be sworn as a witness, it must be shown that he has been legally subpœnaed. Though if he is present in court, and his fees are paid or tendered to him there, that will be sufficient. The proper practice, however, is to subpœna the person regularly as a witness, and especially is this so where it is intended to pursue the proceedings by way of punishment for a contempt in refusing to be sworn. Due proof of the service must always be made before the justice is authorized to act in the matter. This proof may be made by the return of a constable upon the subpœna, or by the affidavit of any other person who served the subpœna. And it is best to require such proof in every case in which proceedings of this nature are taken. An express admission of the due service of the subpœna, if made by the witness himself, is sufficient. It is not sufficient to merely prove that a witness has been duly subpœnaed, and that he refuses to be sworn; it must also be shown that he is a material witness, Vol. I, 73, § 204, or he cannot be committed for such refusal. The materiality of the witness must be shown, on oath, by the party at whose instance he was subpœnaed. Vol. I, 73, § 204.

Oath of materiality of witness.

You do swear that you will truly answer all such questions as may be put to you in relation to the materiality of the testimony of Charles Jones, a witness in the action now on trial before me, in which A. B. is plaintiff, and C. D., defendant.

If the party then states, under his oath, that the witness is a material one, and that he cannot safely proceed to the trial of the cause without his testimony, the justice must require the witness to be sworn, or to answer the question proposed, if already sworn. If the witness refuses to comply with the requirement of the justice, he must be committed to the county jail, where he shall remain until he submits to be sworn, or to answer, or until he is dead or insane. Vol. I, 73, §§ 205, 206.

Commitment of a witness for refusing to be sworn, &c.

ALBANY COUNTY, }
TOWN OF BETHLEHEM, } *ss:*

J. Wood, a justice of the peace of the town of Bethlehem, in the county of Albany, to any constable of said county, and to the keeper of the county jail of said county, GREETING: Whereas, on the trial of a civil action before me, the said justice, this day, in which A. B. was plaintiff, and C.

D., defendant, Charles Jones, being called as a witness on the part of the plaintiff (or defendant), and being present, and it being proved by the return of Arthur White, one of the constables of said county, that the said Charles Jones had been duly subpœnaed, &c., refused to be sworn, as such witness, in any form prescribed by law. And the said A. B. having made oath, before me, that the testimony of the said Charles Jones was so far material that without it he could not safely proceed with the trial of the said action, now, therefore, you, the said constable, are hereby commanded, forthwith, to convey and deliver the said Charles Jones into the custody of the said keeper of said jail, and you, the said keeper, are hereby required to receive the said Charles Jones into your custody in the said jail, and him there safely keep until he shall submit to be sworn as such witness as aforesaid, and shall be discharged by due course of law; hereof fail not. Given under my hand this 3d day of June, 1865.

J. WOOD, *Justice.*

The foregoing form is applicable to a case in which the witness refuses to be sworn at all as a witness. But a witness is frequently sworn, and answers most of the questions put to him, though he may refuse to answer some of the questions propounded to him. In that case, the commitment ought to be similar in form to the one just given, with such a difference in the statement as will conform to the facts of the case. Instead of reciting that the witness refused to be sworn, the commitment ought to state that the witness was duly sworn, and that he refused to answer some specified question or questions, which statement may be in the following form:

"The said Charles Jones was called and duly sworn by me as a witness, on the part of the plaintiff (or defendant), and on his examination (or cross-examination) the said Charles Jones was asked, by the said plaintiff (or defendant), the pertinent and proper question, 'Whether he had seen C. D., the defendant in the action, write?' to which question the said Charles Jones refused to make any answer."

The commitment must state the question precisely as it was put to the witness, which may readily be done by reducing the question to writing.

A witness cannot be committed to jail, under this statute, for refusing to answer where he obtained liquor, or as to the cause of his intoxication, when the proceeding is one instituted under the Excise Laws of 1857, ch. 628. *People* v. *Webster*, 14 How., 242. And if so committed, he will be relieved on *habeas corpus*, and discharged from imprisonment. *Ib.* In such a case, the question is a jurisdictional one. On a *habeas corpus*, issued in a case of a commitment for a contempt of court, two questions only are examined. One is, whether the court had jurisdiction to make the commitment, and the other, whether the commitment is regular and sufficient on its face. *People* v. *Sheriff of New York*, 29 Barb., 622; *S. C.*, 7 Abb., 96; *People* v. *Kelly*, 21 How., 54; *S. C.*, 12 Abb., 150. A justice should never require an answer to a question which might tend to criminate a witness, or subject him to an action for a penalty, if he claims his exemption. *Byass* v. *Sullivan*, 21 How., 50; 3 R. S., 690, § 102, 5th ed.

CHAPTER V.

DAMAGES.

SECTION I.

DAMAGES IN ACTIONS ON CONTRACTS.

General view of the subject.] The compensation, recompense, or satisfaction which the law gives to the party injured against the party causing or producing the injury, is termed damages. As a general rule, the damages ought to be precisely commensurate with the injury. But the cases hereafter cited will show how far the rule is enforced in actual practice, and how far it is modified or disregarded. In every case, the damages must be the result of the injury complained of; whether it consists of the withholding of a legal right, or the breach of a duty legally due to the plaintiff. General damages are such as necessarily result from the injury, and they may be proved under a general allegation of damages in the complaint. *Ante*, 310.

The law always presumes some damage to follow from the violation of any right or duty implied by law, and therefore nominal damages will be awarded, if none greater are proved. But where the damages, though the natural consequences of the act complained of, are not the necessary result of it, they are termed special damages, which the law does not imply, and, therefore, in order to prevent a surprise upon the defendant, they must be particularly specified in the complaint, or the plaintiff will be precluded from giving evidence of them on the trial. *Ante*, 310.

There are few instances in which the right to recover damages to some amount will be disputed if it is conceded that the plaintiff has established a cause of action. And yet there are a few cases in which it is said that no damages are recoverable, because the injury itself was so insignificant as to be beneath the notice of the law. See Vol. I, 728, 734, 735, 793, 795, 796.

But, notwithstanding some exceptional cases, the law generally gives a remedy by way of damages to the injured party. "Wherever the common law gives a right, or prohibits an injury, it also gives a remedy by action." 3 Bla. Com., 123, and see Vol. I, 729. "If a statute gives a right, the common law will give a remedy to maintain that right; *a fortiori*, where the common law gives a right, it gives a remedy to assert it. This is an injury, and every injury imports a damage." Lord HOLT in *Ashby* v. *White*, 1 Salk., 19. "It is the pride of the common law, that wherever it recognizes or creates a private right, it also gives a remedy for a willful violation of it." *Yates* v. *Joyce*, 11 Johns., 140, opinion. "It is a general and very sound rule of law, that where an injury has been sustained, for which the law gives a remedy, that remedy shall be commensurate to the injury sustained." SEDGWICK, J., in *Rockwood* v. *Allen*, 7 Mass., 254. It is a natural and legal principle that the compensation should be equivalent to the injury. SHIPPEN, Ch., J., *Bussey* v. *Donaldson*, 4 Dallas, 206.

"The general rule of law is this: Whoever does an injury to an other is liable in damages to the extent of that injury. It matters not whether the injury is to the property or the person, or the rights or the reputation of an other." STORY, J., *Dexter* v. *Spear*, 4 Mason, 115. But it is not to be assumed, from this general language, that the law will give a remedy for every loss which one individual may sustain from the acts of an other. If the damages result from fraud, deceit, or malice, there are many cases which are actionable. Vol. I, 727 to 737, 853 to 862. But there are some few instances in which one person may suffer injury from the acts of an other, and yet the law gives no redress by way of damages. See Vol. I, 728, 734, 735, 736, 793, 795.

As a general rule, the measure of damages is a matter of law to be determined by the court. "In cases where a rule can be discovered, the jury are bound to adopt it. That rule is, that the plaintiff should recover so much as will repair the injury sustained by the misconduct of the defendant." WASHINGTON, J., in *Walker* v. *Smith*, 1 Wash. C. C. R., 152. Again, in reference to the rate of damages on a foreign bill of exchange, the court said: "In this, as in other cases of contract, the rule by which the amount or extent of redress should be ascertained is a question of law." *Graves* v. *Dash*, 12 Johns., 17, 23.

Although the law aims at furnishing a compensation to the injured party, it will be found that there are few instances in which such a result is actually attained. Where the injury which results from the acts or omissions of an other is from fraud, malice, or willful wrong, there are several considerations which bear upon the measure of damages. If the action is founded upon an unpaid bill or note, or for the price of goods sold, or for the value of property paid for, but not delivered, compensation will be measured by the actual pecuniary loss directly sustained. In such a case no indirect loss is taken into the account, such as a loss of profits that might have been made had the contract been performed; nor is any notice taken of the loss sustained by the derangement or disturbance of business produced by the failure to perform the contract, such as loss of credit, or of business, or even the insolvency of the injured party. Neither is any allowance made in such a case for mental anxiety and suffering; nor is any account taken of the time and money expended in pursuing a legal remedy, except such costs, fees, and charges as the law allows against the unsuccessful litigant. So, too, the law, as a general rule, does not change the rule of damages by reason of the motives of the party who fails to perform his engagement or contract; and for that reason the measure of damages is the same, whether the contract was broken through honest inability or fraudulent design. There are some cases, however, in which the motives of a party may have an influence upon the question of damages, and these will be noticed in a subsequent place.

Nominal damages.] The law recognizes a distinction between nominal and substantial damages. In an action for the recov-

ery of substantial damages the object generally is to attempt to obtain a remuneration for the loss actually sustained, or as near that as the law will permit. But there are cases in which the injury is not such as to entitle the complaining party to substantial damages, and yet the law will permit him to recover nominal damages. Where there is an invasion of a legal right the law infers some damage as resulting therefrom, and in the absence of proof of any particular damage, the law will award nominal damages if no other. Vol I, 794, 796, 797. By nominal damages is to be understood that a small sum is given, as a penny or a sixpence, &c. In some cases the amount of damages recoverable is not important to the plaintiff, except in so far as it affects the right of recovery. When the object of the action is to establish a right or title, the recovery of a small sum is as effectual as a verdict or judgment for a large sum. In an action for a trespass upon lands, or for injuries to a watercourse, or other cases of a similar nature, the amount of damages is frequently quite small. Vol. I, 766, 767, 791 to 800. But the judgment in relation to the rights of the parties is as conclusive as though the largest damages were awarded.

Where a right of action is given by statute, and the plaintiff is entitled, on the evidence, to maintain an action, the court ought not to grant a nonsuit, even though the damages sustained by the plaintiff are merely nominal. *Quin* v. *Moore*, 1 E. P. Smith, 432, 434. And the same rule is applicable in those cases in which the common law clearly gives a right of action for the recovery of some damages for violating a clear legal right. Where the action is brought for the purpose of determining a right as in an action of trespass to real estate, or the like, and the plaintiff establishes a right of recovery, then the defendant ought to pay the expenses resulting from the litigation of the question. There are cases, however, in which the action is prosecuted from motives of malice or revenge, and in which no important question is involved; and it is sometimes a question what ought to be the decision in such a case. That such litigation ought not to be encouraged is a point upon which there will be a general agreement; but it is not always easy to apply a proper corrective by way of a legal disposition of the case. If, upon undisputed evidence, the plaintiff is entitled to a judgment for some damages, no court or jury have a right to disregard the law by determining the case against the plaintiff; and, in such cases, the only legal mode of disposing of the case is to render a judgment in favor of the plaintiff for nominal damages. Such cases as these, however, are not usual, for there is seldom a trial in which there is not a fair issue made upon a question of fact, upon which there is a conflict of evidence; and when, in a case of that character, a court or jury can clearly see that malice alone is the motive for bringing the action, they can apply the proper corrective by finding a verdict in favor of the defendant. This course will give full effect to the principle of law which declares against

useless or vindictive litigation. If, however, the plaintiff makes out a clear case according to law, it is the duty of a jury to be very careful that they do not disregard their own duties and their oaths by finding a verdict against law and evidence, merely because they suppose that the plaintiff was actuated by an improper motive in bringing his action.

Remote and consequential damages.] As a general rule the law does not take into consideration any damages which are the remote results of the act or injury complained of. And where such damages exist, they are usually termed remote or consequential damages, by way of distinguishing them from such damages as are a positive and direct result of the alleged act or injury. The principle here enunciated may seem to be easy of application, and in many cases it is so; but there are other instances in which there is no little difficulty in deciding whether a given case falls within the rule which excludes the damages as too remote. A few of the numerous cases will be noticed for the purpose of showing the application of the rule in actions of contract and also those of tort. If a dealer in drugs and medicines carelessly labels a deadly poison as a harmless medicine, and sends it so labeled into the market, he is liable in damages to any person who, without any fault on his part, is injured by using it as a medicine, in consequence of the false label. Vol. I, 731, 834.

In an action to recover the price of a steamboat, the defense was that a portion of the machinery was unsound; that in consequence of such imperfections considerable delay was caused in the use of the vessel, and the defendant claimed to deduct not only the amount necessary to remedy the actual defects, but also for the loss of profits upon the trips which might have been run during the time the vessel was delayed for the purpose of repairs; but the court disallowed the claim as to the profits as too remote. *Blanchard* v. *Ely*, 21 Wend., 342.

So, in an action to recover the price of a steam engine, boilers, and other apparatus, the defendant cannot recoup the gains and profits which would have arisen from the use of the engine if it had been delivered at the time agreed; such damages are too remote. *Freeman* v. *Clute*, 3 Barb., 424; *Griffin* v. *Colver*, 22 Barb., 587. The latter of the cases cited was affirmed by the court of appeals, and the rule laid down by that court was that where there is a breach of a contract which stipulates for the delivery, at a certain day, of a steam engine, built and purchased for the purpose of driving a planing mill, and other definite machinery, the ordinary rent or hire which could have been obtained for the use of the machinery whose operation was suspended for the want of the steam engine may be recovered as damages. *Griffin* v. *Colver*, 2 E. P. Smith, 489. The general rule is that the party injured by a breach of contract is entitled to recover all his damages, including gains prevented as well as losses sustained, provided they are certain, and such as might

naturally be expected to follow the breach. It is only uncertain and contingent profits, therefore, which the law excludes; not such as, being the immediate and necessary result of the breach of the contract, may be fairly supposed to have entered into the contemplation of the parties when they made it, and are capable of being definitely ascertained by reference to established market rates. *Ib.;* see *Hadley* v. *Baxendale*, 9 Exch., 341; *Fletcher* v. *Tayleur*, 17 C. B., 21; *Davis* v. *Talcott*, 14 Barb., 611.

So, again, where, in a lease of a dairy for five years, the lessor agreed to put the barns on the premises in a good state of repair, but neglected to do so, it was held that the lessee could not recover the damages sustained by injuries to the cows and young cattle, or the increase of food and the decrease of produce resulting from the state of the barns, because these damages were altogether too remote and contingent. *Dorwin* v. *Potter*, 5 Denio, 306, Vol. I, 961.

In an action for a breach of the implied warranty of title, on the sale of a horse, the measure of damages is the price paid by the purchaser, with the interest thereon, and the costs recovered against the purchaser in an action by the then owner; but the costs incurred in the defense of the action by the purchaser are too remote, and cannot be recovered. *Armstrong* v. *Percy*, 5 Wend., 535; *Burt* v. *Dewey*, 31 Barb., 540.

A brief notice will now be taken of actions for a tort. In cases of deliberate or malicious wrong, the law generally gives very liberal relief; and in cases of reckless or mischievous acts which are injurious to others, and even where exemplary damages are not claimed, the party in the wrong is frequently made answerable for consequences very remote from the original act. In one old case the defendant threw a squib into the market-house, which fell on the stall of a gingerbread seller; he, to save himself, threw it on an other stall; the proprietor of the second stall also threw it off, and, in so doing, it struck the plaintiff and put out his eye; here it was held that the injury was the direct and immediate act of the defendant, and that he was liable for the damages. *Scott* v. *Shepherd*, 2 W. Bla., 892. So, where the defendant went up in a balloon, which descended in the plaintiff's garden, a short distance from the place of ascent, and the defendant, being entangled and in a perilous situation, called for help, and a crowd of people broke through the fences into the plaintiff's garden, and beat and trod down his vegetables and flowers, it was held that, though ascending in a balloon was not an unlawful act, yet, as the defendant's descent, under the circumstances, would ordinarily and naturally draw the crowd into the garden, either from a desire to assist him or to gratify a curiosity which he had excited, he was answerable for all the damage done to the garden of the plaintiff, including that done by the crowd. *Guille* v. *Swan*, 19 Johns., 381. So, where the defendant, having quarreled with a boy, pursued him with a pickax, and followed him into the plaintiff's store, where,

in his effort at flight, he committed unintentional damage, the defendant was held responsible for the damage done. *Vandenburgh* v. *Truax*, 4 Denio, 464; see *S. C.*, Vol. I, 810. And for a further illustration of these principles see Vol. I, 727 to 737.

Actions for breach of contracts.] The law in relation to contracts in general, and as to the right of action which may arise from the breach of a contract, express or implied, has been sufficiently noticed in volume one. The cases which will be here noticed relate to the measure of damages recoverable in actions founded upon a breach of contract. Where nominal damages will be awarded has been already seen, *ante*, 649. And it now remains to ascertain and determine what rule is applicable where the damages claimed are substantial. And, in the first place, it will be observed that there are two principles which are prominently kept in view in all such discussions. One of these principles is, that the plaintiff must show that he has sustained damage, and the law will not give actual compensation unless in those cases in which there has been actual loss. The other principle is, that the contract itself furnishes the measure of damages. The exceptions to these rules will be noticed while examining the cases cited hereafter. And, since they are so intimately related and connected, the most convenient method will be to discuss them together. There are numerous cases in which the parties may legally fix the amount of damages by a special agreement for that purpose; and when this is done in a case in which the law permits the agreement, the contract of the parties will furnish the measure of damages, or, in other words, they establish a rule for themselves, which will be the law of the case. The general rule is that in all actions for the mere breach of a contract, the damages are to be limited to the consequence of the breach alone, without any regard to the motives which induced the violation of the contract. To this general rule there are two exceptions, one of them relates to a sale of real estate, and the other to a breach of marriage promise. This subject will be further noticed hereafter.

The principle that the contract furnishes the measure of damages is not, in all cases, to be so construed as to enable a party who performs his part of a contract to recover from the defaulting party the entire sum named in the agreement; for there are many instances in which it has been held that, in actions for the breach of a contract, the measure of damages is not the price stipulated to be paid on full performance, but the actual injury sustained by the defendant's default. The reason for such a decision is, that although the contract furnishes the measure of damages, it is still subject to the qualification of the other rule that compensation is given for the actual loss.

In an action for the breach of a contract, in not furnishing freight for transportation as the defendant agreed, the plaintiff claimed to recover the entire price agreed upon for the transportation of a number of horses upon a canal boat. It was shown

that the plaintiff tendered performance on his part, and that there was a neglect or refusal on the part of the defendant; yet the court held that the measure of damages was not the sum or price agreed to be paid on performance, but that it was limited to the actual loss and injury sustained by the defendant's non-performance. *Shannon* v. *Comstock*, 21 Wend., 457. So, where the plaintiff was employed by the defendant to do certain work, and he commenced and partially performed the job, but the defendant then countermanded the order, though the plaintiff went on and completed the job, and then sued to recover the stipulated price; it was held that he could not recover that sum, and that the measure of damages was a compensation for the work done before the countermand, including the materials furnished, and also such damages as resulted from the defendant's breach of the contract. *Clark* v. *Marsiglia*, 1 Denio, 317; see this case and others similar, stated in Vol. 1, 180, 181, 182.

In an old case the action was founded upon an agreement by the defendant to purchase a horse, and the agreed price was to be settled thus: The defendant was to pay one barleycorn for the first nail in the horse's shoes, and then to give two for the second, and afterwards doubling the number for each nail in the shoes. It appeared that there were thirty-two nails in the shoes, and that the quantity of barley, at the agreed rate, would amount to five hundred quarters. The judge who tried the case directed the jury to disregard the contract, and to give the value of the horse as damages, which was £8, which was done. *James* v. *Morgan*, 1 Levinz, 111; and see *Thornborow* v. *Whiteacre*, 2 Ld. Raym., 1164. Such extreme cases, however, are rare, and when they do occur, the decision is put upon the ground that the contract is unconscionable, and the court gives judgment for such sum as is reasonable and just, without regarding the terms of the contract.

In an action by an assignee, of a right of action for a breach of warranty, the measure of damages is the same as though the action had been brought by the assignor. *Sweet* v. *Bradley*, 24 Barb., 549; see, also, Vol. I, 91 to 94. In such a case the assignee is entitled to recover the full amount of the claim or demand without any reference to the sum which he may have paid for it. *Ib.* But there are cases in which the plaintiff may have a sufficient title or interest in a claim or demand, or in property, to entitle him to maintain an action, although he may not be entitled to recover the entire or full value. And in an action between the general owner of property and one having only a lien upon it, or a special interest in it, when the latter prevails, his damages are limited to the amount of his lien or special interest. *Seaman* v. *Luce*, 23 Barb., 240; *Rhoads* v. *Woods*, 41 Id., 471. Where there is neither fraud nor an express agreement to pay damages, the general rule is that no damages are recoverable for anything which occurs antecedent to the closing of the contract; and, therefore, no damages can be allowed for

the time spent in making a contract which is subsequently broken. *Durkee* v. *Mott*, 8 Barb., 423, 427. And in an action for the breach of a contract, the defendant may show, if he can, that the fulfillment of the contract would have cost the plaintiff more than he was to receive from the defendant for such performance. *Ib.*

If one contracts for board and lodgings, for a specified time at an agreed price, and he subsequently leaves before the expiration of the time, without just cause, the other party will not be entitled to recover the stipulated price as damages, but merely the actual damages sustained by the breach of the contract. *Wilson* v. *Martin*, 1 Denio, 602; *Spencer* v. *Halstead*, Id., 606. And so where a contract is made for the use of lodging rooms for a specified period, and the defendant occupies them a small portion of the time, and then leaves them without legal cause, the plaintiff will be limited to the damages actually sustained by the breach. *Greene* v. *Waggoner*, 2 Hilt., 297. But if the defendant claims that anything has been received, or might have been received, for the use of the rooms by way of mitigation of damages, the burden of proof is on him, for the plaintiff is not bound to show affirmatively that he could not have rented the rooms. *Ib.;* and see *Costigan* v. *Mohawk & Hudson R. R. Co.*, 2 Denio, 609, and Vol. I, 180, 181, 182.

In an action by one partner against the other, for dissolving the partnership in violation of a provision fixing its continuance for a certain term, the plaintiff may recover probable profits for the time intermediate the dissolution and the end of the term contracted for. *Bagley* v. *Smith*, 6 Seld., 489. And evidence as to the amount of the past profits is admissible as a means of estimating the damages sustained. *Ib.*

In an action for a breach of a continuing covenant to keep in repair a gate upon the plaintiff's lands, the measure of damages is not such a sum as will enable the plaintiff to repair or rebuild the gate, but nominal damages for the breach, and such additional actual damages as may have accrued to the plaintiff by the entry of cattle upon his lands, or otherwise, in consequence of the defendant's neglect. *Beach* v. *Crain*, 2 Comst., 86; *S. C.*, 2 Barb., 120. In such a case the covenant is a continuing one, and a recovery in one action does not bar an other action for damages subsequently accruing from a neglect to make such repairs. *Ib.* But a bond conditioned to furnish the obligee and his wife with all necessary meat, drink, lodging, washing, clothes, &c., during both and each of their natural lives, is an entire contract, and a failure by the obligor to provide for the obligee and his wife according to the substance and spirit of the covenant, amounts to a total breach; and full and final damages may be recovered, for the future as well as the past. *Shaffer* v. *Lee*, 8 Barb., 412.

In an action on an instrument which purports to assign a judgment, when there was, in fact, no such judgment, the measure of damages is the value of the property owned by the alleged judg-

ment debtor, and which might have been taken on an execution at the time of the pretended assignment, not exceeding the amount of the alleged judgment. *Jansen* v. *Ball*, 6 Cow., 628.

Since the decision of the case just cited, the law has been altered so that property may be obtained by supplementary proceedings when an execution has failed to reach it. And since the object of the law was to give such damages as would be equal to the remedy attainable against the alleged judgment debtor, it may be that the true rule would be to fix the measure of damages at such sum as is equal to that collectible of the defendant upon a valid judgment, by any legal means, not exceeding the amount of the judgment.

A telegraph company received from the plaintiff a message informing the person to whom it was addressed where he could get a certain sum of money, which message was, by the negligence of the company, delayed until it was too late for the money to be used as the plaintiff intended, in consequence of which neglect he lost a valuable contract, and was also compelled, by the terms of his contract, to pay a large sum in damages. But the company was not informed that the money was intended for any particular use, and it was held that the plaintiff could not recover of the company anything more than the amount paid for the message, and the amount of interest which accrued on the sum specified in the message during the time it was delayed. *Landsberger* v. *Magnetic Telegraph Co.*, 32 Barb., 530.

The well settled rule in such cases is that the damages must be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract; that is, they must be such as might naturally be expected to follow its violation. *Ib.; Griffin* v. *Colver*, 2 E. P. Smith, 489; *Hadley* v. *Baxendale*, 9 Exch., 341.

The measure of damages for delay in fulfilling a contract to repair a vessel, by reason of which the other party lost the use of it in the meantime, is the rent or price which would be paid for the charter of the vessel during the period of delay, and not the probable profits. *Rogers* v. *Beard*, 36 Barb., 31.

Where there is an executory contract for the performance of work, and it is provided that payments shall be made as the work progresses, but the contract is rescinded by the employer by a refusal to fulfill it, and the other party consequently abandons the work, the covenants for the payment of installments subsequent to the time at which the work was abandoned, though independent covenants, become mere penalties, and the measure of damages is merely the actual losses and expenditures of the party employed. *Skinner* v. *White*, 17 Johns., 357; and see *Skinner* v. *Dayton*, 19 Id., 513; *Masterton* v. *Mayor of Brooklyn*, 7 Hill, 61; *Story* v. *N. Y. & Harlem R. R.*, 2 Seld., 85.

Where work is done under a special contract, at estimated prices, and there is a deviation from the original plan, by consent, the estimates are to be the rule of payment so far as the special

contract can be traced, and for the extra labor the party is entitled to recover upon a *quantum meruit*, with the addition of such sums as may be requisite to compensate for the extra expense caused by the defendant's interruption of the work. *Dubois* v. *Delaware & Hudson Canal Co.*, 4 Wend., 285; *S. C.*, 12 Id., 334; 15 Id., 87.

So, where work is to be done according to a certain plan, and for a specified sum, and the parties abandon the plan by consent so that it is impossible to trace the contract in the work done, the measure of compensation is the value of the work, which may be recovered as though no contract had been entered into. *Hollinsead* v. *Mactier*, 13 Wend., 276. But where there is a special contract to do specified work at stipulated prices, and the employer is to furnish the materials, which he does for a part of the work, and then neglects to furnish the rest of the materials in season, in consequence of which the laborer abandons the job, the measure of damages is not the value of the work done by estimating its value as though no contract had been made, but the recovery must be governed by the contract price, unless the plaintiff shows affirmatively that the defendant's neglect rendered the work more expensive, or that it had to be done at a less favorable season of the year, at an additional expense. *Koon* v. *Greenman*, 7 Wend., 121.

As to the rule where an employee is improperly discharged, see Vol. I, 180, 181. Where an employee improperly abandons his employer's service, in a case where he had hired out to serve for a specified time, the legal measure of damages is the difference between the wages agreed to be paid to the defendant and the price which the plaintiff was obliged to pay for labor to supply his place. *Peters* v. *Whitney*, 23 Barb., 24. Injuries which may occur to the plaintiff's crops by reason of the defendant's leaving the service cannot be considered, and evidence of such damages is inadmissible. *Ib.*

There are cases in which a party is excused from the full performance of a special contract, in the event of sickness or death. Vol. I, 119. In such cases the laborer may recover the actual value of the services rendered. *Wolfe* v. *Howes*, 6 E. P. Smith, 197. But the recovery must be for what the services are reasonably worth; and if they have not been worth anything, there can be no recovery. *Clark* v. *Gilbert*, 32 Barb., 577. The contract price which was to be paid for the completed service is not the measure of compensation for the partial and interrupted service. *Ib.* In an action for the recovery of the value of services rendered under a contract which was void by the statute of frauds, because the contract was not to be performed within a year, the plaintiff may recover according to the contract price, if there is no other evidence of value given by either party. *Nones* v. *Homer*, 2 Hilt., 116. But where the agreement provides that services are to be paid for in land, or by a permanent lease of land, the contract is void by the statute of frauds, and the

measure of damages is the value of the services rendered, not the value of the land or of the lease. *Erben* v. *Lorillard*, 5 E. P. Smith, 299. And evidence of the value of the land or of the lease is not admissible evidence if objected to. *Ib.; King* v. *Brown*, 2 Hill, 485, and *Burlingame* v. *Burlingame*, 7 Cow., 92, are overruled on these points.

Actions upon bills or notes.] In an action upon a bill of exchange or a promissory note, where there is no question made as to the currency or rate of exchange, the rule is established by law, and is fixed and arbitrary. The plaintiff will recover precisely the legal rate of interest, neither more nor less. The actual damages may be, and they frequently are, much greater. The non-payment of the money at the time when it was due may have been a cause of great inconvenience to the creditor, or it may have caused him serious and positive loss, even to the extent of causing him to fail in business. And yet, the law does not take into account these remote results, nor allow any damages for them. But while it is true that the creditor cannot recover anything but the legal rate of interest, he is also relieved from proving any damages whatever. And if the money is not paid or tendered when it is due or before action is brought, the plaintiff will recover legal interest, even though he could not have loaned out the money for interest if it had been duly paid.

Notes are frequently given which are payable in specific articles. They usually specify the amount intended to be paid, and contain a promise to pay the amount in chattels of a particular character. Sometimes the number or quantity of articles is mentioned, and at other times the promise is general to pay a given sum in a kind of chattels mentioned. The time when, and the place where, such notes are payable is discussed in Vol. I, 415 to 417. But it is sometimes a question whether such notes are to be considered as contracts for the payment of money, or agreements for the delivery of goods. In this state such contracts are held to be contracts for the delivery of goods, provided the promisor complies strictly with the terms of his contract by delivering the chattels in due time and manner. But if the promisor neglects to avail himself of the option or privilege allowed to him of paying in chattels, then the contract is regarded as a promise to pay the debt in money, with interest from the time of the default. *Fletcher* v. *Derrickson*, 3 Bosw., 181, 189. An action was brought upon a chattel note in this form: "For value received, I promise to pay A. B. $79.50, on, &c., *in salt, at fourteen shillings per barrel*," and it was held that the measure of damages was the sum specified in the note, and not the value of the salt, on the day specified for payment. *Pinney* v. *Gleason*, 5 Wend., 393; reversing *S. C.*, 5 Cow., 152; and see *Brooks* v. *Hubbard*, 3 Conn., 58; *Perry* v. *Smith*, 22 Verm., 301, and *Clark* v. *Pinney*, 7 Cow., 681.

It does not make any difference in the rule of damages whether the price of the chattels has increased or depreciated in value,

nor whether the value of the chattels at the time fixed for payment is greater or less than the sum specified in the note, because the amount of the debt, with interest from the time when payment should have been made, is the measure of damages in any event. *Ib.; Fletcher* v. *Derrickson*, 3 Bosw., 181, 189.

There are other contracts which provide for the payment of chattels, although the promise is not in the usual form of a chattel note, yet, in legal effect, it is treated as a chattel note. Where an agreement is made between a debtor and his creditor, that the former will make and deliver to the latter a specified sum of money in merchandise, of a specified description, at a certain sum per pound, "to be paid on specified days," and that the latter will apply it on debts, for which he also has security, such agreement or contract is, in legal effect, a promissory note, payable in chattels, and the measure of damages, where there is a breach of the agreement, is the amount so agreed to be paid, whether the action is brought against the principal debtor or against his sureties. *Fletcher* v. *Derrickson*, 3 Bosw., 181. In such a case it is of no consequence whether the market price of the article is greater or less than the price at which it was to be received. *Ib.*

Interest as damages in actions on contract.] The subject of interest has already been fully discussed. Vol. I, 548 to 559. And whenever interest is payable by the terms of the contract, or by operation of law, then interest may be allowed by way of damages. And whenever the law gives interest as a matter of right, it is not discretionary with a court or jury whether to allow or refuse it. If not allowed in those cases in which it is clearly allowable by law, the disallowance will be sufficient to render the judgment erroneous.

In an action upon a judgment, interest is recoverable whether the original demand drew interest or not. And even when the action is for a tort, interest is recoverable in an action founded upon a judgment rendered for such tort. *Klock* v. *Robinson*, 22 Wend., 157; *Lord* v. *Mayor of N. Y.*, 3 Hill, 426. But interest is recoverable from the date of the judgment only, and not from the rendition of the verdict. *Ib.* "Every judgment shall bear interest from the time of perfecting the same." 3 R. S., 637, § 1, 5th ed.; Laws 1844, ch. 324, § 1. Interest is also taxable as costs on a verdict or report of a referee. *Ib.*, § 2.

Sales of personal property.] In actions for the recovery of damages for the breach of contracts relative to the sale of personal property, there may be several distinct classes of cases. The vendor may neglect or refuse to deliver the goods sold, whether the purchase price has been paid or not; the vendee may refuse to accept or pay for the articles purchased; there may be a breach of warranty in relation to the quality or quantity of such article, or there may be a failure of title to it. In all such cases the injured party is entitled to relief by way of damages. Before noticing these several classes of cases, it may be proper to refer

to those cases in which goods or chattels are sold and delivered without any express agreement as to the price. In all such cases the vendor is entitled to recover the fair market value of the articles delivered, which will constitute the measure of damages. If there is a running account, interest is not generally recoverable, though there are some exceptional instances. See Vol. I, 553, 554. And now as to those cases in which the vendor neglects or refuses to perform his contract. In an action by a vendee against a vendor for the recovery of damages for the non-delivery of goods, merchandise, or chattels, pursuant to the contract of sale, the measure of damages is the difference between the market value of the article contracted for on the day when it ought to have been delivered, and the price which, by the terms of the agreement, was to have been paid for it. *Dana* v. *Fiedler*, 2 Kern., 41; *McKnight* v. *Dunlop*, 1 Seld., 537; *Billings* v. *Vanderbeck*, 23 Barb., 546. The reason for this rule is, that such sum would enable the purchaser to go into the market and supply himself with the same or a similar article from an other vendor. It would follow from this rule, that, if at the time fixed for the delivery, the article has not risen in price, or has fallen, the vendee has lost nothing, and he can, therefore, recover nothing. Where no precise day is fixed for the delivery, but the articles are to be delivered "on or about" a specified day, the vendee will not be limited to the difference between the contract price and the market value on the precise day named, but he may recover the difference between the contract price and the market value within a reasonable time after that day. *Kipp* v. *Wiles*, 3 Sandf., 585.

The cases already referred to were cases in which the purchase price was not paid in advance. But where such price is paid in advance, a different case is presented, and a different rule applied and enforced. And, in the case of contracts for the purposes of trade and commerce, when the purchase price is paid in advance, and the vendor neglects or refuses to deliver the goods according to the contract, the purchaser is not confined, in measuring his damages, to the value of the goods on the day when they should have been delivered; and if he, without unreasonable delay, commences and prosecutes his action, he is entitled to the highest price between the day fixed for delivery and the day of the trial. *Clark* v. *Pinney*, 7 Cow., 681; *Dey* v. *Dox*, 9 Wend., 129; *Rawdon* v. *Barton*, 4 Tex., 289; *Calvit* v. *McFadden*, 13 Id., 324; *West* v. *Wentworth*, 3 Cow., 82.

Where the vendee has not paid the purchase price in advance, and the vendor neglects or refuses to deliver the property sold, the measure of damages is the difference between the contract price and the market value on the day fixed for the delivery, with interest from the time of the default. *Clark* v. *Dales*, 20 Barb., 42; *Belden* v. *Nicolay*, 4 E. D. Smith, 14; *Davis* v. *Shields*, 24 Wend., 322; *Havemeyer* v. *Cunningham*, 35 Barb., 515.

In an action for the breach of an executory contract to sell

and deliver goods, the measure of damages is the difference between the contract price and the market value of such goods at the time and place specified for delivery, with interest thereon. The interest must be allowed as a part of the damages, and is not a matter of discretion with the jury. In ascertaining the market value, the evidence must be confined to the actual market value, and the defendant cannot inquire into the probable effect of throwing upon the market the quantity which he was to deliver. The inquiry is, at what price the vendee could have purchased the commodity in market, not what he could have sold it for if it had been delivered. *Dana* v. *Fiedler*, 2 Kern., 40; *S. C.*, 1 E. D. Smith, 463. In such a case, the defendant cannot be permitted to give evidence as to its market value in quantities equal to that named in the contract, unless it is first shown as a matter of fact, that there is a market price for it in such quantities, nor can he go into a speculative inquiry as to the usual difference between prices on large and small lots, unless it appears that it was, or could be, purchased at the time and place for delivery, in the quantity specified in the contract. *Ib.*

Where there is a market price at the place fixed for the delivery of goods under a special contract of sale, evidence of the market price at other places is not admissible. *Gregory* v. *McDowel*, 8 Wend., 435. If there is an agreement to deliver a specified quantity of property, and the vendor partially performs the contract by delivering a portion of it, but he neglects or refuses to deliver the residue, the only damages recoverable are such as result from the non-delivery of such residue. *McKnight* v. *Dunlop*, 1 Seld., 537. But where the vendor, in an executory contract for the sale of an entire parcel of goods, has, by disposing of a part thereof, put it out of his power to render a full performance, the proper measure of damages, in an action brought against him by the buyer, is not merely the difference between the price and the value of the portion which the vendor was unable to deliver, but such difference upon the whole parcel. *Crist* v. *Armour*, 34 Barb., 378. If, however, the contract is for delivery of all the grain raised upon specified lands, and it is to be delivered in merchantable order, an offer to deliver all that grew upon the land, when three-fourths of it was unmerchantable, is not an offer of performance, and it leaves the buyer at liberty to treat the contract as broken; and, in that case, his measure of damages would be the difference between the contract price and the market price of the merchantable part of the grain, together with the sum he had advanced on the contract, and interest thereon. *Hamilton* v. *Ganyard*, 34 Barb., 204.

In an action by the purchaser of goods against the vendor for damage done to them between the sale and delivery, the measure of damages is the difference between the actual value of the goods in their damaged and in their undamaged state. *Gerard* v. *Prouty*, 34 Barb., 454. The price paid by the purchaser is not

a criterion of the actual value of the goods in their undamaged state. *Ib.;* see, also, Vol. I, 676 to 678.

Having thus briefly considered the measure of damages as against the vendor, when he fails to deliver the article contracted for, a few cases will be noticed for the purpose of showing the rule of damages in case the purchaser refuses to accept the article or to make payment. In some cases the contract fixes the price; in others it does not. If the goods have been delivered, and the price is fixed by the agreement, the measure of damages will be the contract price. If the actual possession of the goods has not been changed by a delivery of them to the purchaser, by reason of his refusal to receive them, the vendor may resell the goods and recover the difference between the contract price and that realized at the sale. Vol. I, 675, 676.

Where a contract is made with a mechanic for the manufacture of an article in the way of his trade, and he makes the article and tenders it to the person who ordered it, but who refuses to accept and pay for it, the mechanic may deposit the article with a third person, and give notice thereof to the purchaser, and then maintain action upon the contract, and recover the price agreed on as the measure of damages. *Bement* v. *Smith*, 15 Wend., 493; and see Vol. I, 510, 675, 676.

Where a contract is made for the sale and delivery of a specified quantity of articles at a specified price, and the vendor delivers a part of the articles, and is willing and offers to deliver the residue, but the vendee, without legal excuse, refuses to receive them, the vendor may sue for the value of the portion so delivered, and may recover their full market value without reference to the price fixed in the contract. *Terwilliger* v. *Knapp*, 2 E. D. Smith, 86.

In an action for the breach of a contract in which the purchaser agreed to receive and pay for specified goods, at a fixed price, at an agreed time and place, the vendor may recover the difference between the contract price and the market price; but if no evidence is given as to the value of the property, the plaintiff is not entitled to recover more than nominal damages. *Billings* v. *Vanderbeck*, 23 Barb., 546.

Where there is a sale of goods which are to be paid for by a bill or note, payable at a future day, and there is a neglect or refusal to deliver such bill or note as agreed, the vendor may sue immediately for the breach of the special agreement, and recover as damages the whole value of the goods, allowing a rebate of interest during the stipulated credit. *Hanna* v. *Mills*, 21 Wend., 90; *Rinehart* v. *Olwine*, 5 Watts & Serg., 157.

Where there has been a sale of goods or chattels at a certain price, to be delivered at a specified future time, and before that time arrives the purchaser notifies the vendor that he will not accept the goods, the measure of damages for a breach of the contract is the difference between the contract price and the market price on the day fixed for delivery, and not on the day when notice was given that the goods would not be received. *Leigh* v.

Paterson, 8 Taunt., 540; *Phillpott* v. *Evans*, 5 Mees. & Wels., 475; *Stewart* v. *Cauty*, 8 Mees. & Wels., 160; *Boorman* v. *Nash*, 9 Barn. & Cress., 145.

If a contract provides for a performance by both parties at the same time and place, and either party, before that time arrives, notifies the other that he will not perform the contract, and he does not, before the time of performance, recall the notice; or if he puts it out of his power to perform the contract on his part, this will relieve the other party from averring or proving either performance or an offer to perform. *Crist* v. *Armour*, 34 Barb., 378. And if the contract is for the sale of a specified quantity of articles, to be paid for on delivery, and the vendor sells and delivers a portion of them to a third person, this will be sufficient to sustain an action by the vendee against the vendor without any averment of performance. *Ib.* In such an action the vendee may recover damages for the breach of the entire contract, and he is not limited to the damages sustained by selling a part of them to such third person. *Ib.;* see *Skinner* v. *Tinker*, 34 Barb., 334, as to notice that contract will not be performed. As to the rule of damages in cases of contract of sale or return, see Vol. I, 479, 480; and *King* v. *Paddock*, 18 Johns., 141, 144.

Warranties as to quality or quantity.] There may be a performance of the contract by the vendee so far as it relates to a delivery of the articles sold, and yet he may be liable to an action for a breach of a part of the contract of sale. The general rule is that there is no implied warranty of the quality of the articles sold, though there are some exceptions to the rule. See Vol. I, 517 to 534. In those cases in which there is an implied warranty, or if there was an express warranty given on the sale of goods or chattels, and there is a breach of the warranty, the purchaser will be entitled to damages for such breach. There are some cases in which the vendee may return the goods and rescind the sale, provided the goods do not answer the warranty. See Vol. I, 512, 516. But where there is neither fraud, nor an express agreement giving a right to return the goods, that cannot be done even though the warranty be broken. Vol. I, 511, 512.

The law, however, gives an ample remedy, for the vendee may retain the goods and still maintain an action for the recovery of such damages as may have resulted from the breach of the warranty. Vol. I, 516, 517. In an action for a breach of warranty on a sale, where there is no fraud in the transaction, the measure of damages is, as a general rule, the difference between the value of such an article as it was warranted to be, at the time of the sale, and the value of the inferior article sold. *Voorhees* v. *Earl*, 2 Hill, 288; *Muller* v. *Eno*, 4 Kern., 597, 600.

In an action for a breach of warranty of soundness in the sale of a horse, the measure of damages is the difference between his value at the time of the sale, considering him as sound, and his value with the defects alleged and proved. *Fales* v. *McKeon*, 2 Hilt., 53; *Comstock* v. *Hutchinson*, 10 Barb., 211; *Cary* v. *Gru-*

man, 4 Hill, 625; *Sharon* v. *Mosher*, 17 Barb., 518. So, in all actions founded on a breach of warranty as to the quality of goods which have been sold, the measure of damages is the difference between the value of the goods, had they been as they were represented, at the time of the sale, to be, and their actual value with the defects complained of. *Ib.; Muller* v. *Eno*, 4 Kern., 597; reversing *S. C.*, 3 Duer, 421; *Lattin* v. *Davis*, Hill & Denio, 9. Where the vendors of a quantity of wool knew that it was purchased by the plaintiffs for the purpose of manufacturing it into hats, and that if there were any cotton in it, it would be unfit for that purpose, but they did not warrant that it was fit for that purpose, but only that the flocks sold contained no cotton; it was held that the only damages which the plaintiffs were entitled to recover upon a breach of this warranty, was the difference between the market value of the wool in its actual state, and what it would have been worth had it contained no cotton, with interest on that difference; and that they could not recover their losses which were caused by manufacturing hats which proved to be of less value on account of the intermixture of cotton. *Prentice* v. *Dike*, 6 Duer, 220. So, in an action for a breach of warranty, on the sale of a quantity of coal dust, that it had no dust of soft or bituminous coal mixed with it, the legal measure of damages is the difference between the value of the article as it actually was and its value had it been as represented; and the fact that the purchaser stated the purpose for which he bought it will not change the rule so as to entitle him to recover damages for the injuries which resulted from using it. *Milburn* v. *Belloni*, 34 Barb., 607; *S. C.*, 12 Abb., 451; and 22 How., 18; *Hargous* v. *Ablon*, 5 Hill, 472; *S. C.*, 3 Denio, 406, and see Vol. I, 523, 524.

As to what constitutes a warranty on a sale by sample, see Vol. I, 527, 528. And where goods were sold by sample upon a warranty or representation that they were of a specified quality, which they were not, and the plaintiff recovered as damages the difference between the price obtained on a resale and that which would have been obtained had the goods been of the quality represented, this recovery was sustained by the court. *Roberts* v. *Carter*, 28 Barb., 462; *S. C.*, 17 How., 524. The price realized on a second sale is admissible as one mode of determining the value. *Reggio* v. *Braggiotti*, 7 Cush., 166; *Foster* v. *Rodgers*, 27 Ala., 602. And proof of the amount for which goods were sold at auction is admissible as a circumstance to be considered on the question of value; but it is neither conclusive, nor, in general, sufficient, without other proof. *Renaud* v. *Peck*, 2 Hilt., 137. There is sometimes a warranty of quantity, either expressed or implied; and in that case the purchaser is entitled to have the article made equal in quantity to what the warranty declared it to be; but he is not legally entitled to claim damages by way of remuneration for injuries remotely sustained in consequence of the deficiency. Vol. I, 531.

Warranty of title.] A warranty as to the title of property sold

may be express or implied; and, when the warranty is established, the measure of damages is the same in both cases. As to implied warranties of title, see Vol. I, 530.

In an action brought for a breach of an implied warranty of title in the sale of a horse, the measure of damages is the price paid, the interest thereon, and the costs recovered against the purchaser or his vendee, in case of a suit by the true owner and a recovery by him, provided due notice of such action was given to the vendor; but the costs and expenses of the defendant in making his defense are not recoverable. *Armstrong* v. *Percy*, 5 Wend., 535; *Blasdale* v. *Babcock*, 1 Johns., 517; *Reggio* v. *Braggiotti*, 7 Cush., 166; *Jeter* v. *Glenn*, 9 Rich.; *S. C.*, Law, 374. If no notice of the action is given to the vendor, the measure of damages for the breach of the implied warranty of title is the amount of the purchase price, with interest thereon. *Burt* v. *Dewey*, 31 Barb., 540, 543; and see Vol. I, 532.

A pawnbroker who sells a chattel as a forfeited pledge, merely undertakes that the subject of the sale is a pledge, and irredeemable, and that he is not cognizant of any defect of title to it. He is not liable to his vendee upon an implied warranty of title, even though the pledgor had no title to the property, and the true owner subsequently reclaims his property. *Morley* v. *Attenborough*, 3 Exch., 500. So, on sales by officers of the law, there is no implied warranty of title. *Ib.*, 514, note and cases cited.

When a vendor is liable for a breach of an express warranty, he may also be liable for the expenses of a litigation which has resulted from acting upon his warranty. If the vendor of a horse sells him with a warranty of soundness, and the vendee, relying thereon, resells him with a similar warranty, and is subsequently sued by his vendee, and he then offers the defense of the action to his vendor, who does not interpose, and the party defends the action himself, he will be entitled to recover the costs of such defense from the original vendor as a part of the damages occasioned by his breach of warranty. *Lewis* v. *Peake*, 7 Taunt., 153. So, where the defendants had sold the plaintiff a picture, warranted to have been painted by Claude, but, in fact, not painted by him, and the plaintiff sold it to a third party with like warranty, and the second vendee sued the plaintiff on the warranty, and recovered damages and costs, it was held that if the second sale was a *bona fide* sale, the plaintiff could recover the costs paid to such second vendee. *Pennell* v. *Woodburn*, 7 Carr. & Payne, 117. But in such cases the vendee from the first vendor must act in good faith and with proper care, or he cannot recover such costs as may result from the breach of a warranty made by him, as will be seen from the following case: The plaintiff purchased a horse of the defendant, with a warranty of soundness, and he then resold it, with a like warranty, to A.; some months afterward A. returned the horse, finding it to have been unsound at the time of the sale; the plaintiff declining to take it back, A. brought an action on the warranty;

the plaintiff gave the defendant notice that the horse was returned to him as unsound, and that an action was brought; the defendant disregarding this notice, the plaintiff defended the action brought against him by A., and failed. In an action against the defendant, on his warranty, the jury finding that the plaintiff might, by a reasonable examination of the horse, have discovered that it was unsound at the time he sold it to A., it was held that the plaintiff was not entitled to recover the costs incurred by him in the defense of the former action, because such defense was, under the circumstances, rash and improvident. *Wrightup* v. *Chamberlain*, 7 Scott, 598; and see *Penley* v. *Watts*, 7 Mees. & Wels., 609.

If a person has bought a horse with a warranty, which has been broken, and he tenders the horse back to the seller, who refuses to receive it, the buyer is entitled to keep the horse for a reasonable time, till he can fairly sell it, and he may recover against the seller the expense of keeping the horse during that time as a part of his damages. *Ellis* v. *Chinnock*, 7 Carr. & Payne, 169.

In such a case the purchaser may keep the horse for a reasonable time for the purpose of selling him. *Chesterman* v. *Lamb*, 2 Ad. & E., 129. But it must be limited to such time as would be required to resell the horse to the best advantage. *McKenzie* v. *Hancock*, R. & M., 436. And if the purchaser does not tender the horse to the vendor by offering to return it to him, there can be no recovery for the expense of keeping it. *Caswell* v. *Coare*, 1 Taunt., 566; *Curtis* v. *Hannay*, 3 Esp., 83.

Principal and surety.] Some of the cases relating to the measure of damages in actions by and between principal and surety have been given in another place. Vol. I, 121 to 125, 371 to 373, 376. As to the case of co-sureties, see Vol. I, 377, 378.

Principal and agent.] The rights, duties and liabilities of each of these parties to the other, and the damages following a breach of duty, has been sufficiently explained elsewhere. Vol. I, 251, 252, 253, 254. There are two general principles relating to this subject which may be properly stated in this place. The first is, that when an agent violates his duty or his obligation to his principal, whether by exceeding his authority, or by misconduct or omission, and any damage results to his principal, he is responsible for such injurious consequences, and bound to make indemnity. Vol. I, 228 to 232, 242, 449. The other rule is, that an agent who, without any default on his own part, incurs losses or damages in the course of transacting the business of his agency, or in following the instructions of his principal, will be entitled to full compensation therefor. Vol. I, 253, 254.

Landlord and tenant.] The general rules of law relating to the rights and duties of such parties have been stated in an other place. Vol. I, 187 to 215. A few cases will now be given in illustration of the measure of damages in actions by and between them. Where a landlord refuses to give his tenant possession of the

demised premises as he agreed to do, the tenant, in an action for the breach of agreement, may recover the expenses incurred by him in preparing to remove to the premises and to occupy them, together with the difference between the real value of the lease and the contract price. *Driggs* v. *Dwight*, 17 Wend., 71; *Giles* v. *O'Toole*, 4 Barb., 261; *Ward* v. *Smith*, 11 Price, 19.

But the tenant cannot recover as damages the profits which he might have made had he obtained possession of the premises. *Ib.* So, in an action by a tenant against a landlord for the breach of an agreement to let a store, the tenant cannot recover as damages the amount of loss which he suffered in consequence of being obliged to crowd his goods into a small space while looking for an other store, nor the expense and injury resulting from packing them, where such packing was not done for the purpose of a removal into the landlord's store. *Lowenstein* v. *Chappell*, 30 Barb., 241. Nor can he recover interest on the value of his stock of goods which he intended to put into the store, for the time during which he was prevented from exposing them for sale. *Ib.* So, in an action by a tenant against a landlord for damages for the breach of an agreement to make an addition to the demised premises, for which addition the tenant was to pay an increased rent, the plaintiff can recover merely the difference between the value of the improvement contracted for, and the additional rent to be charged when the addition was completed. *Berrian* v. *Olmstead*, 4 E. D. Smith, 279; Vol. I, 961.

In an action by the lessee against the lessor for withholding the premises from the lessee's possession, the measure of damages, whether the action is founded upon contract or for a tort, is the difference between the rent reserved or agreed and the yearly value of the premises. *Trull* v. *Granger*, 4 Seld., 115; *Dean* v. *Roesler*, 1 Hilt., 420. Where there is a breach of the landlord's covenant to renew a lease at the same rent, and the lessee accepts a new lease at an increased rent, under a declaration that he reserves his right of action, the measure of damages for the landlord's breach, is the difference between what the tenant was to have paid and what he was compelled to pay. *Tracy* v. *Albany Exchange Co.*, 3 Seld., 472.

If an action is brought by a tenant against a landlord for a trespass in entering upon the premises after the tenant had left them, but before the expiration of the term, and there is no evidence of actual damages, and there are no circumstances from which improper motives on the part of the landlord can be presumed, the tenant may maintain the action, but upon such evidence he can recover nothing more than nominal damages. *Shannon* v. *Burr*, 1 Hilt., 39. Where a tenant is in the quiet and peaceable possession of premises, with a right to remain for a particular period of time, or until the tenancy is terminated by a legal notice, and the landlord enters upon the premises without any process, and closes the entrance thereof, and refuses to permit the tenant to remove his goods, these facts will entitle the

tenant to maintain an action against the landlord, and the measure of damages will be the value of the goods detained and the injury done by breaking up the tenant's business. *Marquart* v. *La Farge*, 5 Duer, 559.

As a general rule, where goods are intrusted to a carrier, and they are not delivered according to the contract, the measure of damages is the value of the goods, with interest thereon from the day when they ought to have been delivered. *Sherman* v. *Wells*, 28 Barb., 403. But it is also a frequent question as to the place at which the value is to be computed or settled. Where the goods intrusted to a carrier are lost before he commences the journey, he is not liable for more than their value at the place where he receives them, whatever may be their value at the place of their destination. *Lakeman* v. *Grinnell*, 5 Bosw., 625. But where a carrier reaches his place of destination, and he fails to deliver the goods transported by him, the measure of damages is the value of the goods at the place of delivery. *Van Winkle* v. *U. S. Mail Steamship Co.*, 37 Barb., 122.*

Where goods are embezzled, or lost during the voyage, the master is bound to answer for the value of the goods missing, according to the clear net value of goods of like quality at the port of delivery. But interest is not recoverable as of course, though the jury may give interest, if the conduct of the master has been improper.

In estimating the value of his goods, the charges which the owner would have had to pay for freight, &c., had they arrived, must be deducted. *Watkinson* v. *Laughton*, 8 Johns., 213; *Amory* v. *McGregor*, 15 Johns., 24. So, where the owner of a vessel contracts to carry goods to a certain port, and the voyage is abandoned in an intermediate port, by reason of the unseaworthiness of the vessel, and the goods are sold there, the measure of the damages is the loss of the increased value of the goods at the place contemplated for their delivery by the contract. *Ib.; Wheelwright* v. *Beers*, 2 Hall, 391. In an action against a carrier, for his failure to deliver goods intrusted to him, interest is not allowable as a matter of law; but it is in the discretion of the jury to give or withhold it, according to circumstances. *Richmond* v. *Bronson*, 5 Denio, 55.

It has been held that, in an action against a common carrier for negligence in not carrying merchandise to market in a reasonable time, the plaintiff cannot recover as damages the difference between the price of the merchandise at the time when it should have been delivered, and the price at the time of its actual delivery, if no deterioration has occurred to the article itself. *Jones* v. *N. Y. & Erie R. R.*, 29 Barb., 633; *Wibert* v. *N. Y. & Erie R. R.*, 19 Barb., 36; approved in *Conger* v. *Hudson River R. R.*, 6 Duer, 375. Carriers of goods do not, in the absence of a special agreement, assume the risk of changes in the market value of goods; and in case of a delay on their part, they are not liable for the fall in price in the meantime. *Ib.* But, in one

* See *Rice* v. *Baxendale*, 7 Hurlst. & Norm., 96.

case, in an action against common carriers, for the recovery of damages resulting from their delay in transporting goods to market within the time agreed, that a loss sustained by the plaintiff, in consequence of a fall in the market price between the time when they should have arrived, and the time when they did arrive, is a proper element of damages, to be taken into account by the jury, in connection with other facts. *Kent* v. *Hudson River R. R.*, 22 Barb., 278.

If there is a special and express agreement to deliver goods at a particular or a specified day, and the contract is broken, the measure of damages is the difference between the contract price of the goods, had they arrived on the day agreed, and the price for which they were actually sold in market at the time of their arrival. *Medbury* v. *N. Y. & Erie R. R.*, 26 Barb., 565.

In an action against carriers for delay in delivering goods, if it is not shown that the goods depreciated in value in consequence of the delay, the plaintiff cannot recover the value of the goods as though they had been converted, nor can he recover any damages except such as resulted directly and necessarily from the negligence and delay of the defendants, such as trouble and expense in procuring other similar goods for carrying on his business. *Briggs* v. *N. Y. Central R. R.*, 28 Barb., 515. In such a case, the plaintiff cannot recover for the time and expenses of an agent and team, while waiting for the arrival of the goods at the terminus of the carrier's route, without first showing that the defendants had notice, at the time of contracting for the transportation of the goods, that an agent of the plaintiff would be waiting there to receive them. *Ib.*

In an action for the refusal by the defendant to perform an agreement to transport corn from New York to Liverpool in his ship at a certain price, the plaintiff is entitled to recover for his damages the difference between the contract price and what he would be compelled to pay for the same service. *Ogden* v. *Marshall*, 4 Seld., 340. In such an action, when a refusal to perform on the part of the contractor is shown, and it is proved that the price of transportation had risen, before the time the ship sailed, the plaintiff is entitled to his damages, measured by the rise in price, without proving that he had the corn ready to ship. *Ib.*

When a bill is payable on a particular day after date, and before its maturity the bill is delivered to an agent for presentment, and he fails to present it properly, the measure of damages is *prima facie* the amount of the bill; but the defendant is at liberty to reduce the damages by proving the plaintiff's actual loss, or that he did not sustain any. *Allen* v. *Suydam*, 20 Wend., 321. That the agent will be liable for such loss as the principal may sustain, by reason of the agent's negligence, is conclusively settled. *Ib.; Walker* v. *Bank of the State of N. Y.*, 5 Seld., 582.

Where an agent or factor is intrusted with goods or chattels to take to market and sell, and he makes a sale of the property, but does not pay over the proceeds, and the principal sues for

the recovery of the money received on such sale, the jury may allow the highest market value shown by the evidence, if the defendant does not show for what price the goods were actually sold. *Clark* v. *Miller*, 4 Wend., 628.

If a factor is instructed not to sell goods below a specified price, but he wrongfully sells the goods below that sum, the measure of damages is the injury actually sustained by the principal; and, therefore, the factor may show that from the time of the sale up to the day of trial, the market price of the goods has not, at any time, been higher than the price for which they were sold. *Blot* v. *Boiceau*, 3 Comst., 78. Where the articles are such as not to have any market value, such as antique paintings, statues, or vases, the principal may insist upon the price named in the instructions, without regard to the market. *Ib.*

In an action against an innkeeper for the loss of goods committed to his care, the measure of damages is the actual value of the goods, and not the cost price. *Needles* v. *Howard*, 1 E. D. Smith, 54.

Liquidated damages.] In the absence of any agreement upon the subject, the law fixes the amount of damages payable for the breach of a contract. But the parties may, by express agreement, provide for a different rule or measure of damages; and if, upon entering into an agreement, they stipulate that a definite sum shall be paid for a breach of it, such agreement is valid. And yet, notwithstanding the legality of such a stipulation, the courts sometimes refuse to carry the agreement into effect. Still there are some general rules which are observed and enforced by the courts. Under such circumstances, the most that can be done, is to state those general rules, and then to cite those cases which have been held to be fixed or liquidated damages, as well as those which hold the stipulation to be a mere penalty.

Wherever the parties fix or settle the amount to be paid for the breach of an agreement, the damages are termed, *liquidated, stipulated* or *stated* damages. The court of appeals have stated the rule upon the subject of liquidated damages as follows: 1 The language of the agreement is not conclusive, and the effort of the court is to learn the intent of the parties. Hence the term "liquidated damages" is not sufficient to control the construction, if the court can discover in the other parts of the instrument reason even to doubt as to the intention of the parties. 2. Where the word penalty is used it is generally conclusive against its being held liquidated damages, however strong the language of other parts of the instrument in favor of such construction. 3. If the sum stipulated is to be paid on the non-payment of a less sum which is certain in amount (or, as some judges say, can be easily ascertained by a jury), and made payable by the same instrument, then it will be treated as a penalty. 4. When the agreement is in the alternative to do an act or pay a given sum of money, the court will hold the party failing to have had his election, and compel him to pay the money. 5. If the sum be

evidently fixed to evade the usury laws, or any other statutory laws, or to cloak oppression, the court will relieve by treating it as a penalty. 6. If, independently of the stipulated damages, the damages would be wholly uncertain and incapable of being ascertained except by conjecture, in such case the damages will be considered liquidated, if they are so denominated in the instrument. 7. If the language of the parties evinces a clear and undoubted intention to fix the sum mentioned as liquidated damages in case of default of performance of some act agreed to be done, then the court will enforce the contract, if legal in other respects. *Bagley* v. *Peddie*, 2 E. P. Smith, 471, 472.

In the case last cited the plaintiff was a gold pen manufacturer, and to secure himself against having the secrets of his trade divulged, as well as against embezzlement, he required from one whom he employed a bond, with surety, which declared the oblitor to be bound, "in the sum of $3,000, as liquidated damages, and not by way of penalty or otherwise," for the performance of the covenants in the agreement by which he was employed. None of the covenants were for the payment of money, or for any other thing where the damages resulting from a breach could be computed from the instrument itself. One of the covenants was, not to reveal the secrets of the trade; and, in an action for a breach of this covenant, it was held that the damages were liquidated, and that the whole sum named was recoverable, and see *Price* v. *Green*, 16 Mees. & Wels., 346.

By a deed for the dissolution of a partnership between the plaintiff and the defendant, it was covenanted by the defendant that he would not at any time or times thereafter, within the next seven years, directly or indirectly, either by himself or in copartnership with an other or others, carry on the business of an attorney or solicitor, within the distance of fifty miles named, nor interfere with, solicit, or influence the clients of the late partnership; and that, if he should in any respect infringe that covenant, then he should immediately thereupon pay to the plaintiff the sum of £1,000 as and for liquidated damages, and not by way of penalty; and it was held that the sum of £1,000 was, upon the construction of this covenant, to be considered by way of liquidated damages, and not as a penalty. *Galsworthy* v. *Strutt*, 1 Wels., Hurlst. & Gord., 659. So, where the defendant sold out his business and his house and lot to the plaintiff, and covenanted in a bond that he would not locate himself *and* practice as a physician or surgeon in the same village, nor within six miles thereof, for the space of ten years, and that in case he should locate so *or* practice, he would pay to the plaintiff, on demand, $500 for each and every month that he should so practice as a physician or surgeon, either in or within six miles of said village, it was held that practicing within such limits was a breach of the covenant, even though the defendant resided without the prescribed limits, and that the damages were liquidated, which entitled the plaintiff to $500 for

each month. *Smith* v. *Smith*, 4 Wend., 468; *Mott* v. *Mott*, 11 Barb., 127.

Where, from the terms of a contract, there is a manifest difficulty in ascertaining what damages will arise from a breach of it, and the fair and reasonable inference is that the amount is specified and agreed on for the purpose of saving the expense or avoiding the difficulty of proving the actual damages, there the parties should be held to their bargain; and this is especially the case where the amount fixed and liquidated is not far beyond what might naturally be expected to result from a breach of the contract. *Cotheal* v. *Talmage*, 5 Seld., 551; *S. C.*, 1 E. D. Smith, 573; and see *Lampman* v. *Cochrane*, 2 E. P. Smith, 275.

Where parties, who contemplated a hazardous mining adventure in California, made an agreement by which some of them agreed to go out there as a company, to mine for gold according to specified rules, and agreed to give the plaintiff, who was interested in the adventure, a bond to pay him $500, as liquidated damages for a breach of the agreement, and the bond was given accordingly, in the penalty of $1,000, conditioned for the payment of $500, as liquidated damages upon a breach of the agreement, this was held to be a case of liquidated damages. *Ib.*

Where the damages, which must result from the breach of a contract, are, in their nature, uncertain, and not calculable or ascertainable without a resort to evidence, a contract is made to do a number of acts, and there is a provision that if either party fails to perform his covenants or agreements, the failing party shall pay to the other the sum of $500, as liquidated damages, the parties will be held to have liquidated the damages at that sum. *Esmond* v. *Van Benschoten*, 12 Barb., 366.

So, where a contract in its legal effect provides for a single act on either side, and is such that the damages, in case of a violation of it, will be uncertain in their nature and amount, and the parties have stipulated that, in the event of a breach, a certain sum shall be paid by the party in default as liquidated damages, they will be regarded as having so intended, and that sum will be treated as the measure of damages. *Mundy* v. *Culver*, 18 Barb., 336.

When the intention of the parties is clear, and the agreement is legal and valid, it will be enforced by the courts, without inquiring whether it was wisdom or folly for the contracting parties to make such an agreement. *Hosmer* v. *True*, 19 Barb., 106. Where the defendant held a lease, of which two years were unexpired, and he covenanted to assign it to the plaintiff by a specified day, and to deliver possession of the premises at that time, and in default to pay to the plaintiff the sum of $500 as liquidated damages, this was held to be a case of liquidated damages, and upon a breach of the covenant the defendent was held liable to pay the full amount. *Knapp* v. *Maltby*, 13 Wend., 587.

Where a purchaser of certain city lots, in consideration that they were sold to him at a low price, covenanted that he would

grade the lots within a reasonable time, and, also, that he would build two houses on them by a certain day, or, in default of building the houses, he would pay the vendor the sum of $4,000, on demand, as liquidated damages, it was held that the covenantee was entitled to recover the $4,000 as liquidated damages, upon a breach of the contract by not building the houses. *Pearson* v. *Williams' Adm.*, 26 Wend., 630; *S. C.*, 24 Wend., 246.

Where A., in consideration of $500, paid by B., in full for fifty acres of land, covenanted to convey the land to B., by a good and sufficient deed, on or before a certain day, or in lieu thereof to pay him $800, this was held to be liquidated damages, and not a penalty, and that B. was entitled, on a breach of the contract, to recover the $800, with interest. *Slosson* v. *Beadle*, 7 Johns., 72. A contract was made between the plaintiff and the defendant for the sale and purchase of real estate. Both parties were to perform the contract on a specified day, on which the plaintiff was to pay $4,000, to assign two mortgages, one for $3,737 the other for $1,000, to convey to the defendant a house and lot, and to deliver to him two promissory notes, to be made by the plaintiff, with a good indorser, for $500; and on the same day the defendant was to execute a conveyance of the land specified. There was a clause as to damages as follows: "In case either of the said parties shall fail to keep, perform and fulfill the covenants and agreements herein contained, on his part to be kept, performed and fulfilled, the party so failing to perform shall pay to the other party the sum of two thousand dollars, which said sum is mutually agreed by and between said parties to be the ascertained and liquidated damages for such non-performance." In an action by the purchaser against the vendor, for his non-performance, it was held that the damages were liquidated at $2,000, which sum the purchaser was entitled to recover. *Clement* v. *Cash*, 7 E. P. Smith, 253, 258. The court said: "The present was a contract for the sale and transfer of real estate, where the damages resulting from a breach would be uncertain in their amount; and it is not to be supposed that the parties were not at least as well able to estimate the value of the bargain, and appreciate the consequences of failure to obtain the land on one hand, or the stipulated consideration on the other, as either judges or juries.

The damages for non-performance were liquidated and fixed, if the language used by the parties to a contract can, in any case, fix the amount. It is precise and explicit, leaving nothing for construction or intendment. The parties declare, in language not capable of being misunderstood or misinterpreted, that they have ascertained and liquidated the damages at two thousand dollars, to be paid by the party failing to perform the agreement to the injured party. If they could do this, that is the sum to be treated as the measure of damages. That they could do it as respected a contract like the present, is clear from numerous

adjudications and upon principle;" and see *Reynolds* v. *Bridge*, 6 Ell. & B., 528.

So, where, in a contract for the sale and conveyance of a farm, the parties agree as to damages, thus: "the parties to these presents bind themselves, each unto the other, in the penal sum of two hundred dollars, as fixed and settled damages, to be paid by the failing party," this will be held to be liquidated damages, and the purchaser will be liable for that amount in case of a breach of the agreement on his part. *Brinkerhoff* v. *Olp*, 35 Barb., 27.

In a contract for the sale of personal property, which is to be executed at a future day, if there is a specified sum mentioned which is to be paid as damages in case of non-performance by the vendor, the sum so named will be considered as limiting the amount, which the vendee can recover whether the damages are regarded as liquidated or as a mere penalty. *Main* v. *King*, 10 Barb., 59.

A mere extension of the time for the performance of a contract is not a waiver of the right to recover liquidated damages. *Esmond* v. *Van Benschoten*, 12 Barb., 366.

So, where an agreement provides for the completion of a specified undertaking by a fixed day, and there is a stipulation that the party who is to perform the work shall pay $10 a day for each that shall elapse after that day, without a fulfillment of the contract, this will be considered liquidated damages, beyond which there cannot be a recovery. *Pettis* v. *Bloomer*, 21 How., 317.

Having examined some of the cases in which the damages were held to be liquidated, it now remains to examine some of the cases in which it was held that the stipulation was to be considered as a penalty, instead of liquidated damages.

In an action for the breach of a contract relative to the sale of lands, the contract provided that if either party was in default, he should "forfeit" to the other the sum of $500, to be paid by the defaulting party, unless the default was occasioned by some cause beyond his control, it was held that this was a provision for a penalty, and not a case of liquidated damages. *Richards* v. *Edick*, 17 Barb., 260; and see *Davies* v. *Penton*, 6 Barn. & Cress., 216; *Kemble* v. *Farren*, 6 Bing., 141. Where a contract provides for the performance of a number of things on both sides, and a certain sum is fixed to be paid by the failing party, it will be held to be a mere penalty, even though it may in terms declare it to be liquidated damages. *Ib.*; *Lampman* v. *Cochran*, 2 E. P. Smith, 275; *S. C.*, 19 Barb., 388.

A contract which provides that the party who is guilty of a breach of it shall "forfeit" a fixed sum, implies a penalty, and not liquidated damages. *Salters* v. *Ralph*, 15 Abb., 273.

Though the sum named in a submission to arbitration is stated to be "ascertained and liquidated damages," to be paid by the party refusing to abide by the award, it will be regarded as a mere penalty, and not as liquidated damages. *Spear* v. *Smith*, 1

Denio, 464; and see *Burgess* v. *Tucker*, 5 Johns., 105; *Hoag* v. *McGinnis*, 22 Wend., 163; *Dakin* v. *Williams*, 17 Wend., 447; *Astley* v. *Weldon*, 2 Bos. & Pul., 346.

However strong may be the language in which the parties have declared the sum to be stipulated damages, it will be considered as a penalty only, in all cases in which it applies to a variety of stipulations, differing in importance, and in all cases where, if construed as a debt, it would compel the payment of a larger sum for a default in the payment of a smaller one. *Ib.; Beale* v. *Hayes*, 5 Sandf., 640; *Boys* v. *Ancell*, 5 Bing., N. C., 390.

An agreement was entered into by an attorney and his client, and the latter stipulated that he would forfeit one hundred dollars in default of placing in the hands of the former certain specified claims for collection; this was held to be a penalty, and not liquidated damages. *Mills* v. *Fox*, 4 E. D. Smith, 220.

SECTION II.

DAMAGES IN ACTIONS FOR TORTS.

In most of the actions which are brought for the recovery of damages for torts committed, the measure of damages may be considered as settled. But, notwithstanding this is the general rule, there are some questions upon which the authorities are not entirely harmonious. In these actions, as in actions for the breach of contracts, the object of the plaintiff is to obtain such compensation or satisfaction as the law will give in the particular instance. As a general rule, in actions for torts, if there is no question of fraud, and there is no charge of willful injury, malice, or oppression, the measure of compensation is a matter of law. But, on the other hand, where the wrongful act is accompanied by aggravating circumstances, or where the motive of the defendant is willful, fraudulent, malicious or oppressive, the amount of damages is left quite largely to the discretion of the jury, as will be more fully explained in a subsequent place. One of the first principles relative to damages in such cases, is, that if the rights of an other are illegally invaded, even though the act may have been done without any evil motive or design, the wrongdoer is still liable for the damages resulting from his wrongful acts. And this is the rule, although his injury may have been done accidentally, unless the act was the result of unavoidable accident. Vol. I, 810, 845.

The man who unlawfully enters upon the lands of an other, upon a mistaken supposition that he had a right to do so, is as clearly a trespasser as he who enters with a full knowledge that he is a wrongdoer. So, too, the man who unlawfully takes or converts the personal property of his neighbor, in the mistaken belief that he is the owner, is as much liable in trespass or trover as he who committed the wrong intentionally. But although the motive in such a case does not affect the right of action, yet it may have an influence upon the question of damages, as we shall hereafter see when discussing that matter.

Trover.] Where the plaintiff recovers a judgment in an action of trover, the general rule is that he is always entitled to recover the value of the property at the time of its conversion, and, in some cases, he is entitled to recover a greater sum. The rule of estimating the value of the article is sometimes important. Where a party has converted property, and he will not produce it, the presumption will be that the article was of the best quality and description. *Armory* v. *Delamirie*, 1 Strange, 505. In the case last cited the plaintiff had found a jewel, and he took it to the defendant, who was a goldsmith, to find out its value, and the defendant took the jewel out of the locket and refused to return it, though the locket was returned. In an action for the conversion, the plaintiff proved what would be the value of a jewel of the first water to fit the locket, but the defendant did not produce the jewel, and the court instructed the jury to find the value of a jewel of the first water as the measure of damages, which the jury did.

Again, it is frequently important to ascertain at what period of time the value should be fixed or determined in those cases in which there has been a change in the price or value of the article between the time of its conversion and the time of the trial. That the plaintiff is entitled to a sum equal to the value at the time of the conversion, is settled beyond all controversy. *Kennedy* v. *Strong*, 14 Johns., 128; *Dillenback* v. *Jerome*, 7 Cow., 294. But the plaintiff may be, and he frequently is, entitled to a greater sum, as the measure of damages. In an action for the recovery of damages for the conversion of property, if such action is brought within a reasonable time, the measure of damages is the highest value of the property, at any time between the conversion and the day of trial. *Wilson* v. *Mathews*, 24 Barb., 295; *Commercial Bank of Buffalo* v. *Kortright*, 22 Wend., 348; *Willard* v. *Bridge*, 4 Barb., 361. Scott v. Rodgers 31 N.Y. 676

There are some cases in which the value of the property is enhanced by the acts of the wrongdoer. And the general rule is, that the party whose property has been tortiously taken is entitled to the enhanced value till it has been so changed as to alter the title. Where saw-logs are wrongfully taken and converted into boards and plank, the owner is entitled to recover the value of the boards and plank, and is not confined to the value of the logs either in the woods or at the place where they were sawed into boards and plank. *Baker* v. *Wheeler*, 8 Wend., 505; *Brown* v. *Sax*, 7 Cow., 95. In an action for logs, which have been converted into lumber and sold at a distant market, the value may be estimated and fixed by introducing evidence of the value of the lumber at its place of destination, deducting the cost of manufacture and of transportation from the market value. *Brizsee* v. *Maybee*, 21 Wend., 144.

Where trees are wrongfully taken and converted into shingles by the wrongdoer, the owner may recover of him the enhanced

value of the timber by estimating it at the value of the shingles. *Rice* v. *Hollenbeck*, 19 Barb., 664.

When property is taken by a willful trespasser, and it is converted by him into property of a different species, the title of the property will not be changed so long as the owner can identify the original materials which constitute the new or improved articles. *Silsbury* v. *McCoon*, 3 Comst., 379; See Vol. I, 821, 822, 823. The law, however, makes a distinction between a willful trespasser and an involuntary wrongdoer. An intentional wrongdoer can never acquire a title to property, however great may be the changes which he makes to it, but it is otherwise with one who acts in good faith. A. agreed to tan a quantity of hides to be furnished by B., and return the leather to him. B. was to furnish the hides on a commission for buying, and a commission for guaranty and selling the leather. The hides were to be insured and charged to A., and, when the leather was sold, the net proceeds, after deducting costs, expenses, commissions, insurance, interest, &c., was to be the profit which was to accrue to A. for tanning the hides. This transaction was held to be a bailment, and not a sale to A., and that in an action by B. against A.'s assignees for a conversion of the property, the proper measure of damages was held to be B.'s interest in the hides, and not the enhanced value thereof when manufactured into leather. *Hyde* v. *Cookson*, 21 Barb., 92. But B. was allowed to recover the amount of the money paid by him, the commissions for buying the hides, the expenses, interest, and the commissions upon the value of the leather when ready for market. *Ib.*

In an action for the recovery of damages for the conversion of chattels, the plaintiff, if he shows a right of recovery, is entitled to recover interest on the value of the property from the time of the conversion. *Andrews* v. *Durant*, 4 E. P. Smith, 496; *Hyde* v. *Stone*, 7 Wend., 354; *Bissell* v. *Hopkins*, 4 Cow., 53; *Baker* v. *Wheeler*, 8 Wend., 505; *Stevens* v. *Low*, 2 Hill, 133.

Interest from the time of the conversion is not a mere matter of discretion with a jury, but a matter of right; and it cannot be refused any more than the damages themselves. *Andrews* v. *Durant*, 4 E. P. Smith, 496, 502. But in an other case reported in the same volume, it was held that it was proper to submit the question whether they would allow interest. *Walrath* v. *Redfield*, 4 E. P. Smith, 458, 462. The court said: "The jury were not instructed to allow interest, but its allowance was submitted to their discretion. There was no error in this. In general, in actions *ex delicto*, it is in the discretion of the jury whether to allow interest by way of damages or not." The most that this case really decides is that the submission of the question to a jury, and their allowance of interest, is no error. It does not decide that the jury may refuse interest, unless that is to be inferred from the expression that interest is in the discretion of the jury.

The plaintiff is not limited to the price which he may have

paid for the property, but is entitled to the market price at the time of the conversion. *King* v. *Orser*, 4 Duer, 431.

Where the vendor of goods disaffirms the contract of sale on the ground that the vendee has neglected or refused to perform the conditions which would entitle him to hold the goods, and such vendor then sues in trover for the goods, the measure of damages is the actual value of the goods, with interest. *Stevens* v. *Low*, 2 Hill, 132. The price agreed on is evidence of the value, but it does not estop the vendee from showing the actual market value. *Ib.*

If a pledgee of stock wrongfully sells it, and when the pledgor offers to pay the debt and requests a return of the stock, the pledgee puts him off from time to time with promises to replace it, and in the meantime it rises in value, the pledgor may recover the enhanced value. *Wilson* v. *Little,* 2 Comst., 443; *S. C.*, 1 Sandf., 351.

Where a constable levies upon property, and it is removed and converted by the defendant in the execution, if the officer brings an action against him he can recover merely the amount of the execution, and not the value of the property. *Spoor* v. *Holland*, 8 Wend., 445.

Where a person having a lien upon personal property, brings an action against the general owner, the plaintiff can recover nothing more than his interest in the property; and not its full value. *Seaman* v. *Luce*, 23 Barb., 240; *Rhoads* v. *Woods,* 41 Barb., 471; *Russell* v. *Butterfield*, 21 Wend., 300; *Spoor* v. *Holland*, 8 Id., 445. But where the action is brought against a stranger who has no title or interest in the property, and who does not act under the authority of the general owner, the plaintiff is entitled to recover the full value of the property. *Alt* v. *Weidenberg*, 6 Bosw., 176.

In an action by a mortgagee of chattels against the mortgagor, or a party having his rights, for a conversion of the mortgaged property, the mortgagee is not entitled to recover the full value of the property, but is limited to the amount of his debt. *Parish* v. *Wheeler*, 8 E. P. Smith, 494. So, where the mortgagee sues a creditor of the mortgagor for seizing and selling the property on an execution against the mortgagor, where he has possession of the property after the mortgage becomes due, the mortgagee cannot recover more than the sum due on his mortgage. *Wood* v. *Combs*, MS., cited in *Chadwick* v. *Lamb*, 29 Barb., 522. So where a prior mortgagee claims chattels under a usurious mortgage, and an action is brought against him by a second mortgagee for a conversion of the property, the defendant will be regarded as the general owner of the property, and the plaintiff as having only a special interest, and he will not be permitted to recover more than the amount due upon his mortgage. *Chadwick* v. *Lamb*, 29 Barb., 518; see also *Goulet* v. *Assler*, Vol. I, 831.

The amount due on a note is the measure of damages for its conversion, unless payment, the insolvency of the maker, or some

similar fact is shown to invalidate it. *Ingalls* v. *Lord*, 1 Cow., 240. So, where the plaintiff made a promissory note, and the defendant wrongfully converted it by negotiating it before due, so as to charge the maker with its payment, it was held that the measure of damages was the amount of the note. *Decker* v. *Mathews*, 2 Kern., 313; *S. C.*, 5 Sandf., 439.

It is a general and a well settled rule that a return of converted property, and an acceptance of it by the owner, will not bar his action for the conversion, but merely go in mitigation of damages. *Hanmer* v. *Wilsey*, 17 Wend., 91; *Wood* v. *Jackson*, 8 Id., 10. And where property is sold under an execution which was illegally issued, the acceptance by the owner of the surplus of the avails of the sale will not deprive him of his right of action, but merely go in mitigation of damages. *Brown* v. *Feeter*, 7 Wend., 301, 308. Where property is wrongfully taken, the subsequent appropriation of it by a sale under an execution in favor of the wrongdoer will not relieve him from liability for damages to the full value of the property. *Otis* v. *Jones*, 21 Wend., 394; and see *Hanmer* v. *Wilsey*, 17 Id., 91. But where property which is unlawfully taken is afterwards returned to the owner, before action brought, and he accepts it, the return and acceptance must be considered in mitigation of damages; and if a judgment is rendered in favor of the plaintiff for the whole amount, it will be erroneous and reversible upon an appeal. *Hibbard* v. *Stewart*, 1 Hilt., 207.

In an action against a corporation for a conversion of the plaintiff's stock, by refusing to issue or to transfer it, the measure of damages is not the subscription money, with interest, but the value of the stock, or its highest price in market, at any time after the demand and a refusal to permit a transfer and to issue a scrip to the owner. *Arnold* v. *Suffolk Bank*, 27 Barb., 424.

A. bought some sheep on credit and left them with the vendor, who, without any default on the part of A., resold the sheep to a third person, and it was held that this was such a conversion of the sheep as entitled A. to maintain trover against the vendor; and that the measure of damages was not the value of the sheep, but the loss sustained by A. in not having the sheep delivered to him at the price agreed on. *Chinery* v. *Viall*, 5 Hurlst. & Norm., 288.

Replevin.] The law relating to the right of action in replevin has been sufficiently noticed already. Vol. I, 862 to 878. And a few words in relation to the measure of damages is all that will be necessary upon the subject. In the first place, it is to be observed that there is one particular in which this action differs widely from ordinary actions. In most cases the plaintiff is the only claimant for damages; but in this action the defendant may claim damages in case he succeeds in the action.

When the plaintiff recovers judgment in the action, his claim is for damages for the detention of the property, and, ordinarily, interest on the amount of the value of the property is the meas-

ure of damages. *Brizsee* v. *Maybee*, 21 Wend., 144. The plaintiff is also entitled to recover for any depreciation in the value of the property. Vol. I, 876, 877. But if he has only a limited interest in the property, he can recover only to the extent of his interest, as against the general owner, although, as against a mere wrongdoer, he may recover the full value. Id., 877.

When the defendant succeeds in the action, he is entitled to a judgment in his favor for a return of the property, and, also, to recover his damages. And, if the goods or chattels have deteriorated in value, he is also entitled to such sum as will be equal to the value of the goods at the time they were taken, with interest on that value from the time of the taking. *Rowley* v. *Gibbs*, 14 Johns., 384.

Where exemplary or vindictive damages are not recoverable, and the remedy sought is merely pecuniary, the principle is that the owner must be fully indemnified, and that the wrongdoer must not be permitted to derive any benefit or advantage whatever from his wrongful act. *Suydam* v. *Jenkins*, 3 Sandf., 614. The damages, when limited to an indemnity, will be ascertained by adding to the value of the property at the time the owner is dispossessed, the damages which he is proved to have sustained from the loss of its possession. *Ib.* And, to complete the indemnity, it is necessary to allow interest on the value of the property at the time of its wrongful taking, and from that time down to the day of the trial. *Ib.* So, compensatory damages, in addition to the interest, may be added to the value, where it is proved that it is necessary to afford a full indemnity. *Ib.*

Where it is shown that the owner would have derived a larger profit from the use of the property than the interest on its value, or that he had contracted to sell it to a solvent purchaser at an advance on its market price, or that when the wrong was committed it was on its way to a profitable market, where it would have certainly arrived, in such cases the difference between the value at the time of the tort and the advance which the owner would have realized had he retained the possession, ought to be added to the value as compensatory damages, and interest is allowable on the aggregate. *Ib.* So, when it appears that the owner, in all probability, would have retained the property until the trial, and it is then of greater value than when he was dispossessed, the difference is a part of his loss, and may be added to the original value to complete his indemnity. *Ib.* The same rule applies where the evidence justifies the conclusion that the owner, had he kept the possession, would have obtained a higher price for it subsequent to the tort which deprived him of it. *Ib.* Even where exemplary damages are not claimed, the sum which the injured party is entitled to recover is not in all cases to be limited to an indemnity. *Ib.* He is entitled to recover, in all cases, the market value of the property at the time of the conversion, with interest, even where the amount, from special circumstances, may exceed that of his actual loss. *Ib.* So, where the wrong-

doer has sold the property for a larger price than its value at the time of its conversion, the difference must be allowed as cumulative damages. *Ib.* So, where the wrongdoer retains the possession of the property at the time of the trial or judgment, and it is then of greater value than at the time of its conversion, the difference must be added to the sum that would be sufficient as an indemnity. *Ib.*

It may, therefore, be stated as the universal rule, that the amount to be recovered will be ascertained by adding to the value of the property, when the right of action accrued, such damages as shall cover every additional loss which the owner has sustained, and also every increase of value which the wrongdoer has obtained, or has it in his power to obtain. *Ib.*

The highest price which the property has borne at any time between its conversion and the trial, cannot, *in all cases*, be the measure of damages, since when it does not appear that this price would have been obtained by the owner, or has been obtained by the wrongdoer, the damages recovered by this rule would be vindictive, instead of remunerative. *Ib.* With still less reason can the value of the property at the time of the trial, be assumed as the true and sole measure of damages, since this would cast the risk of the depreciation, deterioration, or destruction of the property upon the innocent owner. *Ib.* In actions of tort, the value of the property, in estimating damages, is not always to be determined by its market price. In some cases, as that of family pictures, plate, and the like, its value to the owner, by reason of personal or family considerations, ought to be considered by the jury, by exercising both a sound discretion and a reasonable sympathy with the feelings of the owner. *Ib.*

Where the defendant succeeds in the action, and the proceedings on the part of the plaintiff in taking the property have been fraudulent, vexatious or malicious, or if the defendant's proceedings have been of the same character, and the plaintiff succeeds, the jury may give exemplary damages against either the plaintiff or the defendant, as in cases of willful trespass. *Cable* v. *Dakin*, 20 Wend, 172 ; *Brizsee* v. *Maybee*, 21 Wend., 144.

Where the judgment is in favor of the defendant for a return of the property which has been taken on the plaintiff's replevin process, the plaintiff may show, in mitigation of damages, that the defendant repossessed himself of the greater part of the property shortly after it was replevied. *De Witt* v. *Morris*, 13 Wend., 496. The return of the property goes in mitigation of damages, in the same manner as in an action of trespass. *Ib.*

Trespass upon real estate.] The cases in which trespass may be maintained for a wrongful entry upon real estate have been noticed in another place. Vol. I, 766 to 776. The general rule is that every wrongful entry upon lands lays a foundation for nominal damages, at the least. *Ib.*, 766, 767. And so it is also a general rule that the measure of damages is usually the amount of injury directly resulting from the act complained of. But

where the conduct of the defendant has been malicious, willful or oppressive, the jury may give exemplary damages. In one case, the plaintiff, who was a gentleman of fortune, was shooting on his own estate, in a common field contiguous to the highway, when the defendant, who was a banker, a magistrate and a member of parliament, who had dined and drank freely, after taking the same diversion of shooting, passed along the road in his carriage, and quitting it, went up to the plaintiff and told him he would join his party, which the plaintiff positively declined, inquired his name, and gave him notice not to sport on the plaintiff's land; but the defendant declared with an oath that he would shoot, and accordingly fired several times, upon the plaintiff's land, at the birds, which the plaintiff found, proposed to borrow some shot of the plaintiff, when he had exhausted his own, and used very intemperate language, threatening, in his capacity of a magistrate, to commit the plaintiff, and defying him to bring any action. The witnesses described his conduct as being that of a drunken or insane person. The plaintiff conducted himself with the utmost coolness and propriety. The jury gave a verdict to the plaintiff for £500 damages, which the court refused to set aside. GIBBS, Ch. J., said: "I wish to know, in a case where a man disregards every principle which actuates the conduct of a gentleman, what is to restrain him except large damages? To be sure, one can hardly conceive worse conduct than this. What would be said to a person in a low situation of life, who should behave himself in this manner? I do not know upon what principle we can grant a rule in this case, unless we were to lay it down that the jury are not justified in giving more than the absolute pecuniary damage that the plaintiff may sustain. Suppose a gentleman has a paved walk in his paddock, before his window, and that a man intrudes and walks up and down before the window of his house, and looks in while owner is at dinner, is the trespasser to be permitted to say, 'here is a halfpenny for you, which is the full extent of all the mischief I have done.' Would that be a compensation? I cannot say that it would be." HEATH, J., said: "I remember a case where a jury gave £500 damages for merely knocking a man's hat off; and the court refused a new trial. There was not one country gentleman in a hundred, who would have behaved with the laudable and dignified coolness that this plaintiff did. It goes to prevent the practice of dueling, if juries are permitted to punish insult by exemplary damages." *Merest* v. *Harvey*, 5 Taunt., 442.

So, where the defendant came upon the sidewalk of the plaintiff, in a country village, and there remained, using offensive, vulgar, and vile language towards the plaintiff, and refusing to depart therefrom. The jury gave a verdict in favor of the plaintiff for $20 damages, which was affirmed by the supreme court. *Adams* v. *Rivers*, 11 Barb., 390, 398. The court said: "The jury were not limited to mere compensatory damages, and the court could not have interfered had the recov-

ery been five times as much as it was." In an other case the defendant went to the plaintiff's office, and entered it, for the purpose and with the malicious intent of provoking a quarrel with the plaintiff's clerk, if the latter did not pay a small demand which the defendant claimed of him, and while in the office the defendant wrongfully and violently assaulted such clerk, and in an action by the plaintiff the jury gave the plaintiff a verdict of $400, for the intrusion and trespass in the office, which was held not to be excessive damages. *Walker* v. *Wilson*, 8 Bosw., 586. In the case just cited the conduct of the defendant was entirely inexcusable. He went into the plaintiff's office and demanded pay of the clerk, and on his statement that he could not pay, the defendant struck him several violent blows in the face, causing his nose to bleed copiously; called him harsh names; attempted to seize and arrest him; struck him several other blows; went out of the office, and threatened to go back and continue his violence; he also called the clerk a thief; and on the call of the clerk for assistance, several persons entered from the street. So, in an other case, the wife of the defendant went upon the plaintiff's premises, and into his dwelling house, and enticed a servant girl to leave the plaintiff's service; for this act a jury gave the plaintiff a verdict for $20.00 damages, and this was held right. *Haight* v. *Badgeley*, 15 Barb., 499. Again, in an other case, the defendant threw poisoned barley upon the plaintiff's land and destroyed his poultry, and a verdict was given to the plaintiff, with £50 damages, which was sustained, upon the principle that the jury were not confined to the mere damages resulting from throwing the poisoned barley upon the plaintiff's land, but that they might consider the malicious motives of the defendant. *Sears* v. *Lyons*, 2 Stark., 317, and see *Matthews* v. *Fiestel*, 2 E. D. Smith, 90. But, while the laws thus permit a jury to assess damages with a liberal hand, in cases which call for the exercise of such a power, it must still be remembered that such damages are the exception and not the general rule. The recovery of punitory or vindictive damages is allowed in those cases only in which the act causing the injury was willfully done; where the circumstances show that there was a deliberate, preconceived, or positive intention to injure, or such a reckless disregard of the safety of person or property as is equally culpable. *Wallace* v. *Mayor of N. Y.*, 2 Hilt., 441, 452; *Ives* v. *Humphreys*, 1 E. D. Smith, 197, 202, 203. For an involuntary trespass, or a trespass committed under an honest mistake, without any intent to injure, the damages should be confined strictly to compensation for the injury sustained by the plaintiff, and in estimating the amount of such damages, all the particulars wherein the plaintiff is aggrieved may be considered, whether of pecuniary loss, or pain, or insult, or inconvenience. *Ib.* For a willful trespass, or a trespass committed in reckless or wanton disregard of an other's rights, or accompanied by circumstances of cruelty, or oppression, or other particulars, showing the presence of malice or a

corrupt motive, the jury may, and ought not only to give such compensation as above named, but also further damages in view of the aggravated character which the trespass then assumes, usually called "smart money," or "exemplary damages." *Ib.*

Nuisance.] The general rules of law relating to nuisances will be found elsewhere. Vol. I, 748 to 754. The general principles of law relating to the measure of damages in actions of trespass are equally applicable in actions for nuisances.

If the plaintiff's negligence contributed to the occurrence of the injury, or increased the injurious effect of it, this will be a matter to be considered. Vol. I, 834, 835. If the statute of limitations is not pleaded, the plaintiff is not limited to damages sustained within six years prior to the commencement of the action. *Waggoner* v. *Jermaine*, 3 Denio, 306.

Negligence.] In ordinary cases the measure of damages in actions for injuries resulting from negligence is limited to a reasonable compensation. In one case the defendant negligently left open a large hole in a sidewalk, into which the plaintiff fell and was severely injured. The judge, at the trial, charged the jury that they might give exemplary damages if they thought the defendant was guilty of gross negligence in leaving the sidewalk in that condition; but this instruction was held erroneous, and it was held that the only damages recoverable were such as were the legitimate and direct result of the accident. *Wallace* v. *Mayor of N. Y.*, 2 Hilt., 440.

So, in an action for damages for injuries resulting from a collision of vessels caused by the defendant's negligence, the plaintiff cannot recover, as damages, the probable profits which he might have realized from a return trip from a place to which his vessel was bound at the time of the occurrence of the injury. *Hunt* v. *Hoboken Land Improvement Co.*, 3 E. D. Smith, 144.

So, in an action for the recovery of damages which resulted from the negligence of the defendant in setting fire to the plaintiff's grass and trees, the rule of damages is, that if the thing destroyed, although it is a part of the realty, has a value that can be accurately measured and ascertained without reference to the value of the soil in which it stands, or out of which it grows, the recovery must be for the value of the thing destroyed and not the difference in the value of the land before and after the destruction. *Whitbeck* v. *N. Y. Central R. R.*, 36 Barb., 644.

But where the action is brought to recover damages for willful negligence, the jury may take into consideration the motives of the defendant, and if the negligence is accompanied with a contempt of the plaintiff's rights and convenience, the jury may give exemplary damages. *Emblen* v. *Myers*, 6 Hurlst. & Norm., 54, 60, and note; and see *Thomas* v. *Harris*, 3 Hurlst. & Norm., 961; *Britton* v. *South Wales R. R. Co.*, Id., 963.

Trespass to personal property.] The principles governing a right of recovery in this action have been fully explained. Vol. I, 805 to 813. When this form of action is adopted under ordinary

circumstances, and no matters of aggravation are shown, the general rule is the same as in trover, and the measure of damages is the value of the property, with interest. But where the conduct of the defendant has been willful, malicious, cruel or oppressive, the jury may give exemplary damages.

In an action of trespass for killing the plaintiff's horse, by beating it to death, the proof showed the horse to be worth $50 or $60; but the jury, under a charge of the court that they might allow *smart money*, gave $75; and this was held right. *Wort* v. *Jenkins*, 14 Johns., 352. The court said, "The plaintiff proved the facts charged in the declaration, and with circumstances of great barbarity on the part of the plaintiff. We think the charge of the judge was correct; and we should have been better satisfied with the verdict, if the amount of damages had been greater and more exemplary."

In an action for a willful trespass in overturning the plaintiff's wagon in the night time, and breaking and injuring it, the proof showed the costs of the repairs to be $3.37, but the justice gave judgment for $5.89 damages, besides costs, on account of the willful injury; and this was held right. *Tifft* v. *Culver*, 3 Hill, 180.

Where an officer having process for the collection of a fine or a judgment, uses such process oppressively and vexatiously for the purpose of injuring the feelings of the party against whom it was issued, this is actionable, and the jury may give appropriate damages. *Rogers* v. *Brewster*, 5 Johns., 125.

Where process is regular in form, and issued upon a regular and valid judgment, but is executed in a place to which the process does not run, and out of the proper jurisdiction, the party whose goods are taken on it may recover the whole value of the goods, and not merely the amount of damages which he may have sustained by their being taken in a wrong place. *Sowell* v. *Champion*, 6 Ad. & E., 407.

If a sheriff or constable wrongfully seizes goods which are afterwards taken from him by an other wrongdoer, the owner of the goods may, in an action against such officer, recover as special damages, the amount necessarily paid to the latter wrongdoer to get the goods back. *Keene* v *Dilke*, 4 Exch., 388.

Where the property of the plaintiff is sold under illegal process, and the sum demanded is raised by a sale of the property, which is bid off for the benefit of the plaintiff, by his agent and with his money, the measure of damages in an action for the wrongful sale, is the amount of the bid with interest thereon, and not the value of the property. *Baker* v. *Freeman*, 9 Wend., 36; *Clark* v. *Hallock*, 16 Wend., 607.

Where a promissory note was left with an attorney for collection, and the maker of the note wrongfully took the note from the attorney's office, it was held, in action of trespass by the attorney, that he could not recover, as damages, the costs, whether incurred or prospective, of an action for the collection of such note. *Dumont* v. *Smith*, 4 Denio, 319.

In an action for the wrongful taking of personal property, where exemplary damages are not claimed, the actual cash market value of the property at the time of the taking, together with interest, is the measure of damages. But where the property is taken by an officer under an execution, and sold at public auction, the price which the goods brought is competent evidence upon the question of value. *Campbell* v. *Woodworth*, 6 E. P. Smith, 499, reversing *S. C.*, 26 Barb., 648.

Actions against sheriffs or constables.] Actions against ministerial officers are quite frequent; and there are several different classes of actions which are resorted to as occasion requires. Sometimes the action is for oppressive conduct, as has been already seen. *Ante*, 685. At other times the action is founded upon a neglect to execute process, or for permitting an escape from it, or for making a false return thereto. In all such cases, the law gives a remedy to the injured party, by awarding such damages as ought to be given.

In an action against a sheriff for a negligent escape, upon mesne process, the measure of damages is the actual loss or injury sustained by the plaintiff; and *prima facie* the plaintiff is entitled to recover the amount of the judgment rendered against the prisoner, though the officer is entitled to give evidence as to the poverty of the prisoner, or other circumstances which tend to show the actual damages sustained. *Patterson* v. *Westervelt*, 17 Wend., 543. The distinction between an escape from mesne process, and from that on final process, with the difference in the measure of damages, has already been pointed out. Vol. I, 746. As to the measure of damages for a false return to an execution, see Vol. I, 747. In an action for an escape from arrest on a warrant issued under the non-imprisonment act, the rule of damages is that the sheriff is *prima facie* liable for the amount of the judgment. But if it is shown by the sheriff that the debtor was unable to pay his debts, the jury ought to give such damages only as the plaintiff has sustained by the escape. *Latham* v. *Westervelt*, 26 Barb., 256.

In an action for neglecting to levy, and for delaying to return an execution, the sheriff is *prima facie* liable for the whole debt, and his only mode of mitigating the amount of the recovery is by showing that he could not have collected it by exercising due diligence. *Bank of Rome* v. *Curtiss*, 1 Hill, 275; *Ledyard* v. *Jones*, 3 Seld., 550; *S. C.*, 4 Sandf., 67; *People* v. *Lott*, 21 Barb., 130. The plaintiff need not allege, or prove any special damages, because he is presumptively entitled to recover the amount of the entire judgment as damages. *Ib.*, overruling *Stevens* v. *Rowe*, 3 Denio, 327. But the sheriff may show, if he can, that the defendant had no property, or not sufficient property, out of which to have satisfied the execution, even if he had used the diligence required of him by law. And if such proof is given, the plaintiff may rebut it by evidence on his part, and then the jury will be able to say, upon all the evidence, what damages the

plaintiff has actually sustained. *Humphrey* v. *Hathorn*, 24 Barb., 278.

SECTION III.

ASSESSMENT OF DAMAGES.

Time of assessing damages.] It is a general rule that no damages can be included in the judgment, unless they had accrued at the time of the commencement of the action. There are some cases, however, in which the damages are a mere incident or accessory to the principal, as where interest accrues on the demand sued on, in which cases interest may be computed down to the entry of judgment. So, in an action by a father against the seducer of his daughter, the plaintiff may prove, by way of aggravation of damages, any circumstances which are the natural consequences of the principal act, although they did not transpire until after the action was brought. *Hewit* v. *Prime*, 21 Wend., 79. But such cases are exceptions to the general rule, which excludes any damages accruing after the commencement of the action, and this is especially the case where a new action will lie for such accruing claim or demand. In actions of trespass, trover, or for torts generally, the damages should be limited to the commencement of the action, although this rule is not without exceptions in those cases in which the jury are permitted to give the value of the goods at any time previous to the trial. *Ante*, 676. Every continuance of a nuisance is a fresh nuisance, and there may be an action for each day's continuance of it, and the damages ought to be limited to the time of commencing the action. Vol. I, 753.

Amount of damages.] The damages awarded must be such as the law allows, and such as are proved by the evidence; and where it is clear from the return that the judgment is for too great damages, it will be reversed. *Ely* v. *O'Leary*, 2 E. D. Smith, 355. So, on the other hand, if the damages allowed are evidently for less than the law allows, a new trial will be granted. *Robbins* v. *Hudson River R. R.*, 7 Bosw., 1. But in those cases in which the question arises upon an appeal from a judgment rendered in a justice's court, the general rule is that the appellate court has no power to reverse the judgment upon the ground that the damages are excessive, or that they are too small, unless some rule of law has been violated in the assessment of the amount. *Stephens* v. *Wider*, *5 Tiff., 351.

Interest as damages.] Interest is sometimes payable by the express terms of the contract between the parties. But there are other cases in which there is no such agreement, and interest is not recoverable, except by way of damages. As to the subject of interest generally, see Vol. I, 548 to 559.

In actions upon contract, where there has been an express promise to pay interest, or where it is payable as a matter of right and of law, there interest must be allowed by way of damages, and, if refused, it will be error.

In actions for torts, such as trespass, trover, and the like, interest may frequently be given as damages. *Ante*, 677, 680.

Double and treble damages.] At common law the damages are always single, but double and treble damages are, in some cases, given by statute. The jury may, in such cases, double or treble the damages themselves, and the court will intend that they have done so, unless the verdict be, *in terms*, for single damages. *Livingston* v. *Platner*, 1 Cow., 175. But, to entitle the plaintiff to double or treble damages, the complaint must distinctly refer to the statute. *Ib.* The proper course is for the jury to find single damages, and then for the court to double or treble them, as the case may require, when judgment is rendered. *King* v. *Havens*, 25 Wend., 420. If the court refuses to render a judgment for the proper amount, the judgment will be reversible. *Ib.* In an action of trespass, under a statute giving treble damages, judgment should be rendered for treble the amount of damages found by the jury when they find single damages. *Ib.* This was so held in an action for a trespass in cutting down six shade trees belonging to the plaintiff, and in which the jury assessed his single damages at $30, the court holding that he was entitled to recover a judgment for $90 on this finding. *Ib.* And see *King* v. *Havens*, 25 Wend., 420; *Jermain* v. *Booth*, 1 Denio, 639.

Several defendants.] If several persons join in the commission of a trespass, and they are all sued, and a verdict found against all of them, the damages are not divisible, and the jury cannot assess different amounts against the several defendants; and if they should do so, the plaintiff may disregard the finding so far as to be entitled to have judgment against all for the largest amount found against any one of the defendants. *Beal* v. *Finch*, 1 Kern., 128; *Bohun* v. *Taylor*, 6 Cow., 313; *O'Shea* v. *Kirker*, 4 Bosw., 120; *S. C.*, 8 Abb., 70. There may be cases, however, in which the damages may be severed, as where one defendant is found guilty of a trespass at one time and the other at another; or, if one is guilty of a part of the trespass, and an other of the other part; or, if some are guilty of the whole trespass and others of a part only. But in actions in justice's courts such judgments would be quite unusual, even if they are ever entered. And where the trespass is not joint in all respects as to all the defendants, the proper course for a plaintiff will be to bring separate actions against the several defendants. And where injuries are done by animals, there are cases in which a joint action does not lie. Vol. I, 850; *Ante*, 286.

Remitting damages.] Where the jury find damages for a greater sum than that claimed in his complaint, the plaintiff may remit the excess if he chooses. Vol. I, 56, § 116. In such cases the judgment will be erroneous if it is entered for the full amount. *Dox* v. *Dey*, 3 Wend., 356; *Fish* v. *Dodge*, 4 Denio, 311. And the rule is the same where the cause is first tried in a justice's court and then retried in the county court on an appeal. *Ib.* It is true the Code provides liberally for amendments, even upon appeals, but

this kind of amendment has not heretofore been favored, unless upon the terms of granting a new trial. *Ib.* Where the whole case has been fully and fairly tried before the justice, he would be authorized to allow an amendment of the complaint increasing the claim for damages, if done before the entry of judgment. But such an amendment would be wholly in his discretion, to be exercised according to the justice of the application.

CHAPTER VI.

JUDGMENT.

What a judgment is.] A judgment is the decision or sentence of the law, which is pronounced by a judge or court upon the matters contained in the record of an action which has been prosecuted or litigated before such judge or court. It is the final proceeding in an action at law, by which the court applies the law to the particular case presented before it, and specifically grants or denies to the plaintiff the remedy which he has sought by the action. And if the defendant sets up a claim by way of affirmative relief, claim, or defense, such right is also determined and declared.

There cannot be a valid judgment unless it is pronounced by a competent judge or court, at a time and place appointed by law, or in pursuance of it, and in the form which the law requires.

If there is not jurisdiction of the subject matter, or of the person, or if the cause is tried out of the proper jurisdiction, the judgment will be void. *Ante*, 5 to 15, &c.

In every action which is prosecuted to its final termination, the litigant parties present to the court the facts to be considered, the agreements to be considered, and the points of law to be resolved, and the judgment is the result of a full examination of all these matters.

But although the judge or court pronounces the decision, the judgment is really the sentence or decision of the law, and the judge or court is the mere instrument for expressing the determination of the law.

Kinds of judgment.] In justices' courts there are but few varieties in the mode of entering judgment, and these are very simple in form.

In courts of record there are several kinds of judgment which are appropriate and legal when applied to those courts, but which are not at all proper or applicable to justices' courts. And, in discussing the subject under consideration, no explanation will be given of any judgments, except such as are appropriate to these courts.

In civil actions, judgments are usually divided into four classes or kinds.

1. When the facts are admitted by the parties, but the law is disputed, as in the case of a judgment upon demurrers, see *ante*, 330 to 334. 2. When the law is admitted, but the facts are dis-

puted, as in the case of a judgment upon a verdict. *Ante*, 625. 3. When both the law or the facts are admitted by confession of judgment, or by voluntary nonsuit. 4. By the default of either party in the course of the proceedings. But judgment by default is not properly entered in justices' courts, as we shall see hereafter, where the subject will be explained so far as it is applicable to these courts.

These four species of judgments are again divided into such as are either *interlocutory* or *final.* An *interlocutory* judgment is one given in the course of a cause, before final judgment. This form of judgment is rarely pronounced in a justice's court. There is one case, however, in which this is appropriate. When a pleading is demurred to, and the demurrer is sustained, the judgment is not final, but interlocutory, and it requires the party to amend his defective pleading. *Ante*, 333.

A *final* judgment is one which puts an end to the action. And when issues have been joined upon questions of fact, the jury or the justice try the issues and assess the damages, and the judgment is final in the first instance either that the plaintiff recover the damages assessed, or that the defendant is entitled to the sum claimed by way of set-off, &c. In all cases of final judgment the general rule is that the judgment rendered by the justice is peremptory, and is collectible of the goods and chattels of the unsuccessful party, whether plaintiff or defendant. There is an exception to this rule where the plaintiff sues as an executor or administrator, and a set-off is allowed. Vol. I, 46, §§ 53, 54.

Judgment by default.] In courts of record there are cases in which a judgment may be rendered against a defendant by default, provided he neglects or refuses to interpose a defense. But there is no such rule in actions in justices' courts. And even where the service of process upon the defendant has been personal, and he refuses or neglects to appear and answer, the plaintiff cannot proceed on the return day of such process and take judgment against the defendant without proving a legal cause of action. Vol. I, 11, § 64, sub. 8.

The cause of action must also be proved by legal evidence; and if the judgment is founded upon illegal or incompetent evidence, or if there is a material defect in the proofs, the defendant may reverse the judgment, although he did not appear at the trial. *Perkins* v. *Stebbins*, 29 Barb., 523; *Northrup* v. *Jackson*, 13 Wend., 85; *Squier* v. *Gould*, 14 Id., 159; *Warnick* v. *Crane*, 4 Denio, 460; *Swift* v. *Falconer*, 2 Sandf., 640; *Carter* v. *Dallimore*, Id., 222; *Jones* v. *Pridham*, 3 E. D. Smith, 155; *Alburtis* v. *McCready*, 2 Id., 39; *Howard* v. *Brown*, Id., 247; *Storp* v. *Harbutt*, 4 Id., 464.

Where the defendant does not appear on the return day, and the plaintiff is then prepared to prove his case, he may proceed with the action by putting in his complaint, introducing his evidence, and taking judgment.

As to the power of the justice to relieve a defendant from the consequences of a default, see *ante*, 220, 221, 222.

The rule requiring a plaintiff to prove his case, does not extend so far as to require him to anticipate and negative a defense which might have been pleaded. *Humphrey* v. *Persons*, 23 Barb., 314.

Judgment on issues of law.] This subject has been sufficiently explained in a previous place. *Ante*, 330 to 334.

Judgment on issues of fact.] There are frequently several issues joined in an action. If the plaintiff's complaint contains several separate counts for different causes of action, and issue is taken upon each count, there will, of course, be several issues.

So, too, the defendant may interpose affirmative defenses, either as a bar to the plaintiff's claim or by way of set-off. In such cases there will be issues raised for trial. But, in whatever manner the issues may arise, the sole object of every issue is to present a matter for trial and judgment. The general rule is that judgment will be entered in favor of the party who prevails upon the whole record.

Suppose the plaintiff sues for several distinct trespasses, and he proves them all, but the defendant establishes a defense by way of accord and satisfaction to a portion of the causes of action, in such a case the plaintiff will recover judgment if there is but a single cause of action unanswered. Again, if the action is brought upon several separate promissory notes, and a defense is made out to a portion of them, but not as to all, in that case the plaintiff will have judgment for so much as is proved and unanswered.

Further, suppose that the plaintiff sues upon claims which permit the defendant to interpose a set-off, and that such defense is interposed. If the plaintiff's entire claim is proved and admitted it does not follow, of course, that he will recover judgment. For if the defendant establishes his set-off, and it is greater in amount than the plaintiff's demands, the defendant will then be entitled to judgment for the balance due him.

In actions upon money demands, such as bills or notes, bonds, and the like, the judgment, if in favor of the plaintiff, is that he recover the amount due, with such legal damages as may be allowed by law, together with the costs of the action. If the judgment is in favor of the defendant, it is that he recover his costs, unless he has interposed and established a set-off for a greater sum than the plaintiff's demand, in which case judgment is entered in favor of the defendant for the balance, with costs. In actions upon contracts for the recovery of damages for a breach thereof, the plaintiff, if successful, recovers such damages as may be assessed by a jury or the justice, with costs. If the defendant succeeds, the judgment is for costs. So, in actions for torts, the general rule is that the plaintiff, if successful, recovers the amount of damages assessed, with the costs of the action; while, on the other hand, a successful defendant recovers judgment for his costs. If the action is replevin, and the plaintiff

obtained possession of the property by his process, and he then recovers judgment in his favor, the judgment will be that he recover the damages assessed for the wrongful taking and detention, or for the wrongful detention alone where the taking was lawful, together with the costs of the action. If the plaintiff did not recover possession of the property, but he recovers a judgment which declares that he is entitled to it, the judgment will give damages as in the last case supposed, and the jury, or the justice, must, in addition, find and assess the value of the articles claimed. And, in assessing the value, there ought to be an assessment of the value of each separate article, and not by way of a gross sum, for it may happen that a portion of the articles will be restored, while others may not be, and in such case the plaintiff is entitled to recover the value of the articles not delivered. If the property has been taken and delivered to the plaintiff, and the defendant succeeds in the action, the judgment must be for a return of the property, if a return can be had, and for the value thereof, in case a return cannot be had, together with the damages assessed for the taking and withholding the property, with the costs of the action. If, from a defect of proof, the plaintiff is nonsuited on the trial, the defendant is entitled to a judgment for the return of the property, without giving any proof of his title. *McCurdy* v. *Brown*, 1 Duer, 101; see Vol. I, 876, 877.

Judgment on issues of law and of fact.] Where there are several separate causes of action set out in the complaint, there may be issues of law and of fact in the same action, since some of the causes of action may be demurred to, and issues of fact joined on the others. The mode of disposing of the issues in such a case is pointed out, *ante*, 333.

Judgment of nonsuit.] There are several cases in which a judgment of nonsuit is required by statute. Vol. I, 55, § 110. But there are other instances in which a judgment of nonsuit must be rendered. If the plaintiff fails to sustain his action by proof at the trial, the justice may grant a nonsuit upon a proper motion, and a judgment of nonsuit follows, with the costs of the action. But there may be voluntary, as well as compulsory nonsuits, and, if the plaintiff is satisfied that the evidence is not sufficient to entitle him to a verdict, he may elect to become nonsuited by withdrawing his action.

The plaintiff may, on a jury trial, make this election at any time before the jury have actually rendered their verdict. This right of the plaintiff sometimes gives him an unfair advantage; for it is not unfrequently the case that the result of a trial is known before the verdict is rendered in open court; and where it is likely to be adverse to the plaintiff, he may avoid the consequences by withdrawing his action. The defendant cannot do this, but is compelled to abide the event. In the supreme court no such advantage is allowed, since the plaintiff is not permitted

to elect to become nonsuited, unless it is done before the jury retire for deliberation upon their verdict. Rule 31.

A judgment of nonsuit is no bar to a new action for the same cause, unless it was rendered upon the merits of the action. And, therefore, a nonsuit for a defect of proofs, or by a voluntary withdrawal, or by a default in not appearing at the proper time, will not bar a new action.

As to the cases in which a nonsuit may be ordered by the justice on the trial, see *ante*, 579. After a cause has been tried before a jury, and it has been submitted to them for decision upon all the evidence given by the parties, it will then be too late to take the cause from them and nonsuit the plaintiff upon the motion of the defendant. *Young* v. *Hubbell*, 3 Johns., 430. If, however, the plaintiff does not appear on the coming in of the verdict, the statute requires the entry of a judgment of nonsuit. Vol. I, 55, § 110, sub. 5; *Douglass* v. *Blackman*, 14 Barb., 381.

So, when an action has been tried before a justice without a jury, and the cause submitted to him for final judgment, it will afterwards be too late for the plaintiff to withdraw the action and submit to a nonsuit. *Elwell* v. *McQueen*, 10 Wend., 519; *Shall* v. *Lathrop*, 3 Hill, 237; *Peters* v. *Diossy*, 3 E. D. Smith, 115; *Hess* v. *Beekman*, 11 Johns., 457.

And, in such a case, if the justice should decide to grant a nonsuit, and should enter a judgment in form for a nonsuit, instead of on the merits, such judgment will, nevertheless, be a final judgment; and be a conclusive bar to a second action for the same cause. *Ib.*

But a cause may be submitted conditionally, with a reservation of a right on the part of the plaintiff to withdraw the action; and if the parties agree to such an arrangement, it will be binding; and if entered into the justice's docket it becomes a part of the record, and cannot be contradicted by parol evidence. *Smith* v. *Compton*, 20 Barb., 262.

So, where a cause is tried before the justice without a jury, and a motion is made for a nonsuit, but the decision of the motion is reserved, the justice may grant a nonsuit within the four days. *Seaman* v. *Ward*, 1 Hilt., 52.

The mere submission of the cause to the justice for his decision, after a trial upon the merits, will not be a bar to a subsequent action in the event that no judgment is entered in pursuance of the first trial. *Young* v. *Rummell*, 5 Hill, 60; *S. C.*, 7 Hill, 503; see Vol. I, 954.

When the docket of a justice shows that a judgment of nonsuit was rendered, parol evidence is not admissible to contradict it by showing that the cause was heard and decided upon the merits. *Brintnall* v. *Foster*, 7 Wend., 103; and see *Smith* v. *Compton*, 20 Barb., 262.

Where a justice improperly grants a nonsuit, and enters a judgment thereon, which is reversed on appeal, the justice cannot proceed with the case as though no nonsuit had been granted,

but the plaintiff must bring a new action, if he wishes to prosecute the claim further. *Anon.*, 9 Wend., 503.

Judgment of discontinuance.] There are several instances in which the statute requires the entry of a judgment of discontinuance. If the justice is a material witness for the defendant, is one instance. Vol. I, 55, § 109; *ante*, 237 to 245. So, where an answer of title to land is properly interposed. *Ante*, 248, 249. Or where the balance of a set-off exceeds one hundred dollars, and the defendant does not require it to be set off. Vol. I, 46, § 51. Or where the claims of both parties exceed four hundred dollars. Vol. I, 46, § 52. Or where the justice is related to one of the parties to the action. *Ante*, 25 to 27. Or where the justice fails to appear on the return day of process. *Ante*, 217 to 219.

The effect of a discontinuance is merely to terminate the existing action. It is no bar to a future action for the same cause for which the first one was instituted.

Judgment, when to be rendered.] The statute has prescribed the times when judgment shall be rendered in the cases specified. Vol. I, 56, § 115.

In the following cases it must be done *forthwith*: 1. Where the plaintiff is nonsuited. 2. If he discontinues or withdraws his action. 3. Where judgment is confessed. 4. Where a verdict is rendered in favor of either party. 5. Where the defendant is in custody at the time of hearing the cause. *Ib.*

In all other cases the justice must render judgment within *four days* after the cause is finally submitted. *Ib.*

Where a judgment is rendered upon an offer made by the defendant, it must be done before answering in the action. See the practice in full, *ante*, 255 to 259.

Where a cause is tried before a justice without a jury, judgment must be rendered within four days after the submission for a final decision; and if it is not rendered until after that time it will be erroneous. *Watson* v. *Davis*, 19 Wend., 371; *Berrian* v. *Olmstead*, 4 E. D. Smith, 279; *Wiseman* v. *Panama R. R. Co.*, 1 Hilt., 300.

The justice may take four days from the time when the cause was finally submitted for judgment. And where a cause is tried before the justice, and the evidence introduced, and the cause then adjourned by consent to a future day for summing up, the cause will not be considered as finally submitted until the summing up, and the justice may take four days from that time within which to render judgment. *Heidenheimer* v. *Wilson*, 31 Barb., 637.

If the fourth day falls on Sunday, judgment must be rendered on the day preceding; and if it is not done until the Monday following it will be erroneous. *Bissell* v. *Bissell*, 11 Barb., 96; and see *Ex parte Dodge*, 7 Cow., 147.

The decision must be evidenced by some official act; and it will be of no consequence that the justice decided the cause in his own mind, if he did not enter the judgment in his minutes or docket, or in some other legal manner. *Seaman* v. *Ward*, 1 Hilt.,

52. Although the statute is imperative as to the time within which judgment must be rendered, yet that does not prevent the parties from agreeing to extend the time beyond the limit of four days. And if the parties stipulate that the justice may take five days instead of four for the purpose of rendering judgment, such stipulation will be valid and be enforced by the courts. And where a judgment is rendered on the fifth day, in such a case, the defendant will be held to be estopped from alleging that the judgment was not rendered in time. *Barnes* v. *Badger*, 41 Barb., 98.

Where the cause is tried by a jury the justice must render judgment *forthwith* upon receiving the verdict, whether it be in favor of the plaintiff or the defendant. Vol. I, 56, § 115. This statute is enforced quite strictly, and, if no judgment is entered until the next day after the rendition of the verdict, no judgment can legally be rendered upon it. *Sibley* v. *Howard*, 3 Denio, 72. Determining the amount of costs to be paid by the losing party is a judicial act, and is a part of the duty of rendering judgment. *Ib.* In one case the cause was tried and the verdict rendered on the first day of the month, on which day the verdict was entered in the docket, but the items of costs were made up during the four succeeding days, and the items were not added up until the *ninth* day of the month, and it was held that the judgment was erroneous. *Ib.* But, notwithstanding the strictness with which the rule is enforced as to the *time* of entering the judgment, there is not the same strictness observed as to the manner of its entry. The statute requires the entry of the judgment to be made in the *docket*, but this is held to be merely directory; and if the judgment is entered in the justice's minutes of the trial, in proper form, and in due time, it will be sufficient. *Walrod* v. *Shuler*, 2 Comst., 134; *Hall* v. *Tuttle*, 6 Hill, 38. And a transfer of the judgment into the docket two or three days afterwards will be a compliance with the law, and a valid judgment. *Ib.*

Where it is sought to reverse a judgment on the ground that it was not rendered forthwith, the error must appear affirmatively, or the judgment will be affirmed. In one case the return stated that the cause was tried by a jury on the 11th day of March, and that the jury returned into court and rendered a verdict for the plaintiff, upon which the justice rendered judgment in favor of the plaintiff on the 12th day of March, and it was held that it might be fairly inferred that the verdict was not rendered until the 12th of March, although the trial commenced on the day preceding, and the judgment was affirmed. *Beattie* v. *Qua*, 15 Barb., 132.

If the time for rendering judgment is extended by the stipulation of the parties, and judgment is rendered within the stipulated time, the party against whom judgment is entered will be estopped from questioning the regularity or the validity of the judgment on appeal. *Barnes* v. *Badger*, 41 Barb., 98.

But if there is no agreement to extend the time, the judgment must be rendered within the time prescribed by statute or it will be reversible on appeal, if not absolutely void.

Where the defendant was arrested on a warrant, and was in custody during the trial, the judgment must be rendered *forthwith*, even though the cause was tried by the justice without a jury. Vol. I, 56, § 115. And if not rendered until the expiration of four days the judgment will be void for want of jurisdiction. *Wait* v. *Van Allen*, 8 E. P. Smith, 319.

Although a verdict may be received on Sunday, no judgment can be legally rendered thereon on that day. Vol. I, 79, § 16; *Hoghtaling* v. *Osborn*, 15 Johns., 119.

There is a statute which prohibits the service of process on Saturday upon such persons as keep that day as the Sabbath. *Ante*, 46, 47. But the statute is not so construed as to invalidate a judgment rendered against such a person on Saturday, where the process had been regularly and legally served on a previous day. *Maxson* v. *Annas*, 1 Denio, 204.

And so a judgment may be legally rendered by a justice on the day of a general election, where the cause was tried before him and submitted on a previous day. *Rice* v. *Mead*, 22 How., 445.

Judgment, how rendered.] The statute provides that the justice shall enter the judgment in his docket. Vol. I, 56, § 115. The construction given to this section by the courts will prevent a judgment from being so irregular as to require a reversal if it has been first entered in the justice's minutes in proper time, and then transcribed into the docket within two or three days. *Walrod* v. *Shuler*, 2 Comst., 134; *Hall* v. *Tuttle*, 6 Hill, 38; *ante*, 695. The correct practice, however, is to enter the judgment in the docket in the first instance, and to do it promptly and within the prescribed time. Until this is done there is no judgment upon which an execution could be properly issued.

The statute requires all legal proceedings to be in the English language. Vol. I, 80, § 18. But where the essential facts of the judgment are intelligible it will be valid, notwithstanding the fact that some of the words are very incorrectly spelled. *Jackson* v. *Browner*, 7 Wend., 388.

There are some cases in which there may be separate judgments as to the several defendants. When the action is for a tort, and there are several defendants, there may be a judgment against some of the defendants and in favor of others. *Moon* v. *Eldred*, 3 Hill, 104; *Dominick* v. *Eacker*, 3 Barb., 18; *Noyes* v. *Hewitt*, 18 Wend., 141, 142, 143; *Van Deusen* v. *Van Slyck*, 15 Johns., 223. If there is no evidence whatever against one of the defendants in an action for a tort, the court should, if requested, direct the jury to find a verdict for such defendant, if the cause is tried by a jury; or he should, himself, discharge him if there is no jury. *Ib.* If, however, there is any evidence whatever the question must be submitted to the jury. *Ib.* In those cases in which the defendant is entitled to a discharge, it will be error to refuse it on a

proper application. *Ib.* If the trial is by jury, and there is no evidence against one of the defendants, it will not be error for the justice to discharge him, instead of directing the jury to acquit him. *Noyes* v. *Hewitt*, 18 Wend., 141, 143. The correct practice, however, is to direct the jury to acquit him, which is done, as a matter of course, by the jury. *Ib.* Where the cause is tried by a justice without a jury, and a defendant is entitled to be discharged, this is usually done at the close of the plaintiff's evidence. *Moon* v. *Eldred*, 3 Hill, 104. But in all such cases of discharging a defendant there should be no judgment entered until the trial is completed. *Ib.* In one case the justice discharged one defendant at the close of the plaintiff's case, and entered judgment forthwith in favor of such defendant against the plaintiff for costs; and at the close of the trial the justice rendered a judgment of nonsuit against the plaintiff, and also entered up a judgment against him for costs in favor of the latter defendant; and this was held to be erroneous, upon the ground that no judgment should have been rendered until the trial was completed, and in that case if judgment was rendered in favor of both defendants against the plaintiff there could be but one judgment; while, if the judgment had been in favor of the plaintiff against one defendant, and against the plaintiff and in favor of the other defendant, there ought to be two separate judgments, one in favor of the plaintiff against one defendant, and the other in favor of the other defendant against the plaintiff, for costs. *Ib.* After the evidence is closed and the jury have retired, it is too late to move for the discharge of one of the defendants, on the ground that there is no evidence against him. *Labar* v. *Koplin*, 4 Comst., 547.

There are also some cases in which there may be separate judgments even in actions upon contracts. If the action is brought upon a negotiable promissory note, and the makers and indorsers are joined, there may be a separate judgment against those who are proved liable, and a judgment in favor of those who show a valid defense, or against whom no cause of action is made out. *Parker* v. *Jackson*, 16 Barb., 33; and see *Bank of Attica* v. *Wolf*, 18 How., 102; *Zink* v. *Attenburg*, Id., 108; *Wilklow* v. *Bell*, Id., 397. The principle of the decision is that a separate judgment may be rendered in any case in which a separate action might have been brought. *Ib.* If several defendants are sued, and one of them pleads infancy, and proves it on the trial, the court may allow the plaintiff to discontinue as to him without costs, and proceed with the action against the others. *Butler* v. *Morris*, 1 Bosw., 329.

Form of the judgment.] The statute does not prescribe any particular form of entering judgments, though it requires the entry into the docket of certain specified acts and things. Vol. I, 68, 69, § 174. The validity of a judgment does not depend upon a literal compliance with the terms of the statute; and if enough appears to show that the justice had jurisdiction of the parties to

the action, and of the subject matter, that the proceedings were regular, and the kind and amount of the judgment, and that it was rendered in due time, this will be sufficient. *Humphrey* v. *Persons*, 23 Barb., 314; *Hall* v. *Tuttle*, 6 Hill, 42, opinion. The correct practice, however, is for the justice to carefully comply with the statute, and all questions as to the regularity or validity of the judgment in this respect will thereby be avoided. Ordinarily the justice is required to render judgment for the amount found and settled by the verdict of the jury, or the decision of the justice. But the parties, whether plaintiff or defendant, may remit a portion of the amount found in his favor and take judgment for the residue, and the justice should render judgment accordingly. Vol. I, 56, § 116.

When a jury return into court with a verdict in favor of the plaintiff for a particular sum, the plaintiff may remit any portion of the amount and take judgment for the residue. *Clark* v. *Denure*, 3 Denio, 319; *Barber* v. *Rose*, 5 Hill, 76. So, where a jury render a verdict in favor of the defendant for a specified sum in an action of tort, where no sum could properly be found for the defendant, he may remit the amount and take judgment in his favor generally, and this will be regular. *Burger* v. *Kortright*, 4 Johns., 414. So, where the case is decided by the justice without a jury, either party may remit all, or a portion of the amount found, and take judgment for the residue. *Putnam* v. *Shelop*, 12 Johns., 435. There may be a judgment in favor of the defendant for the amount of a set-off proved by him, although the plaintiff may not have established any claim on his part on the trial. *Greenleaf* v. *Low*, 4 Denio, 168.

The entries made in the docket in pursuance of the requirements of the statute are conclusive, and they cannot be contradicted by parol evidence. *Smith* v. *Compton*, 20 Barb., 262.

But although the docket is evidence in a subsequent action, between the same parties, to prove what judgment was entered by him, it is not evidence in a suit between others, to show what constable served the summons, nor the amount of his fees *Reynolds* v. *Brown*, 15 Barb., 24. The death of the justice would not affect the rule. *Ib.* The omission of the justice to make the entries required by statute is not a ground of action against him, even where the omission may have been the cause of loss to another. *James* v. *Hartney*, 6 Hill, 487. In the case just cited a constable had duly returned an execution, but the justice omitted to enter the return in his docket. An action was afterwards brought against the constable for a neglect to return the execution, and he was unable to prove the return of it either by the justice or otherwise; but this was held not to give any right of action against the justice in favor of the constable.

The manner of entering into the docket the various proceedings in an action may not be familiar to every person, and for that reason a general precedent for such entries will be given.

Entries in justices' docket on jury trial.

IN JUSTICE'S COURT.

Bradford T. Simmons *agst.* Peter L. Frederick.

April 12th, 1865, summons issued; returnable on the 20th instant, at one o'clock P. M., at my office. April 20th, summons returned, personally served, by John P. Albro, constable, on the 12th instant. Fees, $0.50.

April 20th, both parties appeared, the plaintiff in person, and the defendant by Richard H. Rosa, who produced a written authority (or who swore to his authority). Plaintiff complained on a promissory note executed by the defendant to him, and dated April 1st, 1860, for $25, payable one day after date, and also for goods, wares and merchandise sold and delivered to the defendant, and claimed damages to the amount of $50.

The defendant answered, and denied each and every allegation in the complaint, and also claimed a set-off of $25 for grain and wood sold and delivered to plaintiff, and also for work and labor performed for the plaintiff.

On motion of the plaintiff (or of the defendant), the action was adjourned to the 30th day of April instant, at one o'clock P. M., at my office.

A venire was issued at the plaintiff's request (or at the defendant's) returnable at the time and place last mentioned.

April 30th, the parties appeared at one o'clock P. M., and proceeded to the trial of the cause. The following jurors were returned as summoned upon the venire by John P. Albro, constable. (Insert their names.) The following jurors, who were returned as summoned, did not appear. (Insert their names.) The following jurors appeared. (Insert their names.) The following jurors were sworn to try the action. (Insert their names.)

Harvey Pixley and Jeremiah V. Marselis were sworn as witnesses for the plaintiff, and William Fry at the request of the defendant.

John Smith was offered as a witness on the part of the defendant, and objected to by the plaintiff (state the ground of objection), and rejected.

After hearing the evidence (and the arguments of counsel, if any), the jury retired under the charge of John P. Albro, a constable duly sworn for that purpose, and afterward returned into court, and the plaintiff having answered to his name when called,* the jury found a verdict for the plaintiff for $50, damages, which was received April 30th, 1865, whereupon, I did forthwith, and on the 30th day of April, 1865, render judgment for the plaintiff for,

Damages, ...	$50 00
Costs, ...	5 00
	$55 00

April 30th, 1865, execution issued to John P. Albro, constable.

May 10th, 1865, a notice of appeal was served on me by Richard H. Rosa, Esq., and my fees and the costs of the action paid to me. A copy of undertaking to stay proceedings was also served by him on me at the same time.

The precedent which has been given is merely intended to give a general idea of the manner of making entries into the justice's docket. And since each case has features peculiar to itself, so in each case the entries must conform to the facts as they actually occur.

If the cause is tried by the justice, without a jury, that fact will be evident by omitting any statements as to the jury.

The foregoing form will be a sufficient guide for ordinary cases; but since the change in the law which gives the justice jurisdiction in replevin actions, there are some forms of judgment which ought to be given for such cases.

Judgment for plaintiff in replevin where property was not delivered to him.

State the ordinary proceedings as in the form, *ante*, 699, down to the *, and then proceed thus:

The jury found by their verdict that the plaintiff was entitled to the possession of the property described in the complaint; that the value of said property is $100, and that the damages sustained by the plaintiff by the wrongful taking (or detention) were $25. Whereupon I did forthwith, on the 30th day of April, 1865, render judgment that the plaintiff recover of the defendant the possession of the following described personal property (describing it), or the sum of $100, in case a delivery cannot be had; and also that he recover $25 damages, together with $5 costs, amounting in the whole to $130.

Value of property,	$100 00
Damages,	25 00
Costs,	5 00
	$130 00

Judgment for plaintiff in replevin where property was delivered to him.

State the facts as in the form, *ante*, 699, down to the *, and then proceed:

The jury found by their verdict that the plaintiff was entitled to the possession of the property described in the complaint; that the said property had been taken into the possession of the plaintiff, and that the damages sustained by the plaintiff by the wrongful taking (or detention) are $25. Whereupon I did forthwith, on the 30th day of April, 1865, render judgment that the plaintiff retain possession of the following described property (describe it), and also that he recover $25 damages, together with $5 costs, amounting in the whole to $30.

Damages,	$25 00
Costs,	5 00
	$30 00

Judgment for defendant in replevin where property was delivered to plaintiff.

State facts as in the form, *ante*, 699, down to the *, and then proceed as follows:

The jury found by their verdict that the defendant was entitled to the possession of the property described in the complaint; that the value of said property is $100, and that the damages sustained by the defendant by the taking and withholding the same are $25. Whereupon I did forthwith, on the 30th day of April, 1865, render judgment that the defendant

have a return of the following described personal property (describing it) or the sum of $100 in case a return cannot be had; and, also, that he recover $25 damages, together with $5 costs, amounting in the whole to $130.

Value of property, ...	$100 00
Damages, ...	25 00
Costs, ...	5 00
	$130 00

Judgment for defendant in replevin where property was not delivered to plaintiff.

State facts as in the form, *ante*, 699, down to the *, and then proceed as follows:

The jury found by their verdict that the defendant was entitled to the possession of the property described in the complaint, and that the said property has not been taken from the possession of the defendant. Whereupon I did forthwith, on the 30th day of April, 1865, render judgment that the defendant retain possession of the following described property (describe it), and, also, that he recover $5 costs of the plaintiff.

Judgment in actions of tort, where one defendant is convicted and an other acquitted.

State the facts as in the form, *ante*, 699, down to the *, and then proceed as follows:

The jurors found by their verdict that the defendant, A. B., committed the trespasses (or converted the property, &c.,) as alleged in the complaint, and they assessed the damages of the plaintiff at the sum of $75; and the said jurors also found that the defendant, C. D., did not commit the trespasses (or convert the property, &c.) as alleged in the complaint. Whereupon I did forthwith, on the 30th day of April, 1865, render judgment for the plaintiff against the defendant, A. B., for $75 damages and $5 costs, amounting in the whole to $80; and I did also forthwith, on the said 30th day of April, 1865, render a judgment in favor of the said defendant, C. D., and against the said plaintiff, for $5 costs of the defense.

Where the action is for a tort, and some of the defendants are convicted and some acquitted, it will be very easy to state briefly what the finding actually was, and the judgment rendered thereon. And where the action is founded upon contract, and a verdict is found against some of the defendants and in favor of others, as in the case of infancy, or of actions against the different parties to a bill or note, the findings and judgment may be readily stated.

In the forms given, it is stated that the *jury* found, &c. But if no jury is called, and the cause is tried by the justice, the statement will be that the justice decided, &c. And in every case the court will make the changes which may be found necessary in conforming the judgment to the facts found by the jury, or decided by himself.

Opening or altering judgment.] Where a judgment has once been regularly entered up by the justice, his powers cease; and

he cannot open the judgment for the purpose of relieving the defendant from the consequences of a default, even though that occurred by reason of an excusable mistake or omission. *Alburtis* v. *McCready*, 2 E. D. Smith, 39; *Appleby* v. *Strang*, 1 Abb., 143; *Sperry* v. *Major*, 1 E. D. Smith, 361; *People* v. *Lynde*, 8 Cow., 133. So, where a judgment has been entered for a wrong amount through inadvertence or otherwise, the justice has no power to change the amount, either by increasing or diminishing it. *Hardy* v. *Seelye*, 1 Hilt., 90; *S. C.*, 3 Abb., 103. If the justice by mistake renders judgment for too large a sum in consequence of errors in adding up the items of the demand, he cannot afterwards correct the mistake by reducing the amount. *People* v. *Delaware Com. Pleas*, 18 Wend., 558. So, if a mistake is made in making up the items of costs, and the amount inserted in the judgment is less than that allowed by law, the error cannot be corrected by increasing the judgment. *Dauchy* v. *Brown*, 41 Barb., 555.

In all such cases, whether the mistake makes the judgment for damages too large or too small, or whether the amount of costs is greater or less than allowed by law, the judgment, when once entered up, is conclusive, and cannot be altered by the justice.

There are cases in which a judgment may be opened by consent; and if this is done by the consent of the parties, and the cause retried and a judgment is rendered against the defendant he cannot allege the opening of the case as error. *Scranton* v. *Levy*, 4 Abb., 21. And where the cause is retried by the consent of both parties, it would be in accordance with well settled principles to hold that both of them are estopped from subsequently questioning the regularity and validity of the proceedings. See Vol. I, 1077, &c.

Judgment by confession.] Judgment may be rendered before a justice of the peace, by confession, for any amount not exceeding five hundred dollars. The statutes upon this subject have been given in full. Vol. I, 54, 55, §§ 104, 105, 106; and Id., 6, § 53, sub. 8. Where there is but one person, and he signs a confession of judgment, or where there are several persous and they all sign it, there will be no room for question as to the authority to make the confession. But where one person assumes to confess a judgment against himself, and also against other persons, there will frequently be room for serious questions or doubt as to the validity of the judgment. One partner cannot confess a judgment in favor of a partnership creditor, in the name of the firm, so as to bind his copartners, or so as to bind the partnership property. *Everson* v. *Gehrman*, 10 How., 301; *Binney* v. *Le Gal*, 19 Barb., 592. And where several partners are sued together, one of them has no power to make an offier on behalf of himself and his copartners, that the plaintiff may take judgment under the provisions of the Code, unless there is some evidence from which it may be inferred that his copartners authorized him to make the offer, or assented to it. *Ib.; Ante*, 256; Vol. I, 298.

Judgment, how confessed.] The requirements of the statute must

be substantially complied with, or the judgment will be invalid. It is essential that the defendant should appear personally before the justice; that the confession should be in writing, signed by the defendant, and filed with the justice; and that there should be a proper affidavit, where the judgment is confessed for a sum exceeding fifty dollars. Vol. I, 54, 55, §§ 105, 106.

Where no process is issued for the purpose of bringing the defendant into court, and he does not appear in court before the justice, and the only authority which the justice has for entering judgment is that which arises from a casual meeting in the street, where the defendant verbally authorizes the justice to render judgment against him for a specified amount, any judgment rendered upon such statement will be void. *Tenny* v. *Filer*, 8 Wend., 569. In such a case the judgment would be void for the reason that the confession was not in writing and signed by the defendant, as well as on the ground of non-appearance in court. The statute, as has been already seen, requires that the defendant should appear personally before the justice and make the confession. But this is not a new rule, for under the old law, before the enactment of this statute, the practice was the same; and a judgment, though entered upon a written confession, was invalid where the statement was not made before the justice, but at a different place, and then sent to the justice. In one case, *Martin* v. *Moss*, 6 Johns., 126, the justice rendered judgment for the amount of a note sent to him by the defendant, and accompanying it was a written authority to enter judgment on the note, which the justice did, and on his own knowledge of the defendant's handwriting, but the judgment was held invalid. So, where the judgment was entered in pursuance of a written sealed authority sent to the justice, and proved by the subscribing witness thereto, but the defendant did not appear before the justice personally, the judgment was held erroneous. *Bromaghin* v. *Throop*, 15 Johns., 476; and see *Colvin* v. *Luther*, 9 Cow., 61.

Although the confession must be signed in the presence of the justice, it is not necessary that it should be done at the justice's office, or his residence. And where the confession was signed in the town in which the justice resided, and in his presence, the judgment was held valid, although the confession was signed at the defendant's house, which was some three or four miles from the office and residence of the justice. *Stone* v. *Williams*, 40 Barb., 322. The fact that the justice's docket was not present, but was at his office at the time of signing the confession, does not make any difference in the rule. *Ib.* But the rule as to the place where the confession is to be made is still more extensive than this, for a confession will be valid although it is made by the defendant and taken by the justice out of the town in which the justice resides. *Pollock* v. *Aldrich*, 17 How., 109. The statute which limits the exercise of judicial acts to the town in which the justice resides, relates to the trial of causes and not to the confession

of judgments. *Ib.* Such a confession may be taken in any town in the county in which the justice resides. *Ib.; ante*, 8, 9.

Where no process is issued there must be a written confession of judgment, as is shown by the cases just cited. But, where an action is regularly commenced by the issuing and service of process, the defendant may appear in court and confess judgment orally, and without any affidavit of indebtedness, even when the amount of the judgment exceeds fifty dollars. *Gates* v. *Ward*, 17 Barb., 424. In such a case, if the defendant appears on the return day of the process, and, when the complaint is filed, he admits in open court that a specified sum is due from him to the plaintiff, and he consents that the justice shall render judgment for the amount, this may be done, and the judgment will be regular and valid. *Ib.* If, however, the proceedings are merely colorable, and are taken for the purpose of defrauding the creditors of the pretended debtor, the judgment will be void as to them. *Ib.* A judgment ought always to be so entered as to show clearly in whose favor it is rendered. *Slaman* v. *Buckley*, 29 Barb., 289. On an appeal from a justice's judgment, the return showed that the action was brought for taking personal property, and that the defendant interposed an answer containing a general denial, and the return further stated that the justice entered "judgment for damages, with costs, $2.74," without stating in whose favor the judgment was rendered, and it was held that the fair inference from the facts stated in the return was that the judgment was rendered in favor of the plaintiff for some amount of damages, since no claim was alleged or proved to authorize a judgment in favor of the defendant for damages. *Ib.* In the case last cited the plaintiff appealed from the justice's judgment, on the ground that he had been defeated in his action by the justice, but the appellate court held that, on the facts appearing in the return, the true construction was that the judgment was in favor of the plaintiff for some amount, and that if the plaintiff claimed that the judgment of the justice was really in favor of the defendant, he should have procured an amended return, showing that fact affirmatively.

Form of confession of judgment.

IN JUSTICE'S COURT.

John Doe *agst.* Richard Roe.	Before David Kennedy, a justice of the peace of Mayfield, Fulton county, N. Y.

In the presence of David Kennedy, the justice above named, I do hereby confess judgment in favor of John Doe, for the sum of five hundred dollars, on a demand arising upon contract, to wit (state the nature or particulars of the demand), and authorize the said justice to enter judgment against me for the same, with costs. Dated the 15th day of April, 1865.

RICHARD ROE.

In presence of David Kennedy, *Justice.*

Affidavit where confession is for a sum exceeding fifty dollars.

FULTON COUNTY, *ss:* We, John Doe and Richard Roe, the parties named in the foregoing (or annexed) confession of judgment, being each duly sworn, severally say that the said Richard Roe is justly indebted to the said John Doe in the sum of five hundred dollars, upon the demand named in the said confession, over and above all just demands which the said Richard Roe has against the said John Doe, and that the said confession is not made or taken with a view to defraud any creditor.

JOHN DOE,
RICHARD ROE.

Subscribed and sworn before me,
this 15th day of April, 1865,

DAVID KENNEDY, *Justice.*

The effect of omitting to annex an affidavit to the confession, as required by the statute, is merely to render the judgment void as to creditors. *Stone* v. *Williams*, 40 Barb., 322. Notwithstanding such omission the judgment will be valid and binding upon the defendant. *Ib.*

There are cases, too, in which an affidavit may be dispensed with, even though the plaintiff's claim originally exceeded the sum of fifty dollars. If the plaintiff's demand is a large one it may be divided into sums less than fifty dollars in amount, by the consent of the plaintiff and defendant, and then separate judgments entered upon each portion of it; and if this is done, and none of the confessions exceed fifty dollars in amount, there need not be any affidavit of indebtedness or of the justice of the claim. *Cornell* v. *Cook*, 7 Cow., 310.

The statute does not, in terms, require the plaintiff to be present at the time of confessing the judgment; but it is usual for the plaintiff to be present, either in person or by agent or attorney. But even in the case of non-appearence by the plaintiff at that time, he might subsequently ratify the transaction so as to render it valid, and in that event the defendant would be estopped from denying the validity of the judgment. If, however, on the other hand, the plaintiff did not appear, nor subsequently ratify the transaction, he would not be bound by it, especially in a case where the confession was for a sum less than his just due. But, if he should leave a claim with a justice for collection, and the defendant should voluntarily appear before the justice and confess judgment for the amount of the claim so left, the plaintiff would be bound by the judgment.

In every statement of confession the nature of the cause of action ought to be clearly and distinctly stated. If upon contract it may be easily specified. If it arises from a tort that fact should be explicitly stated, so that an execution against the person may be issued in a proper case. So, too, every agreement for a stay of the execution ought to be mentioned in the confession, and the justice will then observe the stipulation by omitting to issue execution until the specified time.

Stamps.] If the confession of judgment is for one hundred dol-

lars or upwards, there must be a revenue stamp for fifty cents, unless such a stamp was used on the process for commencing the action; in which case, that stamp will be sufficient. Vol. I, 1104, Schedule B.

Actions on judgments.] This subject has been sufficiently discussed. Vol. I, 598 to 602.

Transcripts of judgments.] A justice is bound to furnish a transcript of the judgment to any party in whose favor it has been rendered. Vol. I, 10, § 63. This transcript may be filed and docketed in the county clerk's office, and it will then become a judgment of the county court. *Ib.* But the judgment will not be a lien upon lands, unless it exceeds twenty-five dollars in amount, exclusive of costs. *Ib.*

There are cases too, in which the justice is bound to furnish the defendant with a transcript of the judgment. Vol. I, 70, § 182. If judgment was rendered against the defendant on his default, and in his absence, the justice is bound, on his demand, to furnish him with a transcript of the judgment, and with a copy of the process, pleadings, and proofs in the cause. *Ib.* So, if judgment is rendered against the plaintiff in consequence of his default in appearing, the justice is bound to furnish him with such copies on demand. *Ib.* It is not necessary that a transcript from a justice of the peace, of a judgment rendered by him, should show the proceedings which give him jurisdiction to render a valid judgment, in order to authorize it to be filed and docketed. It is, for that purpose, *prima facie* evidence, that the justice had jurisdiction to render the judgment. *Dickinson* v. *Smith*, 25 Barb., 102; *Jackson* v. *Jones*, 9 Cow., 182; *Jackson* v. *Tuttle*, Id., 233; *Jackson* v. *Rowland*, 6 Wend., 666. Nor is it necessary, in such a case, that the certificate of the county clerk should show that the signature of the justice to the transcript was the genuine signature of the justice; or that he was at the time a justice of the county. *Ib.* The judgment, when docketed, becomes a judgment of the county court, and all that the clerk is required to certify is, as to the correctness of the copy of the transcript filed in his office, and the docket of the judgment. *Ib.* It is not necessary to show the jurisdiction of the justice, in order to establish the validity of the judgment. *Ib.* The transcript and docketing are all that it is necessary to prove to establish the judgment as a lien, and the authority of the clerk to issue an execution. *Ib.*

A transcript may be made and certified by a justice after the expiration of his term of office. *Maynard* v. *Thompson*, 8 Wend., 393. And it will be as valid evidence in his own favor, as it is in favor of the plaintiff in the execution, in case an action is brought against such plaintiff and justice for the sale of property under such execution. *Ib.* When the certificate of a county clerk is required, as to the authority of the justice to render such judgment, the certificate must be given by the clerk of the county in which the justice resided at the time of rendering the judgment. *Ib.* A transcript, if intelligible in its essential

parts, will be good, although written in bad English or Dutch. *Jackson* v. *Browner*, 7 Wend., 388. When a judgment has once been regularly entered in favor of a party, the justice is bound to give such party a transcript; and, if he refuses to do so, he will be compelled by mandamus. *People* v. *Lynde*, 8 Cow., 133.

Setting aside docketed judgments.] Where a judgment is confessed before a justice of the peace, for the purpose of defrauding creditors, and a transcript thereof is docketed in the county clerk's office, the county court has the same power to set the judgment aside on motion of the defendant's creditors, that the court would have if the judgment had been rendered in the county court. Vol. I, 55, § 107. But the county court has no power to inquire into the regularity or validity of a judgment rendered by a justice of the peace, in those cases in which a transcript has been docketed, and the injured party applies by *motion* for relief. *People* v. *Washington Com. Pleas.*, 1 Wend., 79. In such a case, the judgment cannot be set aside for irregularities in obtaining it, though the court has power to control the execution issued upon such docketed judgment, and in a proper case, they may set it aside. *Ib.* Where an injured party wishes to obtain relief against the judgment rendered by the justice, his remedy is by *appeal* and not by *motion*. *McCunn* v. *Barnett*, 2 E. D. Smith, 521. Filing a transcript makes the justice's judgment a judgment of the county court, for the purpose of enforcing it, by execution and the like, but not for the purpose of investigating the manner in which the judgment was obtained.

CHAPTER VII.

COSTS.

The authority to render judgment for costs is conferred by statute; and no other costs than those allowed by statute can be taxed by a justice, or entered in the judgment. If the plaintiff recovers a verdict upon a jury trial, or if the justice decides a cause in his favor after a trial before him without a jury, or if the plaintiff proves a right to recover in a case in which the defendant does not appear in the action, in each of these cases the plaintiff is entitled to recover costs. Vol. I, 56, § 112. If a verdict is found in favor of the defendant, after a trial by jury, or if the justice, after a trial before him without a jury, shall decide in favor of the defendant, he is entitled to judgment for costs. Vol. I, 56, § 111. Whenever judgment is rendered against either party, it is with full costs of the action; though the amount is limited, in most cases, to the sum of five dollars. Vol. I, 56, § 117.

There are several cases in which judgment of nonsuit may be given; and in those cases such judgment is followed by the costs of the action. Vol. I, 55, § 110.

There are some cases in which no costs can be taxed by the justice. If an action is discontinued by reason of his own absence on the return day of the process, or upon the day of trial, it will

be the fault of the justice, and not of the parties, that the action fails; and in such a case there is no authority to enter judgment against either party for costs.

So, where the justice is disqualified from trying the action on account of his relationship to one of the parties, he cannot render a legal judgment for costs. *Ante*, 25.

If the justice is a material witness for the defendant, and the action is discontinued for that cause, the judgment must be without costs against either party. *Ante*, 244. So, where the action is discontinued upon an answer of title to land, no judgment is rendered, but each party pays his own costs. Vol. I, 9, § 57. But where the action is discontinued on the ground that title was in question on the plaintiff's own showing, the judgment will be with costs against the plaintiff. Vol. I, 9, § 59.

In courts of record the right to costs is materially affected by the amount of the recovery. But in a justices' court there is no such rule, and a recovery for the smallest sum, even for one cent, will carry costs as effectually as a judgment for the full amount of the justice's jurisdiction. It is a very rare thing, however, for a justice or a jury to find for a sum less than six cents. The law gives six cents as nominal damages, and that is invariably the least sum given as damages. The verdict, however, must be for some sum upon which a judgment may be rendered. And if the verdict is for only one mill damages, no judgment can legally be rendered upon it; and if entered up merely for the costs of the action it will be erroneous. *Brown* v. *Smith*, 3 Cai., 81.

The costs which are to be entered in the judgment, are those which the prevailing party is entitled to recover against the losing party. If the plaintiff succeeds, none of the defendant's costs are taxed in the judgment. So, if the defendant prevails, none of the plaintiff's costs can be allowed or entered in the judgment.

Where a verdict is found for the defendant, the justice has no right to enter in the judgment the costs which had accrued on the plaintiff's part for the summons, the constable's fees for its service, or the fees for swearing the plaintiff's witnesses. *Penfield* v. *Carpender*, 13 Johns., 350. So, on the other hand, where the plaintiff recovers judgment, the justice cannot enter in it charges for the subpœnas issued to the defendant. *Bronson* v. *Mann*, 13 Johns., 460; *Timmerman* v. *Morrison*, 14 Johns., 370. Nor can he, in such a case, include in the judgment the fees for swearing the defendant's witnesses. *Williams* v. *Sherman*, 15 Johns., 195; or the costs of an adjournment granted on motion of the defendant. *Dennison* v. *Collins*, 1 Cow., 111. The costs of a venire, however, always abide the event of the action, and must, therefore, be always included in the judgment, let which ever party may succeed. *Rickey* v. *Bowne*, 18 Johns., 131.

If a justice should err in taxing costs by allowing too great a sum, this will not be a ground of reversal of the judgment. If illegal fees or costs are allowed and collected, the injured party may recover them back by action. Vol. I, 65, § 156.

The amount of costs to be entered in the judgment may exceed five dollars where there are foreign witnesses, or where there are more adjournments than one procured by the party against whom judgment is finally rendered. Vol. I, 63, § 151, *a*. As to the costs in case of issuing an attachment against a witness or juror, see *ante*, 559, 560, 641.

Where there is but one plaintiff and one defendant, the costs are taxed in favor of the successful party and against the unsuccessful one. If there are several plaintiffs and several defendants, the recovery is generally in favor of all the plaintiffs and against all of the defendants, and the costs are taxed accordingly. Where there is a recovery by the plaintiff against one defendant, and a verdict or decision in favor of the other defendants, the justice should tax the costs in favor of the plaintiff and against the unsuccessful defendant, in the same manner as though there were no other defendant. And, on the other hand, he must tax the costs in favor of the successful defendant as though there were but one defendant. In such a case there will be but one entry of judgment, which will include a proper judgment in favor of each successful party. See a form of judgment, *ante*, 701.

As a general rule, no costs can be taxed on the decision of a demurrer. Such a judgment is not a final judgment, and costs are not given except on final judgments. See *ante*, 333.

There is one case in which the allowance of costs is discretionary. If an amendment of the pleadings is made after the joining of issue, and an adjournment becomes necessary in consequence thereof, the justice may impose costs as a condition of allowing the amendment. Vol. I, 11, § 64, sub. 11.

The statute does not prescribe any particular items of costs allowable in such case, but leaves the amount discretionary with the justice. The object of the statute evidently was to give the justice power to require the party asking the amendment to obtain it upon such terms as should be just towards the opposite party. In fixing the amount the justice ought to be careful not to go to extremes, either by allowing an unreasonably large sum, or by giving so little as to be equivalent to a refusal of costs. The intention of the statute is that the costs thus allowed are to be paid immediately, since they must be paid as the *condition* of allowing the amendment. Vol. I, 11, § 64, sub. 11. There is no provision for the entry of such an allowance in the judgment, and it could not properly be taxed as costs in the final judgment. And, besides that, the judgment itself might happen to be in favor of the party asking for the amendment; and, in that event, there certainly could not be an entry of the amount in the judgment, while there could not be a separate judgment in favor of the other party for the costs, as in the case of a defendant who obtains a verdict or decision in his favor.

In taxing the costs and fees allowed by law the justice will not require any proof of the right to their allowance in those cases in which the acts were performed to his personal know-

ledge, as in the case of witnesses sworn by him. In such a case, the witnesses' fees would be taxed without proof of the service of the subpœna. If, however, a witness had been subpœnaed, and had attended the trial, but was not sworn, the justice might require proof of the service of the subpœna.

There is no statute, however, requiring such proof, and the justice may require the proof, or may dispense with it as he may deem proper. If, however, he should improperly allow fees in such a case where none were legally taxable, his decision will not be final. And if a party is compelled by execution to pay illegal fees, he may sue and recover them back from the party receiving them. Vol. I, 65, § 156.

Where the fees of officers are items of the taxable costs, their returns as to the amount are generally received as proper and legal evidence of the amount. In taxing costs the justice acts judicially. *Sibley* v. *Howard*, 3 Denio, 72. Until the items of costs and fees are considered and allowed they do not constitute any part of the judgment. *Ib.* Merely setting down certain items without adding them up within the time required by law, is not taxing the costs in such a manner as to render them available as a part of the judgment. *Ib.;* and see *ante*, 695.

Double and treble costs.] There are some statutory provisions relating to this subject which may properly be given here:

"When several persons are made defendants in any writ or proceeding, or in any action, in which the plaintiff, upon a recovery, would be entitled to costs, and one or more of them shall be acquitted by verdict on the trial, or by judgment upon plea in abatement, or on demurrer, or by the plaintiff's discontinuing as to such defendant, every person so acquitted shall recover his costs of suit, in like manner as if judgment had been rendered in favor of all the defendants." 3 R. S., 908, § 1, 5th ed.

"Whenever, by the provisions of any statute, a plaintiff shall be entitled to recover double or treble the damages assessed by a jury, if such damages so doubled or trebled, as the case may be, entitled him to recover costs, he shall recover single costs only in such suit, except in cases otherwise specially provided for by law." 3 R. S., 908, § 3, 5th ed.

"In the following actions, if judgment be rendered for the defendant, upon verdict, demurrer, nonsuit, *non-pros*, discontinuance of the plaintiff or otherwise in any action, *certiorari*, writ of error or other proceeding, such defendant shall recover the amount of his taxed costs, and one-half thereof in addition:

"1. In actions against public officers appointed under the authority of this state, or elected by the people; or against any person specially appointed, according to law, to execute the duties of such public officer; for or concerning any act done by such officer or person, by virtue of his office, or for or concerning the omission, by such officer or person, to do any act which it was his official duty to perform.

"2. In actions against any other person for doing any act by

the commandment of such officers or persons, or in their aid or assistance, touching the duties of such office or appointment.

"3. In actions against any person for taking any distress, making any sale, or doing any other act by authority of any statute of this state. 3 R. S., 908, § 4, 5th ed."

"When double or treble costs shall be awarded to any defendant, the same shall be deemed to belong to such defendant; and the counselors, attorneys, and other officers, who may have rendered any services in such action to such defendant, and the witnesses and jurors in such action, shall be entitled to receive and retain only the single costs allowed by law, for their services respectively. 3 R. S., 909, § 5, 5th ed."

The right to double costs, as given by the foregoing sections of the statute, is not repealed by section three hundred and three of the code. Vol. I, 26, § 303; *Bartle* v. *Gilman*, 4 E. P. Smith, 260; *S. C.*, 17 How., 1.

In a recent case an action was brought against the defendants for a trespass upon lands; the defense was, that the *locus in quo* was a public highway, and that one of the defendants was an overseer of the highways, who had been directed by a warrant issued by the proper commissioners of highways to go on and work the roads, and that the other defendants were, by the directions of the overseer, aiding and assisting him; and upon a verdict for the defendants upon these issues, it was held that they were entitled to double costs. *Van Bergen* v. *Ackles*, 21 How., 314.

To entitle a public officer, or other person, to double costs under this statute, he must acquire his rights as a *defendant*, not as plaintiff, in the proceedings. And where a judgment is obtained against a defendant who is sued as a public officer, in an action in a justice's court, and the judgment is reversed by the county court upon an appeal taken by the officer, and there is afterwards an affirmance of that judgment by the supreme court upon an appeal by the plaintiff, the officer will be entitled to double costs upon the appeal to the supreme court, but not upon the appeal to the county court. *Wheelock* v. *Hotchkiss*, 18 How., 468; *Foster* v. *Cleveland*, 6 How., 253; *Dockstader* v. *Sammons*, 4 Hill, 546.

The costs given by the sections of the statute already quoted are called double costs, though they merely give full single costs and an addition of fifty per cent of that amount, which, in other words, is ordinary costs, and one-half the amount in addition. *Fuller* v. *Wilcox*, 19 Wend., 351. Before these sections were enacted, double costs meant twice the amount of single costs, and treble costs gave the party three times the ordinary costs. As to double costs, the rule is fixed by the statute in relation to those cases to which it applies.

But in relation to treble costs the decisions are contradictory. In *Patchin* v. *Parkhurst*, 9 Wend., 443, it was held that treble costs means common costs, and seventy-five per cent of that amount

added thereto. But in the more recent case of *Walker* v. *Burnham*, 7 How., 55, it was held that the term "treble costs" is to be understood literally, and that the costs are to be actually trebled.

A party who is entitled to double costs may waive his right to them by the mode of presenting his defense. If an officer or other person, who is entitled to double costs, is sued jointly with others, and he answers jointly instead of separately, he will lose his right to double costs, although the verdict is in favor of all the defendants. *Wales* v. *Hart*, 2 Cow., 426; *Bradley* v. *Fay*, 18 How., 481.

A party who is sued in a justice's court as a public officer is entitled to double costs if he succeeds in his defense; and if the fact that he is such an officer does not sufficiently appear from the pleadings, the justice may, before rendering judgment, and in the presence of the parties, hear the evidence of the defendant as to that fact, and as to his right to double costs. *Fuller* v. *Wilcox*, 19 Wend., 351. If the justice should allow too large a sum by way of double costs, this would not be a ground of reversal. *Ib.* The remedy, in such a case, is by an action for the recovery of such amount as is illegally collected. *Ib.* But even if the court had power to reverse a judgment for the allowance of illegal fees, it would not be sufficient to show merely that the sum allowed was greater than the ordinary sum specified by statute, because the intendment would be that there were foreign witnesses, or the like, which would be legally taxable notwithstanding the judgment might be for more than five dollars costs. *Ib.* After a justice has once taxed the costs in an action, and entered up a judgment for the damages and costs, it is too late for him then to alter the amount either by increasing or reducing the same. *Dauchy* v. *Brown*, 41 Barb., 555.

In taxing costs the justice should include such prospective costs as may be incurred in carrying the judgment into effect. He will, therefore, include the costs of entering the judgment, for issuing an execution, and for a transcript of the judgment in a proper case. If the judgment is paid before an execution is issued, the defendant is entitled to a deduction of the amount inserted for issuing the execution.

FEES OF OFFICERS, WITNESSES AND JURORS.

Justice's fees in civil actions.

A summons,	$0 15
A warrant,	0 25
An attachment,	0 25
Drawing any bond,	0 25
Indorsement on replevin affidavit,	0 25
Drawing affidavits, applications and notices, where required by law, for each folio of 100 words,	0 05
Acknowledgment of power of attorney to appear in action,	0 25
Adjournment,	0 25
Subpœna, including all names inserted,	0 25
Hearing application for commission,	0 50

Order for, and settling interrogatories, &c.,	$0 50
Taking depositions of witnesses, for each folio,	0 05
Return and certificates to commission,	0 50
Venire,	0 25
Swearing a jury,	0 25
Trial of issue of fact in case of appearance and answer,	0 50
Administering an oath,	0 05
Swearing constable,	0 05
Receiving and entering verdict of jury,	0 20
Entering judgment,	0 25
Execution,	0 25
Renewing execution,	0 25
Taking affidavits,	0 10
Filing each necessary paper,	0 05

Fees of justice in special proceedings and in criminal cases.

See the statutes in full, Vol. I, 63, 64.

Return to an appeal,	$2 00
Transcript of judgment rendered on default in absence of party,	0 25
Copy of process, pleadings, proofs, &c., for each folio (see Vol. I, 70, § 182),	0 05

To witnesses.

From same county, subpœnaed and attending, for each day,	$0 12½
From another place or county, for each day's actual attendance,	0 25
Attending before commissioner, same as in justice's court.	

To commissioners.

For taking and returning testimony,	$1 00
For every subpœna or oath,	0 06
Postage on commission, not to exceed	1 00

To constables.

Serving a civil warrant,	$0 12½
Serving a summons,	0 12½
Copy of summons delivered on request, or left at defendant's dwelling,	0 09
Serving an attachment,	0 50
Copy of attachment and inventory,	0 50
Serving an execution, for each dollar collected up to fifty dollars,	0 05
For every dollar collected over fifty dollars,	0 02½
Traveling fee to serve summons, warrant, attachment or execution, for every mile more than one, in going only (Vol. I, 65),	0 06
Notifying plaintiff of service of warrant,	0 12½
Traveling fees, for each mile more than one,	0 06
Summoning a jury,	0 50
Serving a subpœna, for each witness, not exceeding four,	0 12½
Serving subpœnas for commission same as in justices' courts,	0 12½

To jurors.

To each juror attending, although not sworn,	$0 06
Each juror trying cause,	0 12½

To any person rendering the service.

Subpœnaing each witness, not exceeding four in each cause,	$0 12½
Same fees on subpœna for executing a commission,	0 12½

Sheriff.

On executions issued by county clerk, same fees as constable on justice's execution. Vol. I, 65, § 155.

CHAPTER VIII.

EXECUTION.

What it is.] In practice it is the act of carrying into effect the final judgment of a court, or other jurisdiction. But the term is usually applied to the instrument employed; and an execution is generally understood to be the judicial writ or process which is founded upon a judgment obtained in a civil action, and issued by the court, or its officers, in behalf of the party recovering such judgment, for the purpose of obtaining the satisfaction or full benefit of it.

Kinds of execution.] In justices' courts, there are but two kinds of execution, one of them for the recovery of specific personal chattels or property, and the other for the recovery of money. Of the first class is the execution issued in replevin actions. The second class includes executions against the person or the property of the party against whom judgment has been rendered in the action.

Forms of execution.] There are several different forms of execution which may be issued upon judgments rendered by justices of the peace. The most common form of execution is that which is issued against the goods and chattels of the defendant. There are some cases, however, in which an execution is issued against the person, though it is not enforced by an imprisonment of the person unless there is a want of property to satisfy it. In replevin actions there may be an execution for the delivery of the property either to the plaintiff or to the defendant, according to the decision or judgment in the action, and as the circumstances of the case may require. So, where a transcript of the judgment has been filed and docketed in the county clerk's office, an execution may be issued by the county clerk.

Form of execution against property.

FULTON COUNTY, }
TOWN OF JOHNSTOWN, } *ss:*

The People of the State of New York, to any constable of said county, GREETING: *Whereas*, judgment has been rendered by and before me, the undersigned, against Richard Roe, in favor of John Doe, for two hundred dollars damages, and five dollars costs, on the 20th day of April, 1865, at the town aforesaid. You are therefore commanded, in the name of the People of the State of New York, forthwith to levy of the goods and chattels of the said Richard Roe (excepting such goods and chattels as are by law exempt from execution), the amount of the said judgment, with interest from the date thereof, until the money is recovered, and to bring the money before me within sixty days, to render to the said John Doe for his damages and costs.* And make due return, according to law, in sixty days from the date hereof. Dated at the said town this 20th day of April, 1865.

PETER W. PLANTZ, *Justice.*

Form of execution against the body.] The form of this execution is the same as in the preceding one down to the *. And where an execution may issue against the body add the following clause immediately after the *.

And if no goods or chattels can be found, or not sufficient to satisfy this execution, you are further commanded to take the body of the said Richard Roe, and convey him to the common jail of the said county, the keeper whereof is hereby commanded to receive the said Richard Roe, and him safely keep nntil this execution is paid and satisfied, or until he is duly discharged according to law.

There are some cases in which an execution cannot be issued against the body without due proof by affidavit. Vol. I, 74, § 212. And when an affidavit is required it should state with particularity the facts authorizing the issuing of an execution.

Affidavit to authorize execution against the body.

JUSTICE'S COURT.

John Doe
agst.
Richard Roe. } PETER W. PLANTZ, *Justice.*

FULTON COUNTY, *ss:* John Doe, the above named plaintiff, being duly sworn, says: That the judgment in the said action was rendered for money collected by the defendant, as a constable of the town of Johnstown, in said county (or for whatever the cause of action may be).

JOHN DOE.

Sworn before me this 20th
day of April, 1865, }
PETER W. PLANTZ, *Justice.*

If a transcript of the judgment has been filed and docketed in the county clerk's office, and an application is made to the county clerk to issue the execution the affidavit should be taken before such clerk.

Execution in favor of plaintiff in replevin.

FULTON COUNTY,
TOWN OF JOHNSTOWN, } *ss:*

The People of the State of New York, to any constable of said county, GREETING: Whereas judgment was rendered by and before me, the undersigned, on the 20th day of April, 1865, in an action between John Doe, plaintiff, and Richard Roe, defendant, in favor of the said John Doe, against the said Richard Roe, for the delivery to the said John Doe, of the possession of the following described personal property, viz.: (describe particularly); or if a delivery thereof cannot be had, then for one hundred dollars, the value thereof duly assessed, and also for twenty-five dollars for damages for the detention thereof, together with five dollars costs of the action. You are, therefore, commanded, in the name of the People of the State of New York, to deliver the said personal property to the said John Doe; and in case a delivery of said personal property cannot be had, you are further commanded to levy the said sum of one hundred dollars, with interest thereon from the rendition of the judgment until the money is received; and you are further commanded to levy the said sum for damages

for detention, with interest as aforesaid, together with the costs and interest thereon, out of the goods and chattels of the said Richard Roe (excepting such goods and chattels as are by law exempt from execution), and to bring the money before me within sixty days, to render to the said John Doe, for his damages and costs, and make due return, according to law, in sixty days from the date hereof. Dated at the said town the 20th day of April, 1865.

PETER W. PLANTZ, *Justice.*

Form of execution issued by county clerk.

The People of the State of New York, to the sheriff of the county of Fulton, GREETING: Whereas judgment was rendered on the 20th day of April, one thousand eight hundred and sixty-five, in an action before Peter W. Plantz, Esquire, a justice of the peace of the town of Johnstown, in Fulton county, between John Doe, plaintiff, and Richard Roe, defendant, in favor of the said John Doe, for the sum of one hundred and fifty dollars, a transcript whereof, given by the said justice for that purpose, was filed and the said judgment was docketed in the clerk's office of the said county of Fulton, on the 20th day of April, one thousand eight hundred and sixty-five, on which judgment the said sum of one hundred and fifty dollars, together with interest thereon from the said 20th day of April, one thousand eight hundred and sixty-five, is now due. Therefore, we command you that you satisfy the said judgment out of the personal property of the said judgment debtor, within your county, belonging to him, on the said 20th day of April, one thousand eight hundred and sixty-five; and if sufficient goods and chattels of the said Richard Roe cannot be found in your county, then we command you that you cause the said judgment to be satisfied out of the lands and tenements in your county, whereof the said Richard Roe was seized on the 20th day of April, one thousand eight hundred and sixty-five (the day of filing the transcript and docketing the judgment with the clerk), in whose hands soever the same may be;* and that you return this execution, within sixty days after its receipt by you, to the under named clerk of the said county of Fulton.

MORTIMER WADE, *County Clerk of Fulton County.*

If the case is one in which an execution may issue against the body of the defendant, a clause of arrest may be inserted. And if proof is required before issuing such an execution, an affidavit may be made as in the form already given. *Ante*, 715. The execution may be in the same form as the last precedent down to the *; and then add the clause of arrest as follows:

Execution against the body.

And for want of goods or chattels, lands or tenements, to satisfy this execution, we command you to take the body of the said Richard Roe, and to commit him to the jail of the said county, there to remain until he shall pay the said judgment, or until he shall be discharged by due course of law.

Indorsement on execution.] In the foregoing forms there has been a direction in the body of the execution for the collection of interest on the judgment. But, if it is preferred, such direction may be indorsed on the execution instead of being contained in it. The indorsement may be in the following form:

Indorsement on execution.

The constable (or sheriff) will collect, by virtue of the within execution, $150 damages, and $5 costs, with interest from the 20th day of April, 1865.
PETER W. PLANTZ, *Justice*, or
MORTIMER WADE, *Clerk of Fulton County.*

There are cases in which an indorsement must be made in the case of joint debtors. Vol. I, 58, §§ 124, 125.

Indorsement on execution against joint debtors.

The within named defendant, James Peterson, was not served with process, and did not appear in the action.
PETER W. PLANTZ, *Justice.*

Execution, by whom issued.] The justice who rendered the judgment is the only person who can properly issue an execution thereon, unless it is in the case of a docketed transcript, in which case the county clerk may issue an execution. Vol. I, 57, § 118; Id., 10, 11, §§ 63, 64, sub. 13. From the time a transcript is filed and docketed, the judgment is a judgment of the county court. Id., 10, § 63. And see *Post*, 917.

When execution is to be issued.] There is now no delay in issuing an execution as under the former practice. And as the law now stands, an execution issued upon a justice's judgment may be issued *at any time* within *five years* after its rendition. Vol. I, 11, § 64, sub. 12; Id., 57, § 118. An action lies against a party who wrongfully takes out an execution on a judgment which he knows has been paid and satisfied, if the property of the defendant is taken and sold upon it, and it is not necessary to allege or prove malice in order to maintain the action. *Brown* v. *Feeter*, 7 Wend., 301.

If a judgment has been rendered by a justice of the peace, he may issue an execution thereon at any time within two years after the expiration of the term of his office. Vol. I, 57, § 119. This rule, however, is not to be so construed as to authorize him to issue an execution at a time more than five years after the rendition of the judgment. The statute does not provide for the issuing of an execution on a justice's judgment after five years from its rendition; and if no execution is issued within that time the only remedy would seem to be by suing upon the judgment, and renewing it. See Vol. I, 13, § 71; Id., 11, § 64, sub. 12.

If a transcript of the judgment has been properly docketed in the county clerk's office, an execution may be issued thereon at any time within five years from the rendition of the judgment by the justice. Vol. I, 10, § 63; Id., 11, § 64, sub. 13.

An execution, issued by a justice of the peace, upon a judgment rendered by him, will be entirely void if issued more than five years after its rendition. *Bates* v. *James*, 3 Duer, 45, 53; *Morse* v. *Goold*, 1 Kern., 285. When a transcript has been filed and docketed in the county clerk's office, leave to issue an exe-

cution, after five years, must be obtained from the county court of the county where the judgment was rendered. Code, § 284.

There is one case in which a justice cannot issue an execution until directed by the surrogate, and that is, where a set-off is established in an action brought by an executor or administrator. Vol. I, 46, § 54.

After the death of the plaintiff in an action, no execution can be legally issued upon the judgment. *Bellinger* v. *Ford*, 21 Barb., 311; *Thurston* v. *King*, 1 Abb., 126; *Wheeler* v. *Dakin*, 12 How., 537; *Jay* v. *Martine*, 2 Duer, 654. The remedy is to sue over upon the judgment, in the name of the proper person, and then issue execution upon that judgment. *Ib.; Ireland* v. *Litchfield*, 22 How., 178. And, in case of the death of a party, an action may be brought within five years of the rendition of the judgment, since it is one of the excepted cases. Vol. I, 599; Id., 13, § 71. If an execution is issued after the death of the plaintiff, upon the application of persons not appearing to have any interest or authority in the matter, and it does not appear that the judgment has been assigned, or that there are any personal representatives of the plaintiff, the execution will be held to be void. *Bellinger* v. *Ford*, 21 Barb., 311; and see *S. C.*, 14 Barb., 250. After the death of the defendant in an action, no execution can be legally issued by the justice against his property. *Griswold* v. *Stewart*, 4 Cow., 457; *Bennet* v. *Davis*, 3 Cow., 68; and see *Gerry* v. *Post*, 13 How., 122; *Frink* v. *Morrison*, 13 Abb., 80. And it may be stated as a general rule, without exception, that where there is but a single plaintiff and a single defendant, and either of the parties dies after the rendition of the judgment, no execution can be issued by the justice on such judgment. Where there are several defendants, and one of them dies after judgment, an execution may be issued in form against all of the defendants, and enforced against the property of the living defendants, but not against that of the deceased party. *Day* v. *Rice*, 19 Wend., 644. So, where one of several plaintiffs dies, there is the same, if not stronger reasons for allowing the survivors to obtain and enforce an execution against the defendants. A payment of the judgment to one of several plaintiffs would be valid. Vol. I, 1065; so a release by one of them would discharge the demand. Id., 1006.

Execution, when returnable.] Under the former practice, a justice's execution was returnable in some cases in thirty days, and in others, in ninety days from the date thereof, the time for the return depending upon the amount of the judgment. But, under the present practice, all executions issued by a justice of the peace must be made returnable sixty days from the date thereof, without any reference whatever to the amount of the judgment. Vol. I, 11, § 64, sub. 12; Id., 59, § 127. An execution which is made returnable "within" sixty days from its date, is as valid as though returnable "sixty days from the date." *Price* v. *Shipps*, 16 Barb., 585.

General requisites of an execution.] The rules relating to process in general, include executions. See *ante*, 41 to 52. The judgment and execution must describe the party whose property is sought to be taken, and it is not enough that the right man is made to pay the debt. *Farnham* v. *Hildreth*, 32 Barb., 277; *Cole* v. *Hindson*, 6 Term R., 234. And, therefore, a judgment and execution against *Freeman* Hildreth will not authorize a sale of the property of *Truman* Hildreth, although the latter was the party actually intended. *Ib.* The constable or sheriff is not authorized to execute the process against the person or property of any one but the individual named in it. *Ib.* Where a defendant, sued by a wrong name, fails to appear in the action, he does not waive his right to object to the misnomer after judgment and execution. *Ib.* So where an execution is issued against the person, the name of the defendant must be correctly stated, and it will not be any defense that the party arrested was the person actually intended, unless he is also the party named in the process. *Griswold* v. *Sedgwick*, 1 Wend., 126; *S. C.*, 6 Cow., 456; *Miller* v. *Foley*, 28 Barb., 630; *Scott* v. *Ely*, 4 Wend., 555; *Mead* v. *Haws*, 7 Cow., 332.

To whom directed.] When the execution is issued by the justice, it must be directed to any constable of the same county. Vol. I, 57, § 120. But where a transcript has been docketed, and the execution is issued by the county clerk, it must be directed to the sheriff of the county. Vol. I, 11, § 64, sub. 13. As to the general rules relating to the direction of process, see *ante*, 43.

Signatures, blanks, &c.] The execution must be signed by the justice, and must be entirely filled up before its delivery to the officer. *Ante*, 41, 42.

Delivery of execution to officers.] In legal strictness, it is the duty of the party in whose favor judgment is rendered, to demand an execution, and to deliver it to the officer for execution by him. The justice does not usually issue an execution upon a judgment rendered by him, unless he has received instructions to that effect, either before or after the rendition of the judgment. If a claim is left with a justice for collection, he will then issue execution upon the judgment without further instructions, since the leaving of the claim is equivalent to such directions. The duties of the justice, in relation to the delivery of an execution to an officer, is the same as that in relation to other kinds of process. *Ante*, 55, 56.

Who to execute.] When a justice's execution is offered to any constable of the county in which it was issued, it is his duty to accept and diligently to execute it by complying with its commands. He must levy within the life of the execution, give a proper notice of sale, sell as the law prescribes, and properly return the execution and the money collected to the justice who issued the execution. Vol. I, 59, §§ 131, 132. Such constable must execute the process in person, and he cannot act by deputy for that purpose. Vol. I, 72, § 198. *Downs* v. *McGlynn*, 2 Hilt.,

14; *S. C.*, 6 Abb., 241. The justice may, however, depute a proper person to execute the process, if requested by the proper party to do so. *Ante*, 48, 49. When the execution is issued by the county clerk upon a docketed transcript, it must be executed by the sheriff of the county. Vol. I, 11, § 64, sub. 13. The sheriff may be compelled to make a proper return, and to pay over the money collected. Id., 61, § 147. Neither a sheriff nor a constable is permitted to execute final process in his own favor; and, therefore, neither of them can serve an execution in his own favor by levying upon property and selling it. *Carpenter* v. *Stilwell*, 1 Kern., 61, 67; *Mills* v. *Young*, 23 Wend., 314.

How executed.] When an execution is regular in form and valid on its face, it is the duty of the officer to execute it according to the commands therein contained, and in pursuance of legal rules. Vol. I, 57, § 120; Id., 59, §§ 131, 132; Id., 60, § 134.

There are sometimes difficulties in the way of obeying the mandates of the process. If the execution directs the arrest and imprisonment of the defendant, that may be impracticable in some cases, as where he remains in his dwelling house. The rule as to arrests on execution is the same as that relating to warrants. See *ante*, 114, 115, 116. If the property of the defendant in the execution is in his own dwelling house, neither a constable nor a sheriff can lawfully enter the house to levy upon it. The door of the house need not be locked for the purpose of protecting it from levy; and if such door is merely latched, it will be a trespass in the officer to unlatch it and enter the house without the consent of the occupant. *Curtis* v. *Hubbard*, 1 Hill, 336; *S. C.*, 4 Id., 437; see, also, *People* v. *Hubbard*, 24 Wend., 369. The absence of the owner or occupant at the time of the wrongful entry by the officer will not make any difference; and the act will be as much a trespass as though he had been present and forbidden the officer's entry. *Ib.* Such owner or occupant may lawfully resist a constable or a sheriff if he attempts to make such unlawful levy. *Ib.* And even a guest in the house will be justified in resisting or aiding in the resistance to the officer's acts, provided no unnecessary force is used. *Ib.* If, however, the officer once gains a lawful and peaceful entrance into the house, and he properly commences the execution of his process, he may continue and complete his levy. And if he leaves the house and the property after commencing an inventory of articles levied on, he may return the next day and complete it; and if the owner of the house then refuses him admittance for that purpose, he may lawfully force the doors and enter the house, and complete his levy. *Glover* v. *Whittenhall*, 6 Hill, 597. So, if the officer gains lawful admission through the outer door of the house, he may afterwards lawfully break open the inner doors for the purpose of executing his process. *Lee* v. *Gansel*, Cowp., 1. So, after gaining a peaceful and lawful entrance into the house, he may also break open cupboards, chests, trunks, and the like, if that is necessary for the purpose

of getting at the property. *Ib.; Hutchison* v. *Birch*, 4 Taunt., 619, 625. But the officer will not be justified in a wanton injury or destruction of property; and, if the owner should offer to unlock or open the doors, trunks, &c., the officer would be a trespasser for breaking them after that. *Ib.* This protection of property does not extend to any building but a dwelling house and its curtilage; and if the goods are in a store, shop, barn, or other building of a similar character, the officer may lawfully break open the doors and make a levy. *Haggerty* v. *Wilber*, 16 Johns., 287. So, where the goods of the defendant in the execution are in the house of a third person, they will not be protected there, if such third person refuses to open the house on the lawful demand of the officer, who comes with a legal process to make a levy upon it. *Semayne's Case*, 5 Coke, 93, a; *Cooke* v. *Birt*, 5 Taunt., 765, 770. But the officer enters at his peril, for if the defendant's goods are not there, the officer will be a trespasser. *Ib.; Johnson* v. *Leigh*, 6 Taunt., 246. The manner of making a levy will be fully explained in a subsequent place.

From what time the property is bound.] "Whenever any execution shall be issued against the property of any person, his goods and chattels, situated within the jurisdiction of the officer to whom such execution shall be delivered, shall be bound only from the time of the delivery of the same to be executed." 3 R. S., 644, § 13, 5th ed." The title of any purchaser, in good faith, of any goods or chattels, acquired prior to the actual levy of any execution, without notice of such execution being issued, shall not be divested by the fact that such execution had been delivered to an officer to be executed before such purchase was made." 3 R. S., 645, § 17, 5th ed.; see also Vol. I, 651.

After personal property has been duly levied upon by virtue of an execution, a purchaser from the defendant in the execution will not get any title, even though the purchase was made in good faith, and for value. *Butler* v. *Maynard*, 11 Wend., 548. And the mere fact that the plaintiff in the execution directed the officer not to make the levy public will not make any difference, even though the officer complies with the request. *Ib.*

But where the plaintiff in the execution directs the officer to keep the levy a *secret*, and not to let the defendant in the execution know of it, the levy will not prevent a *bona fide* purchaser, for value, from getting a good title from the defendant in the execution. *Price* v. *Shipps*, 16 Barb., 585.

Priority of executions.] "If there be several executions issued out of a court of record against the same defendant, that which shall have been first delivered to an officer to be executed shall have preference, notwithstanding a levy may be first made under an other execution; but if a levy and sale of any goods and chattels shall have been made under such other execution, before an actual levy under the execution first delivered, such goods and chattels shall not be levied upon or sold by virtue of such first execution." 3 R. S., 645, § 14, 5th ed.

"If there be one or more executions, and one or more attachments against the property of the same defendant, or if there be several attachments, the same rule prescribed in the last section shall prevail in determining the preference of such execution or attachment." 3 R. S., 645, § 15, 5th ed.

"But any execution or attachment issued out of any court not being a court of record, if actually levied, shall have preference over any other execution issued out of any court, whether of record or not, which shall not have been previously levied." 3 R. S. 645, § 16, 5th ed.

Where several executions are delivered to a constable at different times, and before he has made a levy under any of them, the executions will be entitled to priority, according to the time and order of delivery; and, though a levy may be first made upon the last execution, and the property sold thereon, yet the constable will be bound to pay over the proceeds to the plaintiff in the first execution, or enough of them to satisfy it, if the amount is sufficient for that purpose. *Camp* v. *Chamberlain*, 5 Denio, 199; *Rowe* v. *Richardson*, 5 Barb., 385. A sale upon the execution last delivered will be entirely valid, and pass the title of the property to the purchaser. *Ib.* But the money received upon the sale must be applied on the execution first received; and if the officer neglects or refuses so to apply it, but, on the other hand, pays it to the plaintiff in the last execution, such officer will be liable to the plaintiff in the first execution for the amount due upon his execution, if the proceeds of the sale amounted to so much, or to the extent of the sum received where that is less than the execution. *Lemon* v. *Staats*, 1 Cow., 592; *Marsh* v. *Lawrence*, 4 Id., 461; *Sandford* v. *Roosa*, 12 Johns., 162.

Where two judgments, one larger and one smaller, are rendered in favor of different plaintiffs, against the same defendant, and docketed at the same time, and executions upon both judgments are simultaneously delivered to a constable for execution, and, upon a sale of the property, there is not sufficient money to pay both judgments, the constable must apply the money equally upon the two executions until the smaller one is satisfied, and then apply the residue upon the larger execution. *Campbell* v. *Ruger*, 1 Cow., 215.

Where a constable receives an execution against an individual member of a partnership, upon which he levies upon the partnership property, but before the sale thereof an other execution against all of the members of the firm is delivered to him, he must apply the proceeds of the sale of the partnership property in satisfaction of the execution against all the partners, notwithstanding such execution was last received. *Dunham* v. *Murdock*, 2 Wend., 553; *Crane* v. *French*, 1 Id., 311.

A party may first deliver his execution to a constable, and he may secure the advantage of a previous levy upon the defendant's property, and yet, he may, by his acts or language, forfeit or lose the priority thus gained

The statute makes it the duty of the constable to give immediate notice of the sale of property after he has made a levy, and to sell it as soon as it may conveniently be done. Vol. I, 59, §§ 131, 132. A mere delay on the part of the officer, on his own motion, without any direction or sanction by the plaintiff, will not affect the priority of the execution as against subsequent executions coming into the officer's hands, or into the hands of an other officer. *Russell* v. *Gibbs*, 5 Cow., 390; *Herkimer Co. Bank* v. *Brown*, 6 Hill, 232; *Benjamin* v. *Smith*, 12 Wend., 404. If the plaintiff is not chargeable with anything more than mere acquiescence in the delay, and he has neither said or done anything to encourage it, his execution will not lose its priority. *Ib.* But if the plaintiff himself interferes and directs a delay in the sale, he will, in many cases, render his execution dormant, or postpone all rights under it to the claims of other subsequent execution creditors.

Where goods are levied upon by an officer, and the plaintiff in the execution directs him to leave them in the possession of the defendant therein, and they are thus left in his possession for a year, and then an other execution in favor of an other creditor is delivered to the officer, the latter execution will have priority. *Storm* v. *Woods*, 11 Johns., 110. So, where the plaintiff, at the time of delivering his execution to an officer, directs him to levy upon the property of the defendant; but to do nothing until ordered, unless crowded by younger executions, but by no means to let the execution lose its preference, this will render the execution dormant as against a subsequent execution, if the officer follows the instructions, and does nothing but make an inventory of the property under his levy. *Kellogg* v. *Griffin*, 17 Johns., 274. So, where a levy has been made by an officer, if the plaintiff directs him not to proceed to sell the property unless forced to do so by subsequent executions, and the officer delays the sale until subsequent executions, in favor of other parties, are delivered to him, the first execution will lose its priority, and it will be considered dormant as to the latter. *Kimball* v. *Munger*, 2 Hill, 364. So, where a levy has been made upon an execution, and the plaintiff then directs the officer to delay proceedings until further notice, which the officer accordingly does, this will render the execution dormant as against junior executions, if the order for delay is not revoked until the latter executions have been delivered to the officer. *Knower* v. *Barnard*, 5 Hill, 377.

So, where the plaintiff, after issuing his execution, directs the officer to make a levy for the mere purpose of securing a preference; and also instructs him to leave the property in the possession of the defendant after levy, such execution will be dormant as against subsequent executions in favor of other creditors, where they are delivered to the officer before such instructions are revoked. *Dunderdale* v. *Sauvestre*, 13 Abb., 116.

A direction by the plaintiff to the officer to make a levy, but to keep it secret from the defendant, will render the levy void as

against a *bona fide* purchaser from the defendant. *Price* v. *Shipps*, 16 Barb., 585. And where an execution would be deemed dormant as against a judgment creditor, it will be held to be fraudulent as against a subsequent *bona fide* purchaser. *Ball* v. *Shell*, 21 Wend., 222.

What kind of property may not be levied upon.] A justice's execution does not reach any kind of property but goods and chattels. Vol. I, 57, § 120. For this reason no kind of real estate can be seized or sold upon such an execution. One of the principal difficulties arising in practice is found in those cases in which the right to levy upon fixtures is in question. See Vol. I, 609; and see Id., 604 to 608.

Choses in action, though assignable, are not liable to levy and sale upon an execution; and therefore a promissory note is not a subject of seizure and sale on execution. *Ingalls* v. *Lord*, 1 Cow., 240. So of shares in a public library, or shares of bank stock. *Denton* v. *Livingston*, 9 Johns., 96, 100; and the same rule applies to bills of exchange, bonds, or other choses in action of whatever nature. *Bogert* v. *Perry*, 17 Johns., 351; *Ransom* v. *Miner*, 3 Sandf., 692.

Claim of property by a third person.] In serving an execution, the constable ought to be careful not to levy upon the goods of any person other than the one named in the process; for, if he seizes the goods of a stranger, he will be liable to an action of trespass. Vol. I, 808, 809; *Van Antwerp* v. *Newman*, 2 Cow., 543; *Ackworth* v. *Kempe*, Doug., 40.

If the officer has reasonable grounds for doubting whether the property seized belongs to the debtor, or if the goods are claimed by an other person, he is bound, if no indemnity be tendered by the creditor, to call and impannel a jury and try the title. *Farr* v. *Newman*, 4 Term R., 633; *Platt* v. *Sherry*, 7 Wend., 236, 238; *Townsend* v. *Phillips*, 10 Johns., 98. If the jury find that the goods are not the debtor's the execution may then be returned, *no goods found;* and the constable is justified in making that return, unless an indemnity be then tendered by the creditor; and in case it is, the constable is bound to proceed and sell, notwithstanding the finding of the jury. *Curtis* v. *Patterson*, 8 Cow., 65; *Van Cleef* v. *Fleet*, 15 Johns., 147. The creditor, however, is not bound to tender a bond of indemnity until after the jury have passed upon the question of title. *Ib.* And the officer acts at his peril in making a return of *no goods found*, under any other circumstances; and, if sued for a false return, the burden is upon him to show property out of the defendant, by thus proving his return true. *Ib.; Magne* v. *Seymour*, 5 Wend., 309–311. If the jury find that the goods levied on are the debtor's, the constable must proceed and sell, and the verdict will protect him from vindictive damages. *Townsend* v. *Phillips*, 10 Johns., 98.

Where goods are in the hands and under the control of the defendant in the execution, and they are pointed out as his property to the constable, by the creditor, the constable is bound to

levy upon them without an indemnity; and if he neglects to do so, and if the goods are afterwards removed beyond his reach by the defendant in the execution, he will be answerable to the creditor for his neglect. *Williams* v. *Lowndes*, 1 Hall, 579; *Camp* v. *Chamberlain*, 5 Denio, 198, 203. But if, after a levy, a claim to the goods is interposed by a third person, the constable should proceed to call a jury, as has been already explained. *Ib.* The necessity for calling a jury may be dispensed with by taking a bond of indemnity from the creditor in the first instance, if he is willing to give it. Such a bond is valid, although executed before any levy has been made on the property. *Chamberlain* v. *Beller*, 4 E. P. Smith, 115. And it would be equally valid though not given until after the levy and sale. *Westervelt* v. *Frost*, 1 Abb., 74.

If the bond is given for the purpose of indemnifying against the consequences of a known trespass, the bond will be illegal and void. Vol. I, 123, 914, 915.

Where a claim of property is interposed by a third person, and the constable determines to call a jury to try the title, he ought to summon six competent legal jurors for that purpose. And when that has been done, he should give notice to the claimant of the property, the plaintiff and the defendant in the execution, of the time and place of hearing. The notice may be in the following form:

Notice of trial of claim to property.

[Title of action.]

Take notice, that A. B. makes claim to the property levied upon by me under an execution issued by Peter W. Plantz, Esq., a justice of the peace of Fulton county, in favor of John Doe against Richard Roe, and that I shall proceed to try the claim of the said A. B. before a jury to be summoned by me for that purpose, on the 25th day of April, 1865, at one o'clock P. M., at the public house kept by Rodney H. Johnson, Esq., in the village of Johnstown. Yours, &c.,

JAMES PIERSON, *Constable.*

To A. B., *Claimant;* John Doe, *Plaintiff;* Richard Roe, *Defendant.*

This notice may be served by delivering a copy of it to each of the parties interested; and a service by reading it would be equally valid. Yet, as a matter of careful practice, it will be best to serve it by copy.

There is no rule of law which prescribes any particular time for the notice; but the proper practice will be to give all the parties interested a reasonable and timely notice so that they may have a full and fair opportunity of being present.

After the jurors have convened at the time and place fixed for the hearing, the constable should administer an oath to each of the jurors. The oath may be in the following form:

Oath to jurors on claim of property.

You and each of you do swear that you will well and truly try the claim of A. B., to the property levied on by me, James Pierson, a constable of

Fulton county, under the execution in favor of John Doe against Richard Roe, and true inquisition make according to the evidence. So help you God.

The attendance of the witnesses may be enforced by a subpœna issued by the justice who issued the execution. The subpœna may be in the usual form, except that it must be modified as to the person before whom the witnesses are to appear. After the witnesses have appeared under the subpœna, or voluntarily, at the request of any of the parties, they are sworn before giving their evidence. The constable may administer this oath, which may be in the following form:

Oath to witness.

You do swear that the evidence you shall give to the jury, touching the claim of A. B., to the property levied upon by me, James Pierson, a constable of Fulton county, under the execution in favor of John Doe against Richard Roe, shall be the truth, the whole truth, and nothing but the truth. So help you God.

After the witnesses are sworn, they are examined in the usual manner. The several parties interested may appear by counsel, and the issue will be tried much as a cause is usually litigated. After the hearing the evidence, the jury ought to deliberate alone by themselves, as in other jury trials, and after they have agreed upon question of title, they should reduce their finding to the form of an inquisition, in which they should state in whom they find the property to be. The inquisition should be sealed, and signed by the jurors finding it, and also by the constable before whom it was taken.

Inquisition of jury upon claim to property.

[TITLE TO ACTION.]

We whose names are hereto signed, being a jury summoned and sworn by James Pierson, a constable of Fulton county, to try the claim of A. B., to the property levied on by the said constable under an execution in favor of John Doe and against Richard Roe, to wit, one piano forte, &c., &c., do say upon our oath that the title to said property is (or is not) in the said A. B.

Witness our hands and seals, on, &c., at, &c.

Jurors.		Jurors.	
	[L. S.]		[L. S.]
	[L. S.]		[L. S.]
	[L. S.]		[L. S.]

JAMES PIERSON,
A constable of Fulton county.

Form of bond of indemnity to constable.

Know all men by these presents that we, Daniel Stewart and Daniel Edwards, are held and firmly bound unto James Pierson, a constable of the county of Fulton, in the penal sum of four hundred dollars (or double the value of the goods), to be paid to the said James Pierson, or to his certain

attorney, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents. Sealed with our seals. Dated the 25th day of April, 1865.*

Whereas, the said James Pierson, as constable aforesaid, by virtue of a certain execution, issued by Peter W. Plantz, Esq., one of the justices of the peace of said county, against Richard Roe, in favor of the said Daniel Stewart, for two hundred dollars, damages and costs, has seized, or is about to levy the said execution upon, one certain bay horse, with a wagon and harness, now or lately in the possession of the said Richard Roe, with intent to sell the same, in order to satisfy the said execution; Now, therefore, the condition of this obligation is such, that if the said Daniel Stewart shall, at all times, and forever hereafter, keep the said James Pierson harmless and indemnified of, from and against all damages, costs, charges, trouble and expense, of what nature soever, which he may be put to, sustain or suffer, by reason of such levy and sale, or either of them, then this obligation to be void, or otherwise of force.

DANIEL STEWART, [L. S.]
DANIEL EDWARDS, [L. S.]

Sealed and delivered in presence of
PETER W. PLANTZ.

If the case is one in which a jury has been called to try the title, and they have found the title of the property to be in the claimant, but the plaintiff still insists upon a sale of the property, he may do so, and then the form of the bond will be varied accordingly.

In such a case, the form of the bond will be like the last one down to the *; and then insert the following recital and condition:

Condition where jury has tried title.

"Whereas the said James Pierson, as constable as aforesaid, by virtue of a certain execution issued by Peter W. Plantz, Esq., one of the justices of the peace of said county, against Richard Roe, in favor of the said Daniel Stewart, for two hundred dollars damages and costs; and whereas the said James Pierson, as such constable, did levy upon certain goods and chattels, under such execution, supposed by him to belong to the said defendant, but which were claimed by A. B., and a jury duly called for that purpose having found that the title to the said property was in the said claimant, and the said plaintiff refusing to assent that such property be released from such levy, but insisting that the said constable should retain such levy under his execution, and that he should sell the property." Now, therefore, &c., as in the preceding form to the end.

Fraudulent sales or mortgages.] A very common obstacle in the way of collecting an execution is the claim made by third persons, that the property levied upon has been sold or transferred to them by the judgment debtor. So, claims are frequently made by mortgagees of the property, and the validity of all such claims is always a matter subject to investigation by judgment creditors, who have a levy under their execution. The subject of fraudulent sales, assignments and judgments, has been sufficiently noticed elsewhere. Vol. I, 645 to 654; see also as to chattel mortgages, Vol. I, 148 to 168.

Levy, when to be made.] The law allows a constable sixty days within which to collect an execution, and therefore he may levy upon the defendant's property at any time within the sixty days, provided the levy and sale can all be completed within such sixty days. The statute expressly forbids a constable from levying upon property, or from selling it, after the return day of the execution, unless it has been duly renewed. Vol. I, 61, § 145. And so, too, he is required to return it in sixty days after its date. Vol. I, 11, § 64, sub. 12.

If a constable levies upon property after the return day of the execution, he will be liable as a trespasser. *Vail* v. *Lewis*, 4 Johns., 450. And if the levy is made by the direction of the plaintiff in the execution, both he and the officer are trespassers. *Ib.*

If a constable has two executions against the same defendant, and one of them has priority over the other, and he levies a part of the amount of the prior execution, and after the return day of that process he levies upon other property, the money made on the second levy must be applied on the junior execution. *Slingerland* v. *Swart*, 13 Johns., 255.

There may be cases in which a constable will not have sixty days within which to collect and return the money. If the execution should be issued to the plaintiff, and then retained by him for some time before its delivery to the constable, the officer will be required to do what he does under the process before its return day. Vol. I, 11, § 64, sub. 12. It is evident that the officer would have as many days less than sixty in which to make the money as there were days intervening between its date and the time when the officer received it.

The rule is otherwise in relation to executions issued upon judgments rendered by a court of record, for in such cases the execution is made returnable within sixty days from the time of its receipt by the officer. Code, § 290. And where a justice's judgment has been docketed in the county clerk's office it becomes a judgment of the county court, so that the execution issued by the clerk is made returnable within sixty days after its receipt by the officer instead of sixty days from date, as would have been the form if the justice had issued an execution upon such judgment before it was docketed.

Levy, where made.] The levy may be made by any constable of the county in which the execution is issued and in which the justice resides. And the officer may execute the process by levying upon the property of the defendant wherever it may be found in such county. *Mills* v. *Kennedy*, 1 Johns., 502.

Levy, how made.] When a constable receives an execution his plain duty is to collect it, if possible. But however clear the duty may be, there is frequently a serious difficulty in determining the manner in which he shall perform it. He must first be certain that the property levied upon is such as is liable by law to be taken upon the execution which he holds. But, even if the

property is of that class which is liable to seizure and sale on execution, there may be several persons who are interested in it, and the officer may not feel quite certain as to the proper course to be pursued. And when both of the preceding difficulties have been obviated, he must still be careful that his mode of making the levy is in accordance with the rules of law. These three subjects will each require a brief discussion for the purpose of rendering the discharge of these duties as plain as possible. The general rule in relation to justice's executions is, that every kind of personal property belonging to the debtor may be levied upon, except such as is exempt by the common law, or by virtue of some statute, or unless the property consists of mere choses in action. The officer may, therefore, levy upon all goods and chattels belonging to the debtor, unless they are such as has just been mentioned. Every kind of growing crop which is raised by means of annual cultivation, such as corn, oats, rye, wheat, potatoes and the like, may be levied upon and sold by virtue of a justice's execution. But whenever the crop is not one produced by annual cultivation, such as grass growing, hops growing upon the vines, fruit growing upon the trees, and the like, it is not considered personal property, but a part of the real estate upon which it is growing, and therefore it cannot be taken or sold on a justice's execution. See Vol. I, 639. Such articles, however, may be severed from the soil, and when that is done, they then become personal property and may be levied upon like any other goods and chattels. There are numerous articles which are denominated fixtures, and when they belong to the owner of the land on which they are placed, they cannot, as a general rule, be levied upon or sold by virtue of a justice's execution. But if the articles do not belong to the owner of the land, and the owner of them is legally entitled to remove them at any time, they are treated as personal property, and may generally be levied upon and sold as such on execution. See numerous cases collected, Vol. I, 602 to 609.

Money is a subject of levy, and whenever the constable levies upon any current gold or silver coin belonging to the defendant, he must pay and return it as so much money without exposing it for sale at auction. 3 R. S., 645, § 18, 5th ed.

Bank bills, or other evidences of debt issued by any moneyed corporation, or by the government of the United States, and circulated as money, may also be levied upon and sold like any other personal property. 3 R. S., 645, § 19, 5th ed.; *Handy* v. *Dobbin*, 12 Johns., 220. Under the recent acts of congress, the law has been materially changed in relation to the kind of money which may be lawfully tendered in payment of debts. Vol. I, 1050, 1051. What effect this change in the law will have upon the practice in relation to executions has not yet been settled by the courts.

Where a sheriff or constable receives money, in coin, in payment of an execution which he holds in his hands in favor of the plaintiff in the execution, and he has, at the same time, an other

execution which has been issued against the plaintiff, upon which he is not able to find any property to satisfy, except the money which he thus holds, he cannot, by virtue of the execution against the plaintiff, levy upon such money and apply it to the payment of the latter execution. *Muscott* v. *Woolworth*, 14 How., 477; *Turner* v. *Fendall*, 1 Cranch, 117; and see *Dubois* v. *Dubois*, 6 Cow., 494. But where the property of the defendant in the execution is levied upon and sold by virtue of an execution, and there is a surplus after the payment of such execution, such surplus may be levied upon and sold to satisfy any other execution against the defendant which may be delivered to the officer before the surplus money is paid over to such defendant. *Wheeler* v. *Smith*, 11 Barb., 345. And in such a case it does not make any difference whether the second execution is delivered to the officer before or after the sale on the first execution. *Ib.*

Where goods or chattels are pledged for the payment of money, or for the performance of any contract or agreement, the right and interest of the pledgor may be sold on an execution. 3 R. S., 645, § 20, 5th ed.; *Saul* v. *Kruger*, 9 How., 569. The purchaser, in such a case, acquires the rights of the defendant, and is entitled to the possession of the goods and chattels on complying with the terms and conditions of the pledge. *Ib.;* see Vol. I, 325. But the purchaser cannot have such possession until he redeems it from the pledgee, who is entitled to the possession until his claim is satisfied. *Stief* v. *Hart*, 1 Comst., 20; *Bakewell* v. *Ellsworth*, 6 Hill, 484. Where goods and chattels have been mortgaged, and the mortgagor has any interest in the mortgaged property, such interest may be levied upon and sold upon an execution. Vol. I, 150 to 152. If the title to such property has become perfect and absolute in the mortgagee, or if the mortgage has become forfeited and the mortgagor has no interest greater than the equity of redemption, the property may be levied upon and sold by virtue of an execution issued against the mortgagee. Vol. I, 150. But it cannot be levied upon and sold by virtue of an execution issued against the mortgagor. *Champlin* v. *Johnson*, 39 Barb., 606; *Farrell* v. *Hildreth*, 38 Barb., 178. There are cases in which creditors may have mortgaged property levied on upon an execution issued against the mortgagor in those cases in which the mortgage has not been properly filed, or the possession of the property has remained unchanged. Vol. I, 162 to 168.

Where goods and chattels belong to several different persons, as tenants in common, and an execution is issued against the property of one of these persons, it may be levied upon the joint property of all the parties, and the interest of the party against whom the execution was issued may be sold. The purchaser, however, will acquire nothing more than the interest of the judgment debtor, even though the officer should assume to sell the property as the exclusive property of the judgment debtor. *Fiero* v. *Betts*, 2 Barb., 633; *Mersereau* v. *Norton*, 15 Johns., 179. But, notwithstanding such sale will not transfer any title except that

of the debtor against whom the execution is issued, yet the sale of the entire property is such an abuse of the process by the officer as to subject him to an action of trespass for the wrongful act. *Waddell* v. *Cook*, 2 Hill, 47, and note *a; Dinehart* v. *Wilson*, 15 Barb., 595; *Walsh* v. *Adams*, 3 Denio, 125; *Bates* v. *James*, 3 Duer, 45. If such a sale is directed by the plaintiff in the execution, he will also be liable as a trespasser. *Ib.; Underhill* v. *Reinor*, 2 Hilt., 319. As to what persons are tenants in common, see Vol. I, 284, 285, 278.

Where one of several defendants, named in an execution, is a partner in a firm, his interest in the partnership property may be seized upon and sold on such execution. And, for that purpose, the constable may levy upon the partnership property and sell the interest belonging to such judgment debtor. *Phillips* v. *Cook*, 24 Wend., 389; *Scrugham* v. *Carter*, 12 Id., 131. Upon such a sale, the purchaser becomes a tenant in common with the remaining partners. *Ib.* The constable is not liable to an action of trespass for delivering the property sold to the vendee. *Ib.* But if he should sell the whole property as that of the judgment debtor, instead of limiting the sale to the interest of such debtor, the officer would be liable to an action of trespass or trover. *Walsh* v. *Adams*, 3 Denio, 125; *Waddell* v. *Cook*, 2 Hill, 47; *Bates* v. *James*, 3 Duer, 45.

Although a purchaser of the interest of a partner succeeds to his rights to the partnership property, it is still to be remembered that such purchaser takes the property subject to all the rights of the other partners, and subject to an accounting with them, and also subject to the claims of the creditors of the firm to the partnership property. *Phillips* v. *Cook*, 24 Wend., 389; *Walsh* v. *Adams*, 3 Denio, 125.

If an execution is issued against one of two partners, and the constable levies upon the firm property and sells it as the exclusive property of such debtor, the other partner may maintain an action of trover against the officer to recover the value of one-half of the goods, which he is entitled to recover as the measure of damages without regard to the debts of the firm, or the state of the copartnership accounts. *Ib.*

As to the rights of husband and wife, when an execution is issued against either of them, see Vol. I, 657 to 663.

Where an execution is issued against joint debtors, the statute provides for the mode of its execution, and as to the property which may be levied upon. Vol. I, 58, §§ 124, 125. So it also provides for the case of executions issued in actions commenced by attachments, and in which there was not a personal service of the process, in which case no levy can be made upon any property but that attached. Vol. I, 76, § 221.

Where property is sold upon condition that the title is not to pass until the payment of the purchase price, the title of the unpaid vendor is superior to that of a judgment or execution creditor. Vol. I, 480 to 487.

What acts will constitute a valid levy under an execution is not now a matter of doubt. If the officer takes the property into his actual possession and custody, by removing it from the premises or possession of the defendant in the execution, there could not be any doubt as to the existence of a levy. But such acts are not essential to the making of a valid levy, as the cases cited will show. In the first place, to constitute a valid levy upon personal property, the officer must assume dominion over the property, and have it within his power, and subject to his immediate seizure. *Price* v. *Shipps*, 16 Barb., 585; *Green* v. *Burke*, 23 Wend., 490; *Roth* v. *Wells*, 2 Tiff., 471.

"In order to constitute a valid levy, as to third persons, the goods must not only be within the view of the officer, but must be subjected to his control. He "must take actual possession," which, although the goods are present, can only be done by manual acts, or by an oral assertion that a levy is intended, and which is acquiesced in by those who are present and interested in the question. A levy cannot rest in a mere undivulged intention to seize property. Something more is required; there must be possessory acts to indicate a levy, or it must be asserted by word of mouth, so that what is thus done by the officer, if not justified by the process in his hands, will make him a trespasser." *Camp* v. *Chamberlain*, 5 *Denio*, 198, 202, 203, BEARDSLEY, Ch. J.

Where an officer is instructed to keep the levy a secret from the defendant in the execution, which is done, and the property is not taken by the officer, but is subsequently sold by the defendant to a purchaser in good faith, the latter will hold the property in preference to the officer. *Price* v. *Shipps*, 16 Barb., 585.

So, when an officer does not see the property intended to be levied upon, but merely sits on his horse, or in his carriage in the road, and takes a memorandum of the property as it is named over by the defendant in the execution, but without any knowledge what property the defendant had at the time, or where such property was at that time, this, although it may be treated as a valid levy as against the judgment debtor, will not be sufficient to affect the rights of a subsequent *bona fide* purchaser from such judgment debtor. *Dresser* v. *Ainsworth*, 9 Barb., 620, 629.

So, making an actual levy upon a part of the defendant's property, and then including in the inventory other property not in view of the officer, is not such a levy as to give priority to the levy over an actual levy, subsequently made under an other execution by an other officer. *Ray* v. *Harcourt*, 19 Wend., 495.

In the last case a part of the property in question was a mile and a half distant, and the residue about two miles and a half from the officer at the time of making the levy.

So, where an officer went on to the farm of the defendant in the execution, and made a levy on his property, a part of which was in a field where the officer was at the time with the defendant, and in sight, and an other part of the property, being a yoke of oxen, were in an other lot on the same farm, eighty rods

distant, but not seen by reason of an intervening hill, the levy as to the oxen was held invalid as against a bona fide purchaser of them from the defendant in the execution. *Van Wyck* v. *Pine*, 2 Hill, 666; *Bond* v. *Willet*, 29 How., 47.

It is not necessary, however, that there should be a manual interference with the property in order to constitute a valid levy. It is sufficient if the property is present, and subject to the control of the officer having the execution, and that he then openly and publicly states that he levies upon the property, and asserts his authority over it by virtue of such process and levy. *Barker* v. *Binninger*, 4 Kern., 270; *Green* v. *Burke*, 23 Wend., 490; *Connah* v. *Hale*, 23 Id., 462; *Bond* v. *Willet*, 29 How., 47.

Where personal property is taken by virtue of a justice's attachment, the lien continues until judgment can be rendered, and an execution thereon issued; but if the creditor desires to continue his lien after that time, he must procure an execution and have it levied upon the attached property within a reasonable time, or he will risk the loss of his lien. *Sterling* v. *Welcome*, 20 Wend., 238. In such a case the execution is no lien upon the property until an actual levy upon it. *Ib.* And the levy must be made within the county in which the justice issuing the execution resides. See *ante*, 6 to 11.

The whole matter in relation to a levy may be summed up thus: It is the duty of the officer to levy promptly; and in making such levy his acts must be public, positive and unequivocal, showing an intention on his part to subject the property to the process which it is his duty to execute. In doing this it may sometimes be necessary to remove the property levied upon. In other cases there may not be any necessity for its removal. But whether it is removed or not, the officer must indorse upon the execution the time of making the levy. Vol. I, 59, § 131. It is also the usual and the correct practice to make an inventory of the property levied upon, and to do it at the time of making the levy. But an omission to do this will not invalidate the levy, because an inventory is not, in strictness, essential to the validity of a levy. *Watts* v. *Cleaveland*, 3 E. D. Smith, 553.

The officer ought always to levy upon sufficient property to satisfy the execution, if so much property can be found; and yet he ought not to take an unreasonable quantity of property, since the object of the law is to secure the debt with as little inconvenience as possible to the debtor. But the law does not impose any restriction as to the amount of property which may be taken, nor does it require that all of the property which is taken shall be levied upon at the same time. *Denvrey* v. *Fox*, 22 Barb., 522. And even though an officer were to levy upon property sufficient to satisfy an execution, and he should then levy upon other property at a different and subsequent time, and sell that to satisfy the execution, this would not be sufficient ground to sustain an action of trespass against the officer for making the second levy. *Ib.* The remedy against an officer in such a case

would be for an excessive levy. *Ib.* To constitute a levy the officer must undoubtedly see the goods, and they must be within his power, at least so far as to assert title to them in the presence of those who may be opposed to the execution of the process; but it is never necessary that the debtor's consent should be obtained, or that he should acquiesce in the levy. *Artisans' Bank* v. *Treadwell*, 34 Barb., 553. If an officer should wantonly make an excessive levy, the execution debtor would have a remedy by an action on the case. *Dezell* v. *Odell*, 3 Hill, 215.

Form of indorsement by constable of a levy.

By virtue of the within execution, I have levied on two red cows, one bay mare, the property of the defendant, &c., this 28th day of April, 1865.
JAMES PIERSON, *Constable.*

Same, where an inventory is attached.

By virtue of the within execution, I have, this 28th day of April, 1865, levied on the goods and chattels of the defendant, mentioned in the annexed inventory. JAMES PIERSON, *Constable.*

Form of an inventory to be attached.

An inventory of goods and chattels this day levied upon and taken into my custody, by virtue of the annexed execution:

One red cow,	One stack of hay,
Ten sheep,	Ten common chairs,
Three hogs,	One sofa.

JAMES PIERSON, *Constable.*

Disposition of goods after levy.] It has been already seen, *ante*, 732, that an officer, on making a levy, is not bound to remove the goods, but may leave them in the defendant's possession; and if he does this without security it is at his own risk. The usual practice, however, is for the officer to take a receipt for the goods and chattels levied on, with an agreement to deliver it to the officer on demand, or to pay the amount of the execution. This receipt is usually signed by some friend of the defendant, and the property is then left in the possession of the defendant until such time as may be appointed for its sale. The liabilities of a receiptor have been pointed out elsewhere. Vol. I, 367, 368.

Form of receipt for goods levied upon.

JUSTICE'S COURT.

Daniel Stewart
against
Peter L. Frederick.

Execution issued by Peter W. Plantz, one of the justices of the peace of the county of Fulton, for	$175 00
Constable's fees for collecting,	2 50
	$177 50

Under and by virtue of the execution above described, James Pierson, a constable of the county of Fulton, has levied upon the following goods and chattels, the property of the said Peter L. Frederick, viz.: (Enumerate or

describe the articles.) Received this 28th day of April, 1865, of the said James Pierson, the goods and chattels above mentioned, which I promise to deliver to him, at any time when he shall demand the same, at the dwelling house (or barn, or other agreed place) of the above named Peter L. Frederick, in the town of Mayfield, in the county of Fulton; or, in default thereof, I do hereby agree and promise to pay him the amount of the said execution, with the said costs and fees for the collection thereof.

BRADFORD T. SIMMONS.

The constable may specify in the receipt the time and place for the delivery of the property levied upon, and the receiptor will then be bound to comply with its terms. But no action will lie against the receiptor until a proper demand of the property has been made. Vol. I, 312. And in an action against him it will be a good defense to show that the property has been taken from him by the rightful owner. *Harvey* v. *Lane*, 12 Wend., 563.

Rights and liabilities of constable after levy.] After making a levy upon goods, it is the duty of the constable to exercise proper care for their safety. Vol. I, 312. And if they are injured, he may maintain an action against the wrongdoer. Id., 806, 815. He is not regarded as an insurer of the goods, though he will be held responsible if they are lost through his own neglect, or from that of others to whom he may have intrusted their keeping. *Browning* v. *Hanford*, 5 Hill, 588; *S. C.*, 5 Denio, 586.

Where an execution is levied upon the goods in a store, it is a continuing levy which will cover goods purchased by the judgment debtor, at a time subsequent to the levy, and during the life of the execution, and placed in the same store, if such goods are of the same general description as those levied on, and have been purchased to supply the place of those sold by the debtor, after such levy, or as an addition to the original stock. *Roth* v. *Wells*, 41 Barb., 194. And where goods have thus been levied upon, if the debtor removes or sells a portion of them, and he then substitutes others of a similar description in their place, the property thus substituted takes the place of that which was sold or removed, and becomes subject to the lien of the execution without any new levy. *Ib.* And if the debtor, when called upon under such circumstances, refuses to designate the property which he claims is not covered by the levy, he will be estopped from subsequently maintaining an action against the officer for the value of the property taken by him under the execution. *Ib.*

A sheriff who levies upon goods under an execution, as the property of the defendant therein, may, when he discovers that the goods belong to an other person, relinquish the levy, and return the execution, no goods found. *Blivin* v. *Bleakley*, 23 How., 124. But if an action is brought against the officer for a false return to the execution, the burden of showing property out of the defendant in the execution is thrown upon him, when the good faith of the return is put in controversy. *Ib.*

Where a sheriff levies upon property which cannot be immediately removed or reduced to possession, as upon growing crops

of grain, it will be sufficient to make the levy openly and publicly, and the sale may then be deferred until the time for harvesting it. *Whipple* v. *Foot*, 2 Johns., 418.

Effect of a levy.] It has been held, in some of the older cases, that the mere act of levying upon sufficient personal property to satisfy the execution, amounts to a satisfaction or extinguishment of the judgment on which it was issued, unless the property was fraudulently withdrawn by the defendant from the possession of the officer. But such is not the present rule; and although the levy may cover property sufficient to satisfy the execution, yet if it fails to produce a satisfaction in fact, without any fault on the part of the plaintiff, he may proceed to obtain satisfaction by a new levy upon other goods. A mere levy upon sufficient goods and chattels to satisfy an execution where nothing more is done by the officer than to make the levy, will never amount to a satisfaction of the judgment. *People* v. *Hopson*, 1 Denio, 574, 578; *Waddell* v. *Elmendorf*, 5 Denio, 447. A mere levy neither gives anything to the creditor nor takes anything from the debtor. It does not divest a title; it only creates a lien upon the property. It frequently happens that the levy is overreached by some other lien, is abandoned for the benefit of the debtor, or is defeated by his misconduct; and in such cases there is no reason for holding that the judgment is satisfied. *Ib.*

If property is sold upon an execution issued upon a justice's judgment, and the execution is returned satisfied, but the defendant subsequently sues the plaintiff in the execution, and recovers the value of the property sold, on the ground that it was exempt by law from execution, the plaintiff may sue and recover a new judgment, and then issue execution thereon and collect the amount. *Piper* v. *Elwood*, 4 Denio, 165. A justice has no power to strike out the return on the execution and then issue a new one, and, therefore, an action upon the judgment is the appropriate remedy. *Ib.* A mere levy upon property sufficient to satisfy an execution will not amount to a satisfaction of the judgment, although the officer remains in possession of the goods for a day and a half, when he abandons the levy, and leaves the goods in the defendant's possession, on the ground that the plaintiff refused to indemnify him. *Radde* v. *Whitney*, 4 E. D. Smith, 378. So, where a levy was made by a constable who was at the time a minor, and he abandoned the levy to relieve himself from the consequences of his unlawful act in taking upon himself the duties of the office while under age, this was held not to be a satisfaction of the judgment, although the value of the property levied upon was equal to the amount of the judgment. *Green* v. *Burke*, 23 Wend., 490. Where the debtor has neither paid the debt nor been deprived of his property, a mere levy upon his property will not amount to a satisfaction of the judgment. *Peck* v. *Tiffany*, 2 Comst., 451. But where an officer levies an execution upon property sufficient to satisfy it, and through his negligence or misconduct the property is lost, destroyed, or disposed of, so that

the defendant is deprived of the benefit thereof, it is a satisfaction of the judgment, and the plaintiff must seek his remedy against the officer. *Ib.* Where goods and chattels are levied upon by virtue of an execution, the levy will enure to the benefit of any other execution which is subsequently delivered to the officer during the life of the first execution, and without making any new levy under the latter executions. *Ib.; Birdseye* v. *Ray*, 4 Hill, 160; *Cresson* v. *Stout*, 17 Johns., 116; *Russell* v. *Gibbs*, 5 Cow., 390; *Jones* v. *Atherton*, 7 Taunt., 56.

Sale of property.] After a constable has levied upon the goods and chattels of the defendant, or the party against whom the execution has been issued, the latter may prevent further proceedings, by paying the amount levied to the officer; and this will be deemed a good payment to the plaintiff, or to the party entitled to it. *Jackson* v. *Law*, 5 Cow., 248. If the money is not paid, it is the duty of the constable to proceed immediately in the matter of making a sale. Vol. I, 59, § 131.

A constable who has levied upon goods and chattels is not permitted to advance his own money for the payment of the plaintiff, and then to retain a right to subsequently enforce the execution upon the property for his own benefit. *Reed* v. *Pruyn*, 7 Johns., 426. Nor can he take a bond, or other security, from the defendant, and retain the execution in his hands, and use it afterwards to enforce the payment of the money advanced by him. *Ib.; Sherman* v. *Boyce*, 15 Johns., 443; *Carpenter* v. *Stilwell*, 1 Kern., 61, 67; *Bigelow* v. *Provost*, 5 Hill, 566. Nor can he deliver the goods to the plaintiff in satisfaction of his debt, but they must be sold, and so much of the avails paid over to him as will satisfy his execution. *Thomson* v. *Clerk*, Cro. Eliz., 504.* The plaintiff, however, may purchase the goods at the sale; and in that case the officer may deliver them to him, without payment, and credit the amount to the defendant on the execution. *Nichols* v. *Ketcham*, 19 Johns., 84. But if the purchase amounts to more than the sum due on the execution the balance must be paid over to the officer, who must return it to the defendant. *Ib.*

A plaintiff who bids off goods which are sold on an execution in his own favor, need not pay the money in ordinary cases; and yet, if there is a dispute between him and other execution creditors, as to who is entitled to the money arising from the sale, the constable may refuse to accept his bid, or to deliver the property to him until the money is paid; and if payment is refused he may resell the property. *Russell* v. *Gibbs*, 5 Cow., 390, 396.

But if the property is sold and delivered to the plaintiff by the officer, he cannot maintain an action for the price bid, if the plaintiff can show that the money legally belongs to him. *Ib.*

The right and interest of the pledgor of goods and chattels cannot be sold on an execution, unless they are present and within the view of those attending the sale. *Bakewell* v. *Ellsworth*, 6 Hill, 484; *Stief* v. *Hart*, 1 Comst., 20. Where such right and interest have been levied upon, the officer may take actual pos-

* But see *Hernaman* v. *Bowker*, 11 Exch., 760.

session of the chattels, and hold them until he sells. *Ib.* But after the sale, the pledgee is entitled to the possession of them, which he may retain until the purchaser redeems them. *Ib.*

Sale, when to be made.] The statute does not prescribe any particular time when a sale is to be made, except in the general provision that it must be done before the return day of the execution. Vol. I, 61, § 145. The officer may levy upon the defendant's property as soon as the process is received by him, and then sell it after duly advertising it for sale. Vol. I, 59, § 131. The language of the statute requires him to advertise immediately after making a levy upon the goods and chattels seized; but this direction is practically disregarded by officers. A levy is usually made at the earliest practicable time, and the officer then delays the sale for a reasonable time to enable the defendant to raise the money to pay the amount of the execution, if such indulgence is asked. So, too, the officer frequently advertises the property immediately, and then postpones the sale from time to time for the same purpose. There are times when such an indulgence is eminently proper, as where the defendant is willing but unable to pay immediately, though he will be able to do so in a reasonable time without a sale of his property. In such a case, every just and humane officer will exercise the power he possesses in such a manner as to cause as little injury to the defendant as is consistent with a proper discharge of the duties of his office. If, on the other hand, the defendant is abundantly able to pay, and he delays payment for the mere purpose of depriving the plaintiff of the use of his money, the officer will enforce the execution. It will be seen that a very considerable discretion is confided by law to the officer, as to the time within which the execution is to be enforced. The execution itself runs for sixty days, and if the money is collected within that time the command of the process will have been obeyed. But, while the officer may exercise a discretion in relation to the time of making a sale within the life of the execution, he has no power whatever to sell the property after the return day of the process, unless it has been duly renewed. Vol. I, 61, § 145.

Notice of sale.] The time and manner of giving notice of sale is prescribed by statute. Vol. I, 59, § 131. The notice must describe the goods and chattels levied upon; must be signed by the officer, and put up in three public places in the town or city where the goods are to be sold; and this must be done at least five days before the day of sale. Vol. I, 59, § 131. As to the mode of computing time, see *ante*, 45, 46.

Constable's notice of sale.

By virtue of an execution (or several executions) issued from a justice's court, against the property of Richard Roe, I have seized, and taken (name the articles with particularity), which I will expose to sale at public vendue, to the highest bidder, on the 10th day of May, 1865, at ten o'clock in

the forenoon, at the dwelling house (or barn) of said Richard Roe, in the town of Broadalbin. GARRET VAN VRANKEN, *Constable.*
Dated, May 4th, 1865.

Time and place of sale.] The sale must be made at the time and place fixed by the notice, unless the sale is for some cause postponed. The sale must take place where the property is, and if the property is not present, but at a distance of several miles from the place of sale, such sale will be void. *Cresson* v. *Stout*, 17 Johns, 116; and see Vol. I, 59, § 132. The sale must be made between the hours of nine o'clock in the forenoon and sunset. 3 R. S., 650, § 50, 5th ed. A sale of property upon an execution is entirely void, if made after sunset. *Carnrick* v. *Myers*, 14 Barb., 9.

Postponement of sale.] The constable having an execution to collect may postpone the sale thereon from time to time as he may deem proper, except that he cannot extend the time beyond the return day of the process. This right of postponement may be exercised at any time before the sale is complete; and, therefore, a postponement will be regular and legal, although it may have been made after the sale has been commenced by receiving bids on the property. *Tinkom* v. *Purdy*, 5 Johns., 345. Such postponement may be to a different place from that specified in the notice, and a sale completed at the adjourned place will be valid if there is no fraud or abuse of the process. *Ib.*

If the officer finds that a sale at the time advertised cannot take place, without producing a great sacrifice of property, and that no injury can result to the plaintiff from the delay, it is his duty to postpone the sale. *McDonald* v. *Neilson*, 2 Cow., 140, 190, 191. He is bound to take all lawful and necessary measures to secure the sum which he is directed to levy; but as to the time, manner, and place of sale, he is vested with a sound discretion. *Ib.* The sale, however, must not be out of the town in which the goods and chattels were taken, when the execution is issued by a justice of the peace. Vol. I, 59, §§ 131, 132.

Sale, how conducted.] The sale must take place at the time and place specified in the notice of sale, or at such time and place as may be fixed by the terms of the adjournment. The property must be sold at vendue, and to the highest bidder. Vol. I, 59, § 132. The property must, as a general rule, be present at the sale, *see above*, and it ought to be pointed out so that bidders may examine and inspect the articles to be sold. *Ib.; Warring* v. *Loomis*, 4 Barb., 484. The articles ought to be so specifically pointed out and designated that the purchaser knows precisely what particular article or articles he is purchasing. *Ib.* Where a constable levied upon thirteen sheep, generally, and on the day of the sale the sheep of the defendant, numbering some twenty-two, were all present and in a flock, and the officer offered thirteen of them for sale, without designating which, and in reply to the question of a bidder as to which sheep he sold, he replied " the best, the fattest of them," it was held that no title

passed to sheep thus sold. *Ib.* In such a case the purchaser does not acquire any right to select thirteen sheep out of the flock, and he will be liable in trover for their value if he does so. *Ib.*

An officer who makes a judicial sale must separate the property he sells, from the mass of property with which it is mixed, or the title will not pass. *Stevens* v. *Eno*, 10 Barb., 95. The officer has no right to leave any question to be settled between the purchaser and the defendant in the execution as to what property was sold, nor to leave unsettled any question as to the quantity purchased by the bidder. *Ib.* Where hay is put up into a stack an officer cannot sell a specified number of pounds of it, as it stands in the stack, and reserving a right to the purchaser to separate it at a future time. *Ib.* And if the purchaser subsequently takes any portion of the hay, he will be a trespasser for the reason that the sale is entirely void. *Ib.*

Where personal property consisting of several articles is sold on an execution, subject to a chattel mortgage, the whole ought to be sold in one parcel. *Tifft* v. *Barton*, 4 Denio, 171; and see *Manning* v. *Monaghan*, 9 E. P. Smith, 539. And where the property so sold consisted of a great many articles, which were at different places in the buildings and fields, upon the defendant's farm, so that the whole of them could not readily be brought at one time within view of the officer, it was held that he ought first to declare and point out to the bidders the property to be sold, and that he might then sell the whole together on the premises, although it should not all be at once within his view. *Ib.* So there may be other cases in which the property need not be within the actual view of the bidder at the time of the sale. Where the property in a printing and publishing establishment was sold under an execution, and a part of the articles consisted of stereotype plates, which were not actually in view at the time of the sale, but were in a vault connected with the building, and in a separate room, which was open, and the plates readily accessible for examination by any person wishing to see them, it was held that the sale might be made by exhibiting impressions from the plates, especially when it appeared that this was the usual mode of selling them, and that they would be likely to suffer injury from handling. *Bruce* v. *Westervelt*, 2 E. D. Smith, 440.

Where property is sold under an execution, and a part of it is present at the sale, while the remainder is absent therefrom, the sale will be valid as to that part which was present, although it may be void as to that which is absent. *Linnendoll* v. *Doe*, 14 Johns., 222.

If no bidders attend the sale the officer ought to postpone it, and he should then give notice to the plaintiff of that fact, and of the time and place to which the sale has been adjourned. In that case it is the duty of the plaintiff to attend the sale and bid on the property himself, and if he neglects or refuses to do so, and no other bidders attend, the officer may return that the goods remain on hand for want of bidders. The rule is the same

where the property cannot be sold except at a great sacrifice. And if an officer should sell goods at a very great sacrifice, he would be liable to an action in favor of the injured party whose property was thus sacrificed. *Keightley* v. *Birch*, 3 Camp., 521.

If an officer should sell property worth three or four hundred dollars, for the sum of seventy-five dollars, and an action was brought against him for damages, it would be no legal excuse or defense to show that the property was sold to the highest bidder, *Ib.* A sale upon an execution will pass no greater title to the purchaser than the defendant in the execution has in the same property. *Farrant* v. *Thompson*, 5 Barn. & Ald., 826. In the case last cited, it appeared that certain mill machinery, together with a mill, had been demised to a tenant for a certain term, and that he, without the permission of his landlord, had severed the machinery from the mill, and that it had been afterwards seized by an officer under an execution, and sold by him, and it was held that no title to the property passed to the vendee, and that the landlord might maintain trover for the machinery, even during the continuance of the term. *Ib.;* see also the cases cited in the note to *Morley* v. *Attenborough*, 3 Exch., 500, 514; see also Vol. I, 1083. It is the duty of the officer to sell property enough to satisfy the execution held by him; but if he sells property sufficient to satisfy the execution, and he then sells other property, he will be liable in trover for the excess of property thus sold. *Batchelor* v. *Vyse*, 4 Moore & Scott, 552; *Aldred* v. *Constable*, 6 Q. B., 370; *Stead* v. *Gascoigne*, 8 Taunt., 527. As to the effect which the statute of frauds has upon sales, see Vol. I, 536 to 548. Where a sale is made at auction, the contract is not complete until the bid is accepted, by striking off the article to the purchaser; and at any time before this is done, the bidder may retract his offer, which will terminate the contract. *Payne* v. *Cave*, 3 Term R., 148. The bid is a mere proposition by one party, and it cannot form a contract until it is accepted by the other. *Ib.* If, however, the goods are actually struck off to the bidder, before the bid is retracted, the sale is then complete, and the bidder is liable for the price. And if he refuses to accept and pay for them, the officer may immediately put them up at auction and resell them to the highest bidder; and if there is a deficiency between the price bid by the first purchaser and the sum for which the goods sold on the resale, the first purchaser is liable for the difference. Vol. I, 510, 675, 676. When the value of the goods sold exceeds the sum of fifty dollars, the requirements of the statute of frauds must be observed. Vol. I, 536. A proper entry in the memorandum book of the sale will be sufficient; and so will a part payment or a part delivery of the goods. *Ib.* But to prevent all questions, the prudent course will be to require a written, signed memorandum from the purchaser, which may be brief, as in the following form.

Memorandum of sale of goods, &c.

IN JUSTICE'S COURT.

John Doe agst. Richard Roe.	Before HARLEY BARTLETT, Esq., *Justice.*

May 2d, 1865, William Vail bought of Jacob Lawyer, constable, at auction, on an execution issued in this action,

One bay horse,.............................. .... $150 00

WILLIAM VAIL.

The memorandum may also be signed by the officer, though this is not necessary, since the statute merely requires that it shall be signed by the party who is to be charged upon it. Vol. I, 536, 537.

Constable's right to fees, &c.] A constable who has not made a levy, or done any other act under an execution, is not entitled to any fees or poundage thereon. *Rathbun* v. *Woodworth*, 1 How., 151. But where a levy has been actually made, the officer's right to poundage attaches on the whole amount directed to be levied; and he will not be deprived of his right merely because the judgment is satisfied without a sale of the property, nor by reason of any arrangement between the parties, nor because the property was incumbered beyond its value by prior liens or claims. *Ib.; Parsons* v. *Bowdoin*, 17 Wend., 14; *Hildreth* v. *Ellice*, 1 Caines, 192. So, an officer is entitled to poundage on serving an execution against the body of the defendant, even though the execution should be unproductive by reason of the defendant's subsequent discharge under an insolvent law. *Adams* v. *Hopkins*, 5 Johns., 252.

The officer's fees, on an execution, are no part of the judgment, but are merely an incident to it; and if the judgment is satisfied by an arrangement between the parties, the officer cannot subsequently proceed and sell the defendant's property for the mere purpose of collecting his fees; his remedy is against the plaintiff in the execution. *Jackson* v. *Anderson*, 4 Wend., 474; *Craft* v. *Merrill*, 4 Kern., 456; *Bank of Whitehall* v. *Weed*, 8 How., 104.

Execution in replevin actions.] The execution itself points out the constable's duty when the action was for the recovery of the possession of personal property. See form, *ante*, 715. If the property is in possession of the successful party at the time of rendering the judgment, there will not be any need of a clause in the execution directing a return or delivery of the property to that party. The execution will be sufficient in that case, if it directs the collection of the damages and costs awarded by the judgment. If the plaintiff succeeds in the action, and the property is in the possession of the defendant in pursuance of the law permitting him to retain it by giving a bond, *ante*, 212, 213, the officer should demand the property of the defendant. If the demand is complied with, the officer will take the property and deliver it to the plaintiff. If the property is in the possession of the defendant, and it is in a place where the officer may lawfully take it, he should promptly take it into his possession and return it to the

plaintiff. Whether an officer has any greater powers upon such an execution than is possessed when he has an ordinary execution against property, has not been adjudged in this state. The statute permits, or rather commands, the officer to break open buildings in some instances for the purpose of taking the property upon the replevin process. *Ante*, 203 to 205. But there is no such direction as to the execution of the final process of execution. And in the absence of a statutory authority, or of a judicial decision, permitting the breaking of a dwelling house for the purpose of taking the property, the prudent course will be for the officer to decline doing so. But there are other reasons besides the want of express authority which would lead to the same conclusion. If the defendant has retained the property by means of giving the bond required by law, and the officer cannot lawfully obtain the property, the sureties of the defendant will be liable by the very terms of their bond. *Ante*, 213.

Again, the defendant may have an abundance of other property upon which a levy may be made and the value of the property be collected in case the property itself cannot be obtained. And when there is such other property, the officer should collect the amount of the execution from that, if he has been unable to get the specific property demanded by the judgment and execution. If the specific property is delivered to the officer, and the execution also directs the collection of damages and costs, he must then levy upon the defendant's property and make the amount as in ordinary cases. If the plaintiff has taken the property on his replevin proceedings, and has retained them since that time until the rendition of the judgment, and such judgment is in favor of the defendant for a return of the property to him, the practice, as to the right to break buildings, and the like, will be the same as where the plaintiff has an execution for the return of the property.

Whether a justice's execution may contain a clause for the arrest of the defendant, upon a deficiency of property to satisfy the execution, is not settled by any reported adjudication of the courts of this state. The action of replevin is one founded upon a tort, and the general rule is, that an execution may direct the imprisonment of the defendant in such actions where he has no property upon which a levy can be made. Vol. I, 57, § 120. Upon general principles there can be no doubt of the right to insert such a clause in the execution.

In courts of record an execution is first issued against the property, and if it is returned unsatisfied, an execution against the person may then be issued in a proper case. But in justices' courts no such practice prevails, for the statute expressly directs that the execution shall command the officer first to collect the amount out of the defendant's personal property, if he has sufficient for that purpose, and in case he has not, then, if the action is one in which an execution may issue against the person, he is commanded to arrest and imprison the defendant. Vol. I, 57,

§ 120. There is no good reason, therefore, why an execution in a replevin action may not contain a clause of arrest in default of property to satisfy the amount due.

Execution against the person.] Whenever judgment is rendered in favor of the plaintiff upon a cause of action on which he might have arrested the defendant on a civil warrant, there an execution may be issued against the body of the defendant. As to the cases in which a warrant may issue, see *ante*, 87 to 93. But, even where the defendant is liable to imprisonment upon an execution, he cannot be arrested if he has sufficient property liable to execution, which is within reach of the officer if he chose to levy upon it. Upon receiving such an execution, the first duty of the officer is to search for goods and chattels upon which to levy and make the amount required by the execution. *Hollister* v. *Johnson*, 4 Wend., 639. If there is sufficient property available to satisfy the execution, the officer has no right to arrest and imprison the defendant, and any such arrest would subject him to an action for a false imprisonment. *Ib.* If an officer, without searching or inquiring for property, proceeds at once to arrest the defendant, and it is shown that the defendant had property in his open and visible possession at the time, which was liable to execution, the officer will be liable for making the arrest. *Ib.*

The acts or declarations of the defendant may, in some cases, relieve an officer from searching for property, as where he informs the officer that he has no property upon which a levy can be made, and if the officer takes him at his word, and in good faith arrests him for want of property on which to levy, the defendant will be estopped from questioning the legality of the arrest. *Ib.*

A constable has, in all cases, a reasonable time to search for property before he is bound to arrest the defendant, and if he acts in good faith he will not incur any responsibility by omitting to take the body until such search can be made. *Ib.* But where an officer has an execution for the arrest of a party, he is bound to use all reasonable endeavors to execute it, and he should, at the least, go to the residence of such party to find him, and if, instead of this, he relies upon the vague information which he may happen to obtain from mere casual inquiries in the streets, he does it at the peril of being liable for a false return, where he returns that the defendant could not be found, when the fact is really otherwise. *Hinman* v. *Borden*, 10 Wend., 367.

The general rules relating to arrests upon a civil warrant are equally applicable to an execution. *Ante*, 111 to 117.

If the defendant is arrested upon the execution, and it is not then paid, it is the duty of the officer to take the body of the defendant and convey him to the common jail of the city or county, and to deliver him to the keeper thereof. Vol. I, 60, § 134. If the plaintiff is defeated in an action of tort, and the cause of action is such that he might have imprisoned the defendant, in case he had been successful, the defendant is, in that case, entitled to an execution against the person of the plaintiff. *Keeler*

v. *Clark*, 18 Abb., 154; *Miller* v. *Scherder*, 2 Comst., 262; *Kloppenberg* v. *Neefus*, 4 Sandf., 655.

It has been held, at special term, that in courts of record there may be cases in which the defendant cannot issue an execution against a plaintiff who has been defeated in an action of replevin. *Purchase* v. *Bellows*, 23 How., 421. But in that case the defendant could not have been arrested upon the execution if the judgment had been against him; and unless he could, there would be no reason why he should be entitled to arrest the plaintiff. The effect of taking the body of a party in execution is, as a general rule, a satisfaction of the judgment; and, while the imprisonment continues, no other remedy, by way of enforcing the judgment, is permitted. *Cooper* v. *Bigalow*, 1 Cow., 56; *Sunderland* v. *Loder*, 5 Wend., 58; *Wakeman* v. *Lyon*, 9 Wend., 241; *Chapman* v. *Hatt*, 11 Id., 41; Vol. I, 967, 968. If, however, the defendant escape, the plaintiff is remitted to his former rights, the imprisonment is no longer a satisfaction, and the plaintiff may use the judgment as a set-off against a demand of the defendant, or proceed anew against his person or property. *McGuinty* v. *Herrick*, 5 Wend., 240; *Wesson* v. *Chamberlain*, 3 Comst., 331. As to the effect of a discharge of the defendant by the direction of the plaintiff, see Vol. I, 967.

Discharge of defendant from jail.] If a defendant has been imprisoned upon an execution, he may be discharged after remaining in jail the prescribed time. See the statute, Vol. I, 60, §§ 134 to 141, both inclusive.

Form of affidavit to obtain discharge from jail.

JUSTICE'S COURT.

John Doe *agst.* Richard Roe.	Before PETER W. PLANTZ, Esq., Justice.

FULTON COUNTY, *ss:* Richard Roe, the above named defendant, being duly sworn, says that he has a family in this State for which he provides (or that he has no family), and that he is not a freeholder, and that he has remained in prison in the jail of said county (or on the liberties of the jail, &c.), thirty (or sixty) days, on an execution issued in the above action.

RICHARD ROE.

Sworn before me this 4th day of May, 1865,
PETER W. PLANTZ, *Justice.*

Escape.] The law in relation to escapes is sufficiently explained in an other place. Vol. I, 742 to 746.

Property exempt from execution.] The general rule is that all goods and chattels of the party against whom an execution has been issued may be levied upon and sold, unless they are specifically exempted therefrom by statute, or by some rule of the common law. The statute exempting certain specified articles will be found, Vol. I, 61, 62, §§ 148, 149.

The evident object of the statute is to place the articles exempted beyond the power of the creditor, or of the officer who

holds the execution. The object itself is a humane one, and the courts construe the statute favorably and liberally for the purpose of giving it full effect. *Carpenter* v. *Herrington*, 25 Wend., 370; *Hall* v. *Penney*, 11 Id., 44; *Griffin* v. *Sutherland*, 14 Barb., 456. Spinning wheels, looms, and stoves, put up or kept for use, as well as a sewing machine, are exempt articles. Vol. I, 62, § 148, sub. 1. So of the family bible, family pictures, and school books, and the family library, if not above fifty dollars in value. Id., sub. 2.

It has been held that medical books, which are necessary to a physician or surgeon, are exempt as a part of his family library. *Robinson's Case*, 3 Abb., 466. The same principle would exempt the books of any professional person, if they were necessary to a proper discharge of the duties of his profession, and if they did not exceed fifty dollars in value.

The statute expressly exempts ten sheep with their fleeces, and the cloth or wool manufactured therefrom. Vol. I, 62, § 148, sub. 4. And the courts hold that the yarn or cloth which may be manufactured from the fleeces of the sheep shall be exempt, although the owner of such yarn or cloth is not the owner of any sheep. *Hall* v. *Penney*, 11 Wend., 44. The object of the legislature was to exempt as much wool, or the articles manufactured from it, as could be obtained from the fleeces of ten sheep, and that object will be carried into effect by exempting such yarn or cloth, &c. *Ib.*

There may be cases in which such yarn or cloth would not be exempted from levy and sale upon an execution. If the party claiming the exemption should intentionally reduce or convert all his property into money, or choses in action, except exempt articles, it has been held that it would be a proper question for a jury whether the act was not done for the purpose of hindering and delaying creditors, and if they found that such was the case, they should find for the creditor by sustaining the levy. *Brackett* v. *Watkins*, 21 Wend., 68.

If a householder owns a cow and ten sheep, there will also be exempt as much hay as will be necessary to keep them through the next foddering season after the hay is harvested. *Farrell* v. *Higley*, Hill & Denio, 87. This principle exempts as much hay as may be necessary to winter such cow and sheep, and until the pasturing season commences. *Ib.* The statute also exempts as much pork, beef, fish, flour and vegetables as may be necessary to keep the family until the next annual period for laying up such provisions. *Ib.* The statute does not limit the quantity to such an amount as may be sufficient for sixty days, but exempts all such articles of food as may be necessary for the season, if they were actually laid in for family use. *Ib.* No more fuel is exempt than sufficient to last sixty days. *Ib.*

Potatoes which have been planted for family use are as much exempt from execution while growing as they are after they have

been dug and put up for family use. *Carpenter* v. *Herrington*, 25 Wend., 370.

Where a widow lives with her infant children, and provides for them, a milch cow kept and used by her for the use of the family, is exempt from any execution issued against her. *Brigham* v. *Bush*, 33 Barb., 596.

The necessary wearing apparel of every judgment debtor is exempt from execution, while in actual use, whether he is a householder or not; and the fact that his clothes are temporarily off of his person, as when asleep in bed, will not render them liable to be seized on execution. *Bumpus* v. *Maynard*, 38 Barb., 626; and see *Sunbolf* v. *Alford*, 3 Mees. & Wels., 248.

If a party claims that wearing apparel is exempt because he is a householder, he must establish the fact that he is a householder. *Bowne* v. *Witt*, 19 Wend., 475. An adult person who resides with his stepmother, and transacts her business, is not a householder or a member of her family within the statute as to exemptions of clothing. *Ib.* In the case last cited, the action was for taking the plaintiff's cloak, which he claimed was exempt because he was a householder; but the question whether it was exempt as necessary wearing apparel, was not made in the case, except as connected with the question whether he was a householder

The necessary tools and implements of a mechanic, and necessary working tools owned by a householder, are exempt from execution if they do not exceed in value the sum fixed by law. Vol. I, 62, § 148, subs. 6, 7. The decisions of the courts have settled, in some instances, what articles are to be considered "tools" within the meaning of the statute.

The surgical instruments of a physician and surgeon are exempt from execution, on the ground that they are "tools," if he is a householder and supports a family. *Robinson's Case*, 3 Abb., 466. But a threshing machine is not exempt, on the ground that it is a "working tool," under the act of 1842 and its amendments. *Ford* v. *Johnson*, 34 Barb., 364. A printing press is not a "tool," within the statute. *Buckingham* v. *Billings*, 13 Mass., 82. Neither are printing types and forms. *Danforth* v. *Woodward*, 10 Pick., 423. Nor is a portable machine, called a "Billy and Jenny," which is used for manufacturing cloth, a tool. *Kilburn* v. *Deming*, 2 Verm., 404. And the rule is the same as to a mill saw, belonging to a saw-mill. *Bachelder* v. *Shapleigh*, 1 Fairf., 135. Although a team is exempt in certain cases, the decisions of the court have not been entirely harmonious upon the question what shall constitute a team. The horse of a practicing country physician, whose patients reside at too great a distance from him to visit them on foot, is a necessary team, within the meaning of the statute. *Wheeler* v. *Cropsey*, 5 How., 288. In determining whether the team is necessary, it is entirely immaterial whether the debtor has or has not other means to pay the debt, because the exemption does not depend upon the pecuniary ability of the debtor. *Ib.* The law was

intended for the benefit of all persons to whom a team is necessary in the successful or convenient prosecution of their business in their calling or profession. *Ib.* So, when the defendant is a carman, and is a householder, having a family for which he provides, his horse, harness and cart will be exempt as a team, although there is but one horse. *Harthouse* v. *Rikers*, 1 Duer, 606. A buggy wagon, used by a practicing physician in his professional business, is exempt from execution. *Van Buren* v. *Loper*, 29 Barb., 388; *Eastman* v. *Caswell*, 8 How., 75.

A single horse may be considered as a team within the meaning of the statute, where it is kept and used as such. *Lockwood* v. *Younglove*, 27 Barb., 505. And where the debtor has only one horse, but he hires an other horse to work with it, and the two make up the team which he usually works, his own horse will be exempt, if within the value limited by the statute. *Ib.*

It is not necessary that the defendant should be the sole owner of a horse as a condition of its exemption, for if the defendant is merely a part owner of a horse used as a team, or as a part of a double team, such horse is exempt when belonging to a householder, &c. *Radcliff* v. *Wood*, 25 Barb., 52; *Hoyt* v. *Van Alstine*, 15 Barb., 571. A wagon is not of itself alone exempt from execution; but it may become a part of a team where it is customarily used in connection with a horse or horses, and harness, and in such a case it may be exempt. *Dains* v. *Prosser*, 32 Barb., 290; *Morse* v. *Keyes*, 6 How., 18, is overruled.

A tow-line used for the purpose of towing canal boats by a span of horses, is a part of the team and exempt from execution. *Fields* v. *Moul*, 15 Abb., 6. It is no answer to the claim of exemption that the article is new and has never been applied to the use for which it was purchased, and for which it had been prepared by the owner. *Ib.* Food for a team for ninety days is exempt. Vol. I, 62, § 148, sub. 7.

A very great number and variety of articles are exempt from execution, under the general denomination of necessary household furniture. Two questions may arise in relation to the meaning of these words. One of them is, are the articles necessary? and the other, are the articles properly household furniture? In most cases there will not be any great difficulty in determining either of the questions; but in others there may be quite a difference of opinion. Whether articles conceded to be household furniture are necessary is a question of fact; but whether the articles claimed to be exempt are such as fall within the definition of the statute, has in most of the cases been treated as a question of law. A clock, if necessary, is exempt; and the reason which exempts that may be equally available to render a watch exempt. If the defendant has no clock, and a time-piece is necessary to the proper carrying on of his business, and it is used for that purpose, it is exempt, when owned by a householder, &c. *Bitting* v. *Vandenburgh*, 17 How., 80. A clock may be a necessary article of household furniture, but that fact must be

shown by the party claiming the exemption, and it is a question of fact which will be concluded by the verdict of a jury. *Willson* v. *Ellis*, 1 Denio, 462.

Notwithstanding the general rule which exempts certain articles from levy and sale on execution, this exemption is not unqualified and absolute in all cases. Those articles exempted by the provisions of the Revised Statutes may be regarded as absolutely exempt from execution. But those articles exempted by the Laws of 1842, and its amendments, are liable to be taken on an execution issued for the purchase-money, or on a claim for services rendered by a domestic servant. Vol. I, 62.

Where a judgment is rendered on a demand for the purchase-money of any of the articles exempted by the provisions of the Laws of 1842, the execution issued upon such judgment may be levied upon the articles for which such debt was incurred, or upon any other articles exempted by the Laws of 1842, even although such articles may not have been purchased of the plaintiff. Vol. I, 62, § 148, sub. 7; *Craft* v. *Curtiss*, 25 How., 163. But an execution which is issued upon a judgment founded upon a demand for the purchase of property exempted by the provisions of the act of 1842, cannot be levied upon property which is exempted from execution by virtue of the provisions of the Revised Statutes, notwithstanding such execution may be levied upon any other property exempted by the act of 1842. *Davis* v. *Peabody*, 10 Barb., 91. And so property which is exempt from execution by virtue of the provisions of the Revised Statutes, cannot be taken upon an execution issued upon a judgment rendered for the purchase-money, nor can it be levied on an execution issued upon a judgment rendered upon a demand for the purchase price of any other property exempted from execution by the provisions of the Revised Statutes. *Cole* v. *Stevens*, 9 Barb., 676; *S. C.*, 6 How., 424.

Where property, exempt from execution by virtue of the act of 1842, is purchased, and the purchaser gives a note for the purchase-money, and a third party signs or indorses the note as a mere surety, the liability incurred by such surety is not that of a purchaser of the property, and, therefore, his exempt property will not be liable to be seized upon an execution issued on a judgment rendered on such note. *Davis* v. *Peabody*, 10 Barb., 91. The head note of this case is incorrect. See 11 Barb., vii, *errata.*

If a creditor would enforce his claim for the purchase-money by levying upon exempt property, he must enforce the claim separately. For if he takes a judgment which is founded upon such claim, and also founded upon an other claim which cannot be enforced against exempt property, he will lose all right to levy upon the property sold. *Hickox* v. *Fay*, 36 Barb., 9. By uniting both claims in a single judgment, where one claim would authorize the taking of exempt property, and the other would not, the creditor bars himself from taking any exempt property to satisfy his judgment either in whole or in part. *Ib.*

The term "purchase-money," as used in the act of 1842, means

the money which the purchaser promised or agreed to pay for the property. *Hoyt* v. *Van Alstyne*, 15 Id., 568. And before exempt property can be legally seized and sold on execution, it must appear that the judgment was rendered upon a demand for the purchase-money of the property sold, or for other similar property. *Ib.* If a judgment is rendered in an action for the wrongful taking or conversion of personal property which might properly be a subject of exemption, such judgment is not rendered on a claim for the purchase-money of exempt property, and, therefore, an execution issued upon such judgment cannot be levied upon property exempted by the act of 1842. *Ib.*

A party who claims that certain articles are exempt from execution, on the ground that they are necessary, must prove affirmatively that his claim is well founded. *Griffin* v. *Sutherland*, 14 Barb., 456; *Willson* v. *Ellis*, 1 Denio, 462; *Dains* v. *Prosser*, 32 Barb., 290. It is not enough to show that an article is convenient or useful in a family, unless the jury, or the justice in their place, is satisfied that the article is also necessary. *Van Sickler* v. *Jacobs*, 14 Johns., 434; *Willson* v. *Ellis*, 1 Denio, 462. Upon the question whether the article is necessary, the decision of the justice, or the finding of a jury, is conclusive. *Ib.*

So, the party claiming that property is exempt, must show affirmatively that it does not exceed in value the sum fixed by the statute. *Dains* v. *Prosser*, 32 Barb., 290. If a wagon is claimed to be exempt because it is a part of a team, it must be proved that the wagon, harness and horses do not altogether exceed two hundred and fifty dollars in value. *Ib.* If there is no proof as to the value of the articles in the aggregate, nor of the value of the separate parts, the exemption of the wagon will be disallowed. *Ib.*

Where an action is brought by a party to recover damages for taking and selling household furniture which is claimed to be exempt from execution, the plaintiff must show the quantity quality and value of such furniture which is left after the sale made by the defendant, and it must be made to appear affirmatively that the amount of property allowed by law, as exempt, was not left after the sale. *Tuttle* v. *Buck*, 41 Barb., 417. The evidence ought to show that the property sold was exempt, and its value. *Ib.* Until evidence is given as to the value of the furniture left to the defendant after the execution sale, there will be no question of fact as to the exemption, and no sufficient proof to warrant a finding in favor of the plaintiff, that the property sold was exempt property. *Ib.*

If the exemption is claimed on the ground that the plaintiff is a householder, the burden of proof is on him to show that fact. *Griffin* v. *Sutherland*, 14 Barb., 456. The fact whether a party is or is not a householder, must be proved by competent evidence, and cannot be proved by reputation or hearsay. *Eastman* v. *Caswell*, 8 How., 75.

Jurors are frequently at a loss how to decide upon the matter

of exemption, so far as it relates to the question whether the article is a necessary one. And no better exposition of the law or of the practice can be found than that furnished by SANDFORD, J., in *Dickerson* v. *Van Tine*, 1 Sandf., 724, 730. In speaking of the Revised Statutes, and of the act of 1842, as to exempt property, he said: "The principal difficulty arises under the Revised Statutes; though under the act of 1842 there may be a great choice in respect of the condition and state of repair of the furniture, and its being more or less saleable. In respect of both statutes, I think that what is *necessary* for the householder and his family is to be determined by circumstances. When the six chairs, the table, and like articles enumerated, which are specified and set apart, are such as the debtor had in common use in his family before his failure, and were reasonable and proper for him and them, in respect to their station in life, I do not believe that a sound construction of the law requires that he should be deprived of such articles, and put upon taking such inferior chairs and table, as he and they had not been accustomed to use. I would not suffer a debtor to cover, under these exemptions, extravagant or expensive articles of luxury, or such as may be believed he has bought with a view to screen his effects from his creditors; nor would I add to the misfortunes of his family, by saying to them, in effect, that they were no longer worthy of filling their usual seats, or eating from their accustomed table. The same principle should guide in determining what is necessary household furniture, under the act of 1842." Where the debtor has several articles of the class allowed as exempt property, he may elect which of the articles he will retain, so long as the articles retained do not exceed in value the sum prescribed by the statute. *Seaman* v. *Luce*, 23 Barb., 240; *Lockwood* v. *Younglove*, 27 Barb., 506, 508. In the last case, the court said, "But where one or more animals, or articles of a particular kind, or a particular quantity in value out of several kinds are exempt, and the debtor has a larger number or quantity in value, as some one must determine which shall be taken and what left, it is but reasonable that the debtor should determine which he will claim as exempt. The statute giving this exemption is for the benefit of families, from motives of public policy, and it has repeatedly been held to confer a personal privilege upon the debtor, the benefit of which he may waive altogether, or insist upon, as he may elect. He may waive his privilege as to every article but one, and insist upon it as to that article, if it belongs to the kind or class of exempt property. This shows, I think, that the right of choice necessarily belongs to the debtor." But, while the debtor may elect which articles he will retain as exempt, this does not prevent the officer from making a levy upon all of the articles. And after this is done, the defendant is bound, within a reasonable time, to notify the officer which articles will be retained as exempt property. *Seaman* v. *Luce*, 23 Barb., 240. If the debtor is present at the time of the levy, he may make his

election, and give the officer notice at once, and this will be sufficient. *Ib.*

The right to claim property as exempt is a mere personal privilege, of which no one but the debtor can avail himself. A mere naked bailee of the property, who has it in his possession for the purposes of the bailment, as in the case of an agistor of sheep, cannot maintain an action in his own name for taking the property, on the ground that they were exempt from levy and sale on an execution issued against the bailor. *Mickles* v. *Tousley*, 1 Cow., 114. So, where an officer has levied upon property which is converted by the defendant, the latter is not permitted, in an action against him by the officer, to show that the property was exempt from levy under the execution held by the officer, because that exemption cannot be urged by any person except the defendant in such execution. *Earl* v. *Camp*, 16 Wend., 563. A general assignee of the judgment debtor cannot set up the claim of exemption, if he stood by at the officer's sale of the property, and made no objection at that time. *Smith* v. *Hill*, 22 Barb., 656. And, independently of that, the claim of exemption cannot be made by any one but the debtor. *Ib.* The right to claim a homestead as exempt property is also a personal privilege available to the debtor alone. *Smith* v. *Brackett*, 36 Barb., 571; *Allen* v. *Cook*, 26 Barb, 374. As to a waiver of the exemption laws, see Vol. I, 1088; and see, also, *Kneettle* v. *Newcomb*, 8 E. P. Smith, 249.

Where a party, whose property had been levied on by execution, objected to the sale, on the ground that the property was exempt from execution, but he afterwards turned out the property to the officer to be sold at a future day, it was held that the acts of the defendant in the execution amounted to nothing more than a waiver of the exemption, for the purpose of gaining time, and that the act of the officer in selling the property was done under a claim of authority given by law, instead of an authority given by the defendant, and that a sale of the property was such an abuse of the process as rendered the officer a trespasser from the beginning. *Carnrick* v. *Myers*, 14 Barb., 9; and see Vol. I, 776.

The exemption of property from levy and sale on execution is confined to cases in which the party claiming its benefits is a householder or person having a family for which he provides. Vol. I, 61, 62, § 148. There is seldom any difficulty in determining whether a party is a householder or a person having a family for which he provides. A man who has children, for whom he provides, is a householder, although his wife may be dead at the time. *Griffin* v. *Sutherland*, 14 Barb., 456; *Cox* v. *Stafford*, 14 How., 519. And it is not necessary that his furniture should be constantly in use in order that he may retain the advantages of the exemption laws. *Ib.* He may cease housekeeping, and store his furniture temporarily, for the purpose of making a visit to a distant place, or for any other proper purpose, without

subjecting his furniture to levy upon an execution, when his intention is to return and resume housekeeping. *Ib.* If a woman has a family which she is bound to provide for, she is entitled to the benefit of the exemption laws, notwithstanding she keeps a house of ill-fame as a means of getting a livelihood. *Bowman* v. *Quackenboss*, 3 Code Rep., 17. A father who has children for which he provides is not deprived of the benefit of the exemption laws merely because his children are temporarily absent at school to be educated. *Robinson's Case*, 3 Abb., 466.

The statute expressly exempts property while being removed from one place of residence to an other. Vol. I, 62, § 148. And the rule would be the same independently of any statute upon that point. *Woodward* v. *Murray*, 18 Johns., 400.

The exemption act of 1842 does not apply in those cases in which the demand was incurred for the services performed in any family by a domestic servant. Vol. I, 62, § 149. As to the amendment of an execution, see the next chapter.

Omission to return execution.] An omission to return an execution within five days after its return day will subject the constable and his sureties to an action, in favor of the party in whose behalf the execution was issued. Vol. I, 61, § 143.

In an action for not returning an execution within the prescribed time, it is no defense to show that the constable to whom it was delivered afterwards delivered it to an other constable, who collected the money thereon, and offered it to the plaintiff upon his deducting a sum which he promised in case the money was collected. *Downs* v. *McGlynn*, 2 Hilt., 14; *S. C.*, 6 Abb., 241, and see Vol. I, 72, § 198.

A mere neglect to return the execution in due time is sufficient to render the constable and his sureties liable to an action; it is not necessary to show that any moneys were collected by the officer. *Sloan* v. *Case*, 10 Wend., 370; and see *Moore* v. *Smith*, 10 How., 361. In such an action the plaintiff is entitled to recover the amount of the execution, with interest from the time of the rendition of the judgment. Vol. I, 61, § 143. But before a plaintiff can recover against a constable and his sureties, for not returning an execution, it must be shown that the judgment was valid, and that the justice who issued such execution had jurisdiction of both the defendant and of the subject matter of the action. *Westbrook* v. *Douglass*, 21 Barb., 602; *Cornell* v. *Barnes*, 7 Hill, 35.

A mere consent by the plaintiff in an execution, given without consideration, that the constable who had collected the money thereon might retain it a short time for a temporary purpose will not discharge the constable's sureties from liability. *Boice* v. *Main*, 4 Denio, 55.

An action does not lie against a constable for not paying over money collected by him on a justice's execution, where it is shown that he has been sued and a recovery had against him for selling the property, by the sale of which the money collected by

him was made, where such recovery is equal to the amount of the execution, or exceeds that sum. *Newland* v. *Baker*, 21 Wend., 264. And the action cannot be maintained, even though the plaintiff in the execution executed a bond of indemnity to the constable, on the delivery of the execution to him, and notwithstanding the constable has brought an action upon such bond. *Ib.*

If property is sold for the purpose of satisfying an execution, and there is a surplus left after paying the execution and costs, the constable must return such surplus to the defendant in the execution. Vol. I, 59, § 132. But no action can be sustained against the officer before the return day of the execution, where no demand has been made of the money. *Bortel* v. *Ostrander*, 15 How., 572.

"Every person chosen or appointed to the office of constable, before he enters on the duties of his office, and within eight days after he shall be notified of his election or appointment, shall take and subscribe the oath of office prescribed by the Constitution, and shall execute, in the presence of the supervisor, or town clerk of the town, with one or more sureties, to be approved of by such supervisor or town clerk, an instrument in writing, by which such constable and his sureties shall jointly and severally agree to pay to each and every person who may be entitled thereto all such sums of money as the said constable may become liable to pay on account of any execution which shall be delivered to him for collection." 1 R. S., 826, § 43, 5th ed.

"The supervisor or town clerk shall indorse on such instrument his approbation of the sureties therein named, and shall then cause the same to be filed in the office of the town clerk, and a copy of such instrument, certified by the town clerk, shall be presumptive evidence in all courts of the execution thereof by such constable and his sureties." 1 R. S., 826, § 44, 5th ed.

"All actions against a constable or his sureties, upon any such instrument, shall be prosecuted within two years after the expiration of the year for which the constable named therein shall have been elected." 1 R. S., 862, § 45, 5th ed.

Under this statute it is sufficient that there is an instrument in writing, signed by the constable and his sureties, if it engages that the constable will collect all executions that are collectible, and that the signers will be accountable to all persons in whose favor any execution may come, for the damages in the same, if not paid over according to the statute, &c. *Skellinger* v. *Yendes*, 12 Wend., 306. An action may be maintained upon such an instrument by any creditor who has put an execution into the constable's hands for collection, where the execution has never been returned. *Ib.* Neither the constable nor his sureties can object, in such an action, that the instrument is not under seal; nor that it is not in the form prescribed by the statute; nor that it has not been approved by the town clerk or supervisor of the town for which the constable was elected. *Ib.* An omission to file the instrument within the eight days prescribed by the statute

does not affect its validity, because the statute is merely directory in this particular. *Dutton* v. *Kelsey*, 2 Wend., 615. Where an action is brought against the constable or his sureties, and it is founded upon the instrument, it must be commenced within two years after the expiration of the year for which the constable was elected. *Ante*, 754, § 45.

But where the action is against the constable, for money had and received, there is no doubt but the action will be in time if brought at any time within six years from the time when he received the money.

Form of instrument to be given by a constable and his sureties.

James Pierson, chosen (or appointed) constable of the town of Johnstown, county of Fulton, and Eli Pierson and Daniel Edwards, as sureties, do hereby, jointly and severally, agree to pay to each and every person who may be entitled thereto, all such sums of money as the said constable may become liable to pay, on account of any execution which shall be delivered to him for collection. Dated the 5th day of May, 1865.

JAMES PIERSON, [L. S.]
ELI PIERSON, [L. S.]
DANIEL EDWARDS, [L. S.]

Executed in the presence of, and the sureties approved by,
ALLEN C. CHURCHILL, *Supervisor of Johnstown*, or
JACOB P. MILLER, *Town Clerk of Johnstown.*

Return of an execution.] The statute declares that an execution shall have sixty days to run, and the justice has no power to make it returnable in a less time. *Spencer* v. *Cuyler*, 17 How., 157; *S. C.*, 9 Abb., 382.

No constable can be compelled to return an execution before its return day. *Ib.; Morange* v. *Edwards*, 1 E. D. Smith, 414. He may, however, return it at any time within the sixty days, either where he has made the debt, or where he is satisfied that there is no property; though, if he returns it unsatisfied, he does it at his own risk. *Ib.*

Execution satisfied.

I have levied the within sum, of the goods and chattels of the within named Richard Roe, as I am within commanded.

Dated, &c. JAMES PIERSON, *Constable.*

Part satisfied, and commitment for residue.

I have levied $50, part of the sum within mentioned, of the goods and chattels of the within named Richard Roe, and, for want of further goods or chattels of the defendant, I have taken the body of the defendant and committed him to the jail of the county.

Dated, &c. J. P., *Constable.*

Commitment generally.

I could find no goods or chattels of the within named Richard Roe, whereon to levy, and I have therefore taken his body and committed him to the jail of the county.

Dated, &c. J. P., *Constable.*

No goods or body to be found.

I could not find either goods or chattels, or the body of the defendant, within the county.

Dated, &c. J. P., *Constable.*

Part satisfied, and no goods or body as to residue.

I have levied $50, part of the sum within mentioned, of the goods and chattels of the within named Richard Roe, and no more goods or chattels, or the body to be found.

Dated, &c. J. P., *Constable.*

Levy, and goods unsold for want of bidders.

I have levied upon one bay horse, the property of the within named Richard Roe, which remains in my hands, unsold for want of bidders.

Dated, &c. J. P., *Constable.*

Renewal of executions.] The statute makes ample provisions for the renewal of executions. Vol. I, 59, §§ 128, 129. So there may be a new or further execution issued in a proper case. Id., § 130.

Before a justice renews an execution for the collection of either the whole or a part of the judgment, he should require a proper return from the constable, in which it should appear whether the officer has collected anything, and if he has, then the amount should be stated in the return.

Where a part of the execution has been collected, and the execution is renewed for the residue, the indorsement of renewal ought to express the sum due on the execution. Vol. I, 59, § 129.

If the indorsement, however, clearly shows how much is due, it will be sufficient, although it does not in terms specify the amount. And where an execution was issued by a justice of the peace, upon which the plaintiff acknowledged the receipt of a specified sum, by indorsing the amount thereon, and dating the receipt on the day when the money was received, and the justice subsequently renewed the execution by an indorsement below the receipt, in the following form: "I hereby renew the within execution," and dated and signed the renewal, this was held to be a sufficient compliance with the statute. *Ostrander* v. *Walker*, 2 Hill, 329. In such a case the renewal is, in legal effect, a renewal for the amount unpaid. *Ib.*

Where a constable has levied upon property sufficient to satisfy an execution, and he has returned that the property remains on hand for want of bidders, the justice may renew such execution on the last day which it has to run, and the renewal will retain the lien of the previous levy. *Chapman* v. *Fuller*, 7 Barb., 70. A justice may renew an execution after its return day, and from time to time as the plaintiff may desire it done. *Visger* v. *Ward*, 1 Wend., 551.

And so a justice may renew an execution while it remains unsatisfied, notwithstanding there was a levy upon sufficient property to satisfy it, and the property is held under the levy, when there is not sufficient time to advertise and sell the property before the return day. *People* v. *Hopson*, 1 Denio, 574.

As to renewals by a justice whose term of office has expired, see Vol. I, 71, § 190.

Form of general renewal of an execution.

The within execution renewed. Dated May 5th, 1865.
PETER W. PLANTZ, *Justice.*

Renewal where a part has been paid or collected.

The within execution renewed for one hundred dollars, with interest from this date. May 5th, 1865. PETER W. PLANTZ, *Justice.*

CHAPTER IX.

AMENDMENTS.

In the course of the proceedings in an action, from its commencement to its termination, there are frequently errors and omissions. And where a correction of the mistake is important, and justice will be promoted by an amendment, the statute gives full power to remedy the defect. The statute relating to justice's courts confers all the necessary powers that are conferred upon courts of record. Vol. I, 37, § 1. And there is a general statute applicable alike to courts of record, and to justices' courts, so far as the provisions are applicable or appropriate. These sections of the statute are as follows, 3 R. S., 721 to 723, 5th ed.:

§ 1. The court in which any action shall be pending, shall have power to amend any process, pleading or proceeding in such action either in form or substance, for the furtherance of justice, on such terms as shall be just, at any time before judgment rendered therein.

§ 2. If such amendment be made to any pleading in matter of substance, the adverse party shall be allowed an opportunity according to the course and practice of the court, to answer the pleading so amended.

§ 3. Process by which any action shall have been commenced and on which any defendant shall have been arrested, shall not be amended in the return day thereof.

§ 4. After judgment rendered in any cause, any defects or imperfections, in matter of form, contained in the record, pleadings, process, entries, returns or other proceedings in such cause, may be rectified and amended by the court in affirmance of the judgment, so that such judgment shall not be reversed or annulled; and any variance in the record from any process, pleading or proceeding had in such cause shall be reformed and amended, according to such original process, pleading or proceeding.

§ 5. All returns made by any sheriff or other officer, or by any court or subordinate tribunal, to any court, may be amended in matter of form, by the court to which such returns shall be made, in their discretion, as well before as after judgment.

§ 6. Any imperfection or defect in the award of any venire or any omission to award such venire on the record may be amended or supplied by the court in which such record is.

§ 7. When a verdict shall have been rendered in any cause, the judgment thereon shall not be stayed, nor shall the judgment upon such verdict or any judgment upon confession, default *nihil dicit* or *non sum informatus*, be reversed, impaired or in any way affected by reason of the following imperfections, omissions, defects, matters or things, or any of them, in the pleadings, process, proceedings or record, namely:

1. For want of any writ, original or judicial;

2. For any default or defect in process, or for misconceiving any process or awarding the same to a wrong officer, or for the want of any suggestion for awarding process, or for any insufficient suggestion;

3. For any imperfect or insufficient return of any sheriff or other officer, or that the name of such officer is not set to any return actually made by him;

4. For any variance between the original writ, bill, plaint and declaration, or between either of them;

5. For any mispleading, miscontinuance or discontinuance, insufficient pleading, lack of color, jeofail or misjoining of issue;

6. For the want of any warrant of attorney by either party, except in cases of judgment by confession, where such warrant is expressly required by law;

7. For any party under twenty-one years of age, having appeared by attorney, if the verdict or judgment be for him;

8. For the want of any allegation or averment on account of which omission a special demurrer could have been maintained.

9. For omitting any allegation or averment of any matter, without proving which the jury ought not to have given such verdict.

10. For any mistake in the name of any party or person, or in any sum of money, or in the description of any property, or in reciting or stating any day, month or year when the correct name, time, sum or description shall have been once rightly alleged in any of the pleadings or proceedings.

11. For a mistake in the name of any juror or officer.

12. For the want of a right venue, if the cause was tried by a jury of the proper county.

13. For any informality in entering a judgment or making up the record thereof, or in any continuance or other entry upon such record.

14. For any other default or negligence of any clerk or officer of the court, or of the parties, or their counselors or attorneys, by which neither party shall have been prejudiced.

§ 8. The omissions, imperfections, defects and variances in the preceding section enumerated, and all others of the like nature, not being against the right and justice of the matter of the suit, and not altering the issue between the parties or the trial, shall be supplied and amended by the court, where the judgment shall be given, or by the court into which such judgment shall be removed by writ of error.

§ 9. No process, pleading or record shall be amended or im-

paired by the clerk or other officer of any court, or by any other person without the order of such court, or of some other court of competent authority.

§ 10. The provisions of this title shall extend to all actions in courts of law, and to all suits for the recovery of any debt due to the people of this state, or for any debt, duty or revenue belonging to them, and also to all actions for penalties and forfeitures, to all writs of *mandamus* and prohibition, to all informations in the nature of a *quo warranto*, to writs of *scire facias*, and to the proceedings thereto.

Amendment of process, &c.] One of the well settled rules on the subject of amendments, is that a justice's court possesses all the necessary powers of amendment that are possessed by courts of record. *Fulton* v. *Heaton*, 1 Barb., 552; *Brace* v. *Benson*, 10 Wend., 214, 215. An other rule is that justices are required to allow amendments liberally in all cases where justice demands it, especially where the rights of the opposite party will not thereby be put in jeopardy. *Ib.* Though process is amendable where a mistake has occurred, the power to amend is not available in those cases in which the affidavit on which the process was issued is defective. If a warrant is issued upon a defective affidavit, the affidavit is not amendable so as to avoid the consequences of the defect. *Ante*, 101. And the same rule applies to the case of defective affidavits on attachment cases. *Ante*, 150, 151. A different rule prevails in replevin actions, and a defective affidavit is amendable in a proper case for the allowance of an amendment. *Ante*, 193. When nothing but the given name of a plaintiff is inserted in a summons, the justice may amend it by inserting the surname, as where the name of the plaintiff was Corydon Stanton, and the summons at the time of the service contained the name Corydon alone, but the justice inserted the word Stanton, on the return day, and this was held proper. *Stanton* v. *Leland*, 4 E. D. Smith, 88. So, where the summons served contained the name of the plaintiff as Joseph S. Keeler, it was held that the summons might be amended on the return day by striking out the word Joseph and inserting the word Jasper. *Brace* v. *Benson*, 10 Wend., 213. It has been held that where the name of one of several plaintiffs was inserted by mistake, the court had power to strike it out. *Agreda* v. *Faulberg*, 3 E. D. Smith, 179. But it has also been held that a justice has no power to amend the process or pleadings, in an action on a joint contract against two or more defendants, by striking out the name of one defendant and rendering judgment against one defendant, and in favor of the other. *Webster* v. *Hopkins*, 11 How., 140. So, in an action for a tort, it has been held that if an amendment is allowed by striking out the name of one of two plaintiffs, the justice has no power to amend by restoring the party as a plaintiff, at a subsequent day, if the amendment is objected to by the defendant. *Gates* v. *Ward*, 17 Barb., 424; but see *Lowber* v. *Childs*, 2 E. D. Smith, 577.

Where the date of a summons is incorrectly stated by mistake, the justice may amend the process by stating the true date, and this may be done either before or after the service or return of the process. *Arnold* v. *Maltby*, 4 Denio, 498. So, too, it may be overlooked or disregarded without any amendment. *Ib.*

An attachment may be amended, even after its service and return, by inserting the amount of the plaintiff's demand, as stated in his affidavit for procuring the process. *Near* v. *Van Alstyne*, 14 Wend., 230.

A summons which is issued on a demand for money on a contract, may, if the defendant appears in the action, be amended on the return day, before issue joined, by changing it to a demand for an injury to personal property. *Cooper* v. *Kinney*, 2 Hilt., 12; *S. C.*, 6 Abb., 380.

A justice has power to permit a constable to amend his return to a summons; and the refusal of the defendant to appear on the return day will not deprive the justice of this right. *Perry* v. *Tynen*, 22 Barb., 137. So he has power to permit a constable to amend his return to an attachment, or of the inventory. *Churchill* v. *Marsh*, 4 E. D. Smith, 369.

Amendment of pleadings.] The Code makes ample provision for amendments to the pleadings, whether before the trial, during the trial, or upon an appeal. Vol. I, 11, § 64, sub. 11.

In noticing some of the adjudged cases as to amendments, those decided before the enactment of the Code will be first examined, and afterwards those decided since the Code will be stated.

Under the old system a justice had power to allow an amendment, by permitting the plaintiff to add a new count to his declaration, even after issue joined, and after the cause had been adjourned. *Babcock* v. *Lipe*, 1 Denio, 139. And it was also held that a justice's court had the same power to allow amendments that courts of record possess. *Ib.; Mosher* v. *Lawrence*, 4 Denio, 419. So an amendment might be made as to the description of a paper, or the variance might have been disregarded. *Ib.* So, too, an amendment of the declaration might be made in relation to a jurisdictional question as well as upon any other, as where the declaration claimed damages for an amount exceeding the justice's jurisdiction, it was held that an amendment might be made by reducing the claim to an amount within his jurisdiction. *Woolley* v. *Wilber*, 4 Denio, 570; and see *ante*, 314.

Amendments of the pleadings on the trial are of less importance now than they were under the former practice. A variance between the pleadings and the proofs will now be disregarded, while under the old system it would have been a grave if not a fatal error. *Ante*, 408 to 412.

Under the present practice, an amendment of the complaint will not be permitted where it changes the entire nature of the action, as from an action in tort to one founded upon contract. *Ransom* v. *Wetmore*, 39 Barb., 104. And where an action was

brought for a tort in wrongfully taking and converting the plaintiff's property, and there was an entire failure to prove that the taking was wrongful or tortious, or that there was any fraudulent intent on the part of the defendant, it was held that the plaintiff ought to have been nonsuited on the trial, and that the plaintiff could not, at the close of the case, waive the tort, and recover as upon a contract. *Ib.* A defendant is not obliged, in that stage of the case, to assent to so important and material a change, or by failing to do so, to waive his rights already acquired by a motion for a nonsuit. *Ib.*

So, where a cause has been tried until the plaintiff has rested his case, which he fails to sustain, the plaintiff cannot be permitted to amend his complaint by adding a new and different cause of action. *Waldheim* v. *Sichel*, 1 Hilt., 45.

Where the pleading is demurred to, and the pleading is held to be defective, an order to amend such pleading is a matter of course. *Ante*, 333.

Where an amendment is asked for the purpose of interposing a strict defense, such as the statute of limitations, the courts have sometimes refused to allow the amendment. *Osgood* v. *Whittlesey*, 20 How., 72; *Wolcott* v. *McFarlan*, 6 Hill, 227; *Hallagan* v. *Golden*, 1 Wend., 302.

So, too, it has been held that the defense of usury must be interposed at the joining of issue, and that it will not be allowed to be set up by way of an amendment. *Lovett* v. *Cowman*, 6 Hill, 223. But the recent cases do not make any discrimination as to the nature of the defense, if it is a legal bar to the action. And, where the amendment is allowed for the furtherance of justice, the party amending may interpose the statute of limitations, or usury, or illegality, as well as any other defense. *Sheldon* v. *Adams*, 41 Barb., 54; and see *Bank of Kinderhook* v. *Gifford*, 40 Barb., 659.

The allowance of amendments is a matter of discretion in some cases, and where an amendment, if allowed, would cause an injury to the opposite party, a refusal to permit the amendment cannot be reviewed on an appeal. *Tattersall* v. *Hass*, 1 Hilt., 56. In the case just cited the justice refused to permit the defendant to amend by introducing a new defense at the trial, which, if it had been allowed, would have operated as a surprise upon the plaintiff. It is not proper for a justice, in a case before him, to volunteer and make amendments of the pleadings, which are not asked for by either party. *Loyd* v. *Fox*, 1 E. D. Smith, 101.

Amendment of verdict and judgment.] The power to correct or amend a verdict has been mentioned. *Ante*, 626. So the power of the justice to reduce or increase the judgment, or to change it materially, has been sufficiently explained already. *Ante*, 626.

Where an action sounding in tort is commenced for the conversion of a promissory note, and the pleadings are framed accordingly, and the suit is tried as an action of tort, it is too late for the plaintiff, after an appeal, to ask that the complaint

be amended, and that the suit be regarded as an action to recover the avails of the note as money had and received. *Andrews* v. *Bond*, 16 Barb., 633.

If, however, there is a mere misdescription of a cause of action arising upon a contract, as where a plaintiff sues for use and occupation, when he should have declared in covenant upon a lease, the appellate court will not interfere with the determination of the question in the court below. *Bedford* v. *Terhune*, 27 How., 422.

When amendments are allowed by an appellate court, it will be done for the purpose of sustaining the judgment appealed from, and not for the purpose of rendering it erroneous. *Englis* v. *Furniss*, 3 Abb., 82. When the power to grant an amendment exists, but the court refuses to grant the amendment on the ground of its doubt of the power to allow it, the refusal will be error if the amendment would have been granted but for such doubt. *Russell* v. *Conn*, 6 E. P. Smith, 81; *Beach* v. *Chamberlain*, 3 Wend., 366; *Packer* v. *French*, Hill & Denio, 103.

PART VIII.

APPEALS.

CHAPTER I.

THE PRACTICE ON APPEALS.

SECTION I.

GENERAL PRINCIPLES RELATING TO APPEALS.

Historical sketch.] The right to review judgments rendered by any tribunal of original jurisdiction, is so general that it has found a place under nearly every mode of practice, and in every system of jurisprudence which regards the principles of the common law.

Judgments rendered by inferior tribunals ought to be subject to a full and careful review at the instance of any party who feels aggrieved by them.

In this state, judgments rendered by justices of the peace have always been subject to some mode of review. And in looking over the changes in the law in this respect, it will be seen that the practice has varied frequently, and sometimes materially, although the prominent object of a full and fair review has always been kept clearly in view. It will not be useful to notice the practice from an earlier date than from the year 1787.

Under a law enacted in that year, judgments rendered by justices of the peace were reviewed on a writ of *certiorari* returnable in the supreme court. Before the writ was allowable there must have been an affidavit showing proper grounds therefor. If the writ was allowed, the justice made a return thereto, and the cause was decided by the supreme court, in the first instance, without any review in the common pleas. Laws 1787, ch. 89, § 17.

In 1801, material changes were made in the law relating to justices' courts, but the practice in relation to reviewing judgments rendered by them remained substantially the same. Laws 1801, ch. 165, § 19.

By the Revised Laws of 1813, the justice's court act was modified, but the system of review by the supreme court, upon a writ of *certiorari* founded upon an affidavit, was still retained. 1 Revised Laws 1813, ch. 53, § 17.

In 1818 a material change was made in the law relating to the review of cases tried in justices' courts. If issue was joined, and a judgment was rendered for more than twenty-five dollars, the remedy of the aggrieved party was by an appeal to the court

of common pleas or the mayor's court. The appeal was brought by the service of a notice of appeal upon the justice, paying his fees for making a return, and giving a bond, &c. Laws 1818, ch. 94, § 17. After the return was properly made and filed, the cause was tried in the common pleas. *Ib.*, §§ 18, 19. In cases not provided for by way of rehearing on an appeal, the former mode of review by *certiorari* was retained. *Ib.*, § 21.

In 1824 a change was made in the laws relating to justices' courts, but the system of review by appeal was retained. Laws 1824, ch. 238, § 36. The issues of fact were retried in the common pleas by a jury. *Ib.*, § 38. In cases not provided for by that act, a writ of *certiorari* to the supreme court was an appropriate remedy. *Ib.*, § 36.

The Revised Statutes of 1830 introduced a mode of review which was new in some respects. For the first time, the law gave a remedy by way of review on a writ of *certiorari* issued by the court of common pleas and returnable into that court. The writ was founded upon an affidavit setting forth the grounds of error complained of. 2 R. S., 255, 256, §§ 170, 171, 172, 1st ed. A bond was required. *Ib.*, § 173. After the return was made, the cause was heard and decided upon the return. *Ib.*, 257, § 181. But no cause was brought up by *certiorari* when the amount of the judgment exceeded $25, exclusive of costs. *Ib.*, § 170. Where the judgment exceeded $25, exclusive of costs, the remedy was by way of an appeal to the common pleas. 2 R. S., 258, § 186, 1st ed. This appeal was founded upon an affidavit and the allowance of a proper judge or officer. *Ib.*, §§ 187, 188. If the appeal was allowed, a return was made and the cause retried in the common pleas. *Ib.*, 257–264. For the particulars of the practice the statute must be consulted.

The Constitution of 1846 abrogated the court of common pleas and substituted the county court with a single judge. The judiciary act of 1847 did not change the practice in relation to *certioraris* or appeals, except so far as to make the existing statutes relating to the common pleas applicable to the county courts. Laws 1847, ch. 280, § 35.

The Code of 1848 made the most material changes in relation to the review of judgments. By that act all former modes of review were abrogated. Code of 1848, § 301. Besides this there was but one mode of review, whatever might be the amount of the judgment rendered in the justice's court. By that act the appellant was required to make an affidavit stating the substance of the testimony and proceedings in the court below, together with the grounds upon which the appeal was founded. Code of 1848, § 303. A copy of this affidavit, with a notice of appeal, was also required to be served on the respondent. *Ib.*, § 304. Security for staying proceedings was also provided for. *Ib.*, §§ 305, 306, 307. The respondent was permitted to serve counter affidavits. *Ib.*, § 309. The cause might be heard on the affidavits, or, if they were conflicting, a return by the justice

might be ordered. *Ib.* If no return was ordered, judgment was rendered upon the facts appearing in the affidavits. *Ib.*, § 317. If a return was made, the case was heard and decided upon that. *Ib.* The county court had power to affirm or reverse, or to order a new trial before the same justice, *Ib.*, §§ 317, 319, or before any other justice in the same county. *Ib.*, § 320.

The Code as amended in 1849, changed the practice so far as to require the justice to make a return in the first instance, and no order of the court was necessary for that purpose. Code of 1849, § 360.

When the return was filed the cause was heard and decided on that. *Ib.*, §§ 364, 366.

In 1851, changes were made in the Code, but no material modifications were made in the general features mentioned. Code, as amended 1851, §§ 353, 354, 359, 366.

In 1852, a very important change was made in the law, by which all affidavits were dispensed with, whether on the part of the appellant or the respondent. Code as amended 1852; Laws 1852, ch. 392, §§ 353, 354, 360.

It will be observed that under every change in the law, from the enactment of the Code in 1848, down to the year 1862, there was but one mode of review or trial in the county court. The cause was always heard and decided on the affidavits, while they were allowed; or upon the return, and there was, in no instance, a new trial in the county court. This was the rule whether the amount of the judgment was large or small, when the question related to the merits of the action.

In 1862, the law was again changed, and it has been since modified. For the statutes relating to this subject, see Vol. I, 27 to 34, §§ 351 to 371, both inclusive.

As the law now stands, a judgment may, in some cases, be reviewed upon the justice's return; while in other cases the cause may be retried in the county court.

The brief outline thus given was merely intended to present to the young lawyer, in the most concise manner, some of the prominent features of the various modes of review heretofore in use in this state. This branch of the subject must now be dismissed, and the subject which next demands attention is the practice as it now exists.

What an appeal is.] A notice of appeal is in the nature of process, since it serves to remove a cause from the original jurisdiction to an appellate tribunal. It answers the place of the former writ of error, or a *certiorari*, and that of an appeal. The object of removing a cause to an appellate court is always the same, whatever may be the mode by which the object is attained; and the principal object, generally is, to review the proceedings or judgment below for alleged errors, either of law or of fact. Sometimes, however, the object is to obtain relief from a default which has occurred through an excusable mistake, or for some other equally available cause.

Kinds of appeal.] In one respect, appeals may all be said to be included in a single class, or that it is effected in all cases by a notice. But, when the object of an appeal is considered, they may be divided into several classes, viz.: 1. When the appellant desires to review the proceedings and judgment upon the facts appearing on the face of the return; 2. When he desires to set aside the proceedings or judgment for error in fact; 3. When he desires relief from a default taken against him; 4. When he desires to review some order made by the court below; 5. When he desires to have the advantage of a new trial in the county court; or, 6. Where the appeal is taken from some summary or special proceedings.

There are some peculiarities in the practice in relation to each of these separate classes of appeals, and the various classes will each receive a proper notice in the course of this chapter.

Who may appeal.] Where there are but two parties, a plaintiff and a defendant, no one will doubt the right of either of them to appeal from a judgment rendered against him in favor of the opposite party. But where there are several plaintiffs and several defendants, and a judgment is rendered against all of the defendants, or against all of the plaintiffs, there is sometimes a question made whether an appeal must be brought by all the parties against whom such judgment is rendered, or whether an appeal may be brought by some of the parties when they alone feel aggrieved by the judgment. It is not important to inquire what the old law was in that respect, unless that law controls the question under the present practice. For the rule under the old practice, see *People* v. *Rensselaer Com. Pleas*, 11 Wend., 174; *Thompson* v. *Valarino*, 3 Denio, 179.

The Code expressly provides for such a case. "Any party aggrieved may appeal in the cases prescribed in this title." Code, § 325. And the title thus mentioned includes appeals from justices' and other inferior courts. There are numerous instances in which but one of several defendants has any valid ground of appeal. If an action of trespass is brought against two defendants, there may be a plain case made out against one of them, and as to the other, there may not be anything like a legal case proved; and yet a judgment may be rendered against both defendants. In such a case, it is entirely evident that one party would be "aggrieved," while the other might not have any just cause of complaint. Upon such a state of facts, there can be no doubt that the aggrieved party may bring and sustain an appeal without joining the other defendant. *Mattison* v. *Jones*, 9 How., 154.

There may be instances, too, in actions arising upon contract in which the same rule would prevail, as in the case of a judgment against the maker and indorser of a negotiable promissory note. If a case was proved against the maker, but not against the indorser, and judgment was rendered against both, there can

be no doubt that the indorser might bring his appeal without joining the maker.

These cases supposed are mere instances for illustration, and whenever any party can show that he is legally aggrieved by a judgment, he may sustain an appeal without joining a co-defendant or a co-plaintiff, who is not aggrieved by the judgment.

One who is not a party to an action, but a mere stranger to it, cannot bring an appeal. *E. B.* v. *E. C. B.*, 8 Abb., 44; *Matter of Bristol*, 16 Abb., 397; *Martin* v. *Kanouse*, 2 Abb., 390. The legal representatives of a deceased party to an action will be included in the term "aggrieved party," and they may therefore bring an appeal in those cases where the deceased party could have done so had he survived. *Beach* v. *Gregory*, 2 Abb., 209; *Martin* v. *Kanouse*, Id., 392.

Where a party is sued by a fictitious name, and a judgment is rendered against him by such name, he may, notwithstanding, bring an appeal in his true name. *McCabe* v. *Doe*, 2 E. D. Smith, 64. The right of appeal is not restricted to the party against whom the judgment is rendered, and both parties may appeal from the same judgment.

When no cross appeal is taken by the respondent, he cannot take any advantage of an error committed to his prejudice in the court below, nor will it be a ground of reversal in his behalf, although such error clearly appears from the return on the appeal brought by the appellant. *Robbins* v. *Codman*, 4 E. D. Smith, 316; *Glassner* v. *Wheaton*, 2 E. D. Smith, 352.

A plaintiff who has been nonsuited in the court below, at his own request, cannot reverse the judgment, upon an appeal, even though questions of law were decided against him by the court, and notwithstanding the nonsuit was submitted to with the avowed purpose of reviewing these decisions on the appeal. *O'Dougherty* v. *Aldrich*, 5 Denio, 385.

It is not necessary that a judgment should be rendered against the party appealing to entitle him to sustain an appeal, for a party may reverse a judgment rendered in his own favor where he is injured or aggrieved by it. *Parker* v. *Newland*, 1 Hill, 87. Where a justice improperly excludes evidence offered by a plaintiff, who, in consequence thereof, recovers judgment for less than he would have been entitled to if the evidence had been admitted, such plaintiff may bring an appeal and reverse the judgment. *Bissell* v. *Marshall*, 6 Johns., 100.

But a party will not be permitted to reverse a judgment in his own favor for errors committed by the court below, unless such error is a cause of injury, or legally "aggrieves" him. *Hughes* v. *Stickney*, 13 Wend., 280; *Williams* v. *Gwyn*, 2 Saund., 46.

From what judgments an appeal lies.] An appeal lies from judgments, rendered by justices of the peace, by justices' courts in the cities, by the district courts of the city of New York, or by the general term of the marine court of that city. To what

court the appeal must be taken will be explained in the next section.

The general rule is that no appeal will lie before the judgment in the court below is complete and perfect. As illustrative of this, it has been held that an appeal would not lie from a judgment of nonsuit, where no costs were awarded against the plaintiff. *Monnell* v. *Weller*, 2 Johns., 8; *Nellis* v. *Turner*, 4 Denio, 553; *Haulenbeck* v. *Gillies*, 7 Abb., 421; *S. C.*, 2 Hilt., 239.

But if a judgment of nonsuit is improperly granted, and it is entered with costs against the plaintiff, an appeal will lie to reverse such judgment. *Smith* v. *Sutts*, 2 Johns., 9. And where a justice is about to nonsuit a plaintiff for a defect in his proofs, the defendant cannot prevent a review of the judgment on an appeal by asking to have the judgment entered without costs; and if judgment of nonsuit is entered against the plaintiff, with costs, an appeal lies from the judgment. *Nellis* v. *Tucker*, 5 Denio, 82.

If a county court should order a judgment of nonsuit, an appeal would lie from it, even though no costs were awarded on the record. *Lovell* v. *Evertson*, 11 Johns., 52. The reason assigned is that the plaintiff is aggrieved by being defeated of his right of action, and by being deprived of his costs for prosecuting it. *Ib.* And there is no reason why the same rule should not prevail in relation to judgments rendered in justices' courts.

Where a judgment of nonsuit is rendered with costs, on account of the want of jurisdiction by the justice by reason of his relationship to one of the parties, such judgment may be appealed from, and will be reversible. *Edwards* v. *Russell*, 21 Wend., 63; *Randall* v. *Hall*, Hill & Denio, 239; *ante*, 25.

When a justice renders a judgment which is void on account of his want of jurisdiction of the subject matter of the action, an appeal will lie to reverse such judgment. *Striker* v. *Mott*, 6 Wend., 465. In such a case it is no answer to the appeal to say that the judgment is void, and that it therefore need not be reversed. *Ib.* But where a party procures a judgment to be rendered in his own favor, which is void for want of jurisdiction, he will not be permitted to reverse it on appeal for the irregularity in procuring it. *Fairbanks* v. *Corlies*, 3 E. D. Smith, 582; *S. C.*, 1 Abb., 150. It is only the party who is aggrieved that is allowed to bring the appeal, or reverse the judgment. *Ib.*

Where a justice renders a judgment in an action of which he has no jurisdiction over the subject matter, and an appeal is brought in a case in which a new trial would ordinarily be proper, the county court ought to refuse to entertain the cause or to render any judgment therein. *Malone* v. *Clark*, 2 Hill, 658.

It is not necessary that the action should have been a litigated one to entitle the defendant to appeal; for if the judgment against him is a final one, he may appeal even though he did not at any time appear in the action in the court below, nor object to the introduction of illegal evidence. *Ante*, 635. So where there

is no jurisdiction over the person of the defendant, and a judgment is rendered against him in his absence, he may appeal from the judgment and reverse it. *Willins* v. *Wheeler*, 28 Barb., 669; *Fitch* v. *Devlin*, 15 Barb., 47. So where a judgment is rendered against a defendant, in his absence, before the expiration of the time allowed for appearance, on the false statement of the plaintiff that the defendant did not intend to appear, an appeal lies to reverse such judgment. *Beach* v. *McCann*, 1 Hilt., 256.

When a judgment is rendered by a justice of the peace in a civil action of which he has jurisdiction, an appeal lies from it without any reference to the nature of the action, whether it arose upon contract or for a tort. And this rule includes every class of civil actions of which a justice may take cognizance. It does not make any difference whether the judgment was rendered upon an issue of law or upon an issue of fact, for an appeal lies in either case. Vol. I, 27, § 352.

A judgment rendered by a justice of the peace in summary proceedings between landlord and tenant is appealable. 3 R. S., 840, § 52, 5th ed.; Laws 1849, ch. 193, § 5; *Spraker* v. *Cook*, 2 E., P. Smith, 567, 574; *Deuel* v. *Rust*, 24 Barb., 438; *Williams* v. *Bigelow*, 11 How., 83. So a judgment rendered by a justice of the peace, in an action to enforce a lien under the mechanics' lien law, is also appealable. *People* v. *Judge of Rensselaer Co.*, 13 How., 398, 401, and cases there cited.

Appeal the only mode of review.] The Code has abrogated every mode of reviewing justices' judgments, except that prescribed by that instrument itself. Vol. I, 27, § 351. The effect of this change in the practice is to render many of the old decisions of very little value, so far as it relates to the existing system of practice. And yet the rules of construction settled and enforced in some of those cases, will be applied to the settlement of questions as to the proper construction of the various sections of the Code. But while the mere rules of practice, or the machinery by which a cause is transferred from an inferior to a superior court, have undergone material changes, it is to be remembered that the decisions of all questions which involve the merits of the action, and which were brought up for review, is controlled by the same rules of law which existed long before the enactment of the Code.

The provisions of section 366 of the Code, Vol. I, 31, declaring upon what principles judgments are to be rendered by the appellate court, are such as have been in force from the earliest period of our judicial history. And, upon all such questions, the former decisions of the courts are as applicable and as authoritative now as at any former time. It is true that the section just referred to, and in some instances there are other sections which confer powers upon appellate courts which they did not possess before the enactment of the Code. This, however, will not cause any confusion or embarrassment in relation to the older decisions, which will, of course, be controlled by the statutes now in force.

Appeal to what court.] The general rule is, that appeals from judgments rendered by justices of the peace, and by justices' courts in cities, in civil actions, must be taken to the county court of the county in which such justice resides, and in which such judgment was rendered. Vol. I, 27, § 352. The exceptions to this rule are, that judgments rendered by justices' courts in the city of New York must be taken to the court of common pleas of the city and county of New York, instead of being removed to the county court. The same rule prevails in relation to appeals from judgments rendered by a general term of the marine court. Vol. I, 27, § 352. Appeals from judgments rendered by the justices' courts of the city of Buffalo must be taken to the superior court of that city. *Ib.*

Appeals where more than $50 *is claimed.*] When the pleadings of either party in the court below demand a judgment of more than fifty dollars, or where the action is replevin and the value of the property and the damages shall exceed fifty dollars, exclusive of costs, a new trial is had in the county court in either of two cases: 1. Where the judgment was rendered upon an issue of law; 2. Where it was rendered upon an issue of fact. Vol. I, 27, § 352. If an issue of fact is joined a new trial is to be had in such cases, whether the defendant was present at the trial or not. *Ib.*

The appellant, however, is not compelled to submit the cause to a new trial in the county court even where he appeals from a judgment in such a case. If he desires to avoid a new trial in the county court he may do so by stating in his notice of appeal that the appeal is taken upon questions of law only, in which case no new trial is had in the county court, but the cause is heard and decided upon the return in the same manner as though the judgment was for less than fifty dollars, notwithstanding the judgment appealed from exceeds fifty dollars in amount. Vol. I, 27, § 352. As to the practice in the marine and the district courts in the city of New York, see Vol. I, 28, § 352.

There is an other class of cases in which no new trial is had in the county court, but the cause is heard and decided upon the justice's return, notwithstanding the judgment may be for more than fifty dollars. And where no issue whatever is joined, and the defendant does not appear in the action in the court below, but a judgment is rendered against him in his absence, the appeal is decided upon the justice's return, whatever may be the amount of the judgment.

Appeals where $50 *or less is claimed.*] Where neither party claims more than fifty dollars in his pleadings, or where the value of the property and the damages are assessed at less than that sum, or where the judgment is for fifty dollars or less, and no issue was joined between the parties, and the defendant did not appear in the action in the court below, an appeal from such a judgment is always heard and decided upon the justice's return. In such a case no new trial can be had in the county court. Vol. I,

27, § 352; *Ib.*, 31, § 366. The rules applicable to the decisions of such cases will be noticed in a subsequent place.

Appeal, when to be brought.] Where judgment is rendered upon process which was personally served, or where issue was joined by consent, without process, an appeal must be taken from such judgment within twenty days after its rendition. Vol. I, 28, § 353. But where the judgment was rendered upon process which was not personally served, and the defendant did not appear in the action in the court below, the defendant may bring an appeal at any time within twenty days after personal notice has been given to him of the judgment. *Ib.*

Where judgment is rendered by a justice against a defendant in his absence, the latter may demand of such justice a transcript of the judgment, and a copy of the process, pleadings and process in the cause, and the justice is bound to furnish them upon the payment of his legal fees therefor. Vol. I, 70, § 182.

If an appeal is not brought within the time allowed by law for that purpose the right of appeal will be lost. *Figaniere* v. *Jackson*, 2 Abb., 286; *Seymour* v. *Judd*, 2 Comst., 464. An appearance for the sole purpose of moving to dismiss the appeal will not cure the defect. *Ib.* But where a written admission is given of due service of the notice of appeal, this will be a waiver of the objection that the notice was not served in due time. *Struver* v. *Ocean Ins. Co.*, 9 Abb., 23.

Where a judgment was rendered upon process which was not personally served, and the plaintiff desires to limit the time for appealing, he ought to serve a notice upon the defendant for that purpose.

The notice ought to be in writing, and to be served by delivering a copy thereof to the defendant personally. Care ought to be taken to note the time of making such service, so that due proof may be made of the time when the service was made.

Form of notice.

JUSTICE'S COURT.

John Doe
vgst.
Richard Roe.

To Richard Roe, *defendant:*

You will take notice that, on the 20th day of July, 1865, I recovered a judgment against you, before Richardson P. Clark, Esq., a justice of the peace, of Johnstown, Fulton county, for the sum of $150 damages, and $5 costs; and that such judgment was rendered in an action commenced by a long attachment (or otherwise, as the case may be).

JOHN DOE, *Plaintiff.*

Dated July 20th, 1865.

Affidavits not necessary.] Although it was formerly necessary to make and serve an affidavit which stated the substance of the evidence and proceedings in the court below, as well as the grounds of appeal, *ante*, 764, it is not now necessary or proper to serve any affidavits in ordinary cases of appeals.

In cases where error in fact is assigned as the ground of appeal, or where the defendant seeks to be relieved from a judgment which was rendered against him in his absence, and which does him injustice, the court may decide the cause upon the affidavits of the respective parties. Vol. I, 31, § 366. The appellant need not, and usually does not, serve such affidavits at the time of serving the notice of appeal. It may, however, be done at that time, if he prefers that mode of practice.

But even when such affidavits are served, whether at the time of serving the notice of appeal or afterwards, they do not serve the purpose of the affidavits used under the former system of appeals allowing or requiring affidavits. The object of an affidavit under the former practice was to enable the justice to see what errors or acts were complained of, so that he might return fully as to such matters. And when the return was made and filed, the object for which the affidavit was employed was generally attained. But the affidavit made in these cases of error in fact, or for excusing a default, are used for a very different purpose. The justice is not required to answer them in his return; and when the return is complete, the affidavits are not superseded by the return, but are still used as a part of the evidence upon which the cause is to be decided by the county court.

The practice on appeals assigning error in fact, or asking to be relieved from a default, will be explained in a subsequent place.

SECTION II.

NOTICE OF APPEAL.

The practice of bringing an appeal by the service of a notice is the most simple and convenient mode yet adopted in this state. This notice answers a double purpose, since it takes the place of the old writ of *certiorari*, as well as that of the affidavit on which that writ was formerly allowed. The notice is a process, or in the nature of a process, for removing the cause to the appellate court; and it also states the grounds on which the appeal is founded, which were formerly stated in the affidavit. The present practice, therefore, is one which saves labor, while it secures all the advantages of the old system.

Notice of appeal must be in writing.] The statute does not declare in express terms that a notice of appeal from a justice's judgment must be in writing. But the character of the statute renders a written notice as necessary as though it had been expressly declared to be indispensable. The notice must state the grounds; it must be served on the justice and on the respondent; it may in some cases be left with a person of suitable age and discretion; it may be served on the attorney of the respondent in some cases; and it may also, in a proper case, be left with the clerk of the appellate court. Vol. I, 28, §§ 353, 354.

Again, section 408 of the Code provides, "Notices shall be in writing; and notices and other papers may be served on the party or attorney in the manner provided in the next three sections,

when not otherwise provided by this act." This section is applicable to appeals to the county court. Vol. I, 2, § 8. Besides this, a notice of appeal is clearly a species of process, and there is a general statute which expressly requires all process to be in writing. Vol. I, 80, § 18. A mere verbal notice of appeal is a nullity, although it may have been given within the time allowed for bringing an appeal. *People* v. *Eldridge*, 7 How., 108.

Notice must state the grounds of the appeal.] The statute expressly requires that a notice of appeal should state the grounds on which the appeal is founded. Vol. I, 28, § 353. This requirement was intended to secure the attainment of several objects at the same time and by the same process: 1. It was intended that the notice should furnish the justice with full and explicit information as to the alleged errors committed in the court below, so that such justice might be able to return fully as to all the objections made; 2. It was intended that the respondent should know what points of error were alleged against the judgment rendered, so that he might be enabled to procure a further or an amended return if that should be necessary for the purpose of securing a fair hearing; and so that he might know what legal grounds of error were assigned, and thus be prepared to meet those on the argument; 3. It was also intended that the appellate court should be apprised of the points brought up for its decision, so that it could intelligently render judgment upon the rights of the parties. Before noticing the cases decided in relation to the notice of appeal provided by the Code, it may be well to examine briefly some of the older cases relating to the same subject and governed by the same principles of law.

Under the old system of review upon a writ of *certiorari*, the affidavit on which it was founded must have stated the grounds upon which an allegation of error was founded. 2 R. S., 256, § 171, 1st ed. Under that statute it was held that where the error relied on was, that the evidence did not warrant the verdict, it was not enough to detail the facts proved, but that the complaining party must specifically state in the affidavit that such was the ground of error. *People* v. *Suffolk Com. Pleas*, 18 Wend., 550. But where it appeared from the affidavit that questions concerning the regularity of the proceedings, the admission or rejection of evidence or the like, were made and decided on the trial, that was held to be a substantial compliance with the statute without specifying at the close of the affidavit the particular grounds on which the party relied. *People* v. *Columbia Com. Pleas*, 6 Wend., 544; *People* v. *Onondaga Com. Pleas*, 8 Id., 509.

A justice was required to stand indifferent between the litigant parties, and where he drew the affidavit and the papers for a *certiorari* at the request of the unsuccessful party, the court quashed the writ. *People* v. *Suffolk Com. Pleas*, 18 Wend., 550. Under the old practice it was not essential that the affidavit should state the verdict or the judgment in the court below; and, if necessary,

it might have been supplied by a supplemental affidavit. *Philips* v. *Brainard*, 2 Cow., 440.

Where the affidavit stated enough to enable the officer, to whom application was made for the *certiorari*, to judge whether errors had been committed in the proceedings in the court below, and where it stated sufficient to inform the justice as to what facts a return would be required, this was held to be entirely sufficient without a formal statement of the grounds of error at the close of the affidavit. *People* v. *Columbia Com. Pleas*, 6 Wend., 544; *People* v. *Onondaga Com. Pleas*, 8 Id., 509.

From the cases thus cited, it is evident that the court acted upon the principle that a substantial compliance with the requirements of the statute was sufficient if it enabled the justice to make a full and accurate return as to the points complained of as error. The same rule of construction ought to prevail under the practice established by the Code. The notice of appeal supplies the place of the affidavit under the old system, and it ought to be held to be sufficient in cases where the old affidavit was held to be sufficient for the purpose of giving notice of the grounds of error.

The cases decided since the enactment of the Code will now be noticed.

There are some cases in which it is important that all the evidence taken in the court below should be returned, especially in those instances where the error complained of is, that the judgment is unsupported by evidence, or that it is contrary to the weight of the evidence given on the trial below.

In all such cases the notice of appeal ought to require a return of all the evidence and proceedings below, and also require the justice to certify that he has returned all the evidence and proceedings. Though, as we shall see in a subsequent place, the legal intendment, in the absence of proof to the contrary, will be, that all the evidence has been returned by the justice.

There are cases, however, in which it is not at all important to the appellant that all the evidence should be returned, as where the error relied upon is some erroneous ruling of the justice which will reverse the judgment irrespective of any question as to the evidence or the merits of the action. In such cases the notice of appeal need not call for a return of all the evidence, nor need it require a return of any matters, except such as will clearly present the point alleged as error. *Partridge* v. *Thayer*, 2 Sandf., 227. And, in such a case, it will not be necessary for the justice to return all of the evidence, nor any portion of it, except such as may bear upon the point complained of as the ground of appeal.

It has become quite a common practice among justices to return all, or substantially all, the evidence, whether called for in the notice of appeal or not.

In some cases this may be entirely proper, particularly where the points alleged as error are affected to a greater or less extent

by all the evidence so returned. But where the evidence does not at all affect the questions under review, and it is not called for by the appellant's notice of appeal, there is no necessity, nor any propriety in returning such useless matter, which merely serves to incumber the record, to waste time, and in some cases to mislead the parties and the court.

It is not overlooked that some of the cases have declared that it is the duty of a justice to return all of the evidence under the practice established by the Code.

But such general language must be limited to the case presented; and more than this, the construction to be adopted must be such as will carry into effect the great object of all appeals, which is to require a return of so much of the proceedings and evidence as will fairly present the error complained of, while all other extrinsic matters will be excluded.

The propriety of this rule will be entirely evident upon considering the practice as to new trials in the county court. In those cases in which a new trial is had in the county court, the justice does not return the evidence taken in the court below. Vol. I, 30, § 360.

The reason is obvious, since the evidence could not be of any use on the new trial. But the principle is the same where the cause is decided upon the justice's return; and in that case no evidence should be required to be returned when it is clear that it does not in any manner affect the questions under review. Such a rule would be equally advantageous to the parties, to the counsel employed, and to the court itself. Nothing could conduce more to the dispatch of business, and to the certainty of obtaining justice, than a system that requires a full and clear statement of such matters as affect the merits of the parties involved, and then rigidly excludes all extrinsic matters from the record.

How grounds of error ought to be stated.] As a question of first impression, it would seem that there could be very little difficulty in complying with the requirements of the Code in this respect. And yet there is a most irreconcilable conflict in the decisions of the courts upon this question.

The object of the law is clear, and no one doubts that it merely intends to provide that the justice, respondent, and the appellate court shall be informed of the grounds upon which the appeal is founded. The principal difficulties have arisen upon the question whether particular specifications of the ground of error were sufficient in notices under review, and if they were not, what effect followed from the omission or defect in the notice. For the convenience of those who may not have the principal reports upon these points, most of the decisions will be briefly stated.

In *Kelty* v. *Jenkins*, 1 Hilt., 73, the notice of appeal stated the grounds thus: "The judgment is unsustained by, and contrary to, law and evidence;" and this was held insufficient. The

court said that if such a statement were sustained, the notice would be a mere formality, and might be given in every case; and that it would not furnish any information whatever to the respondent or the court as to the grounds on which the appeal was brought.

In *The Mayor of N. Y.* v. *Green*, 1 Hilt., 393, the notice did not state any grounds of error, but referred to the affidavit and the proceedings in the court below as the place where the grounds of appeal would be found; but this was held to be insufficient.

In *Lee* v. *Schmidt*, 1 Hilt., 537, the notice alleged as the grounds of error, "That the judgment rendered by the court is contrary to the clear and decided weight of the evidence produced on the trial of this action," but the statement was held to be defective, and the court said, page 540, "We have, therefore, held that it must specify with reasonable certainty the alleged error or errors, whether in the process, the pleadings, the proceedings at the trial, or in the giving of judgment, that the justice may omit nothing in his return essential or necessary to bring up the matter fairly for review, or, in the event of his neglecting to do so, that the respondent may have an opportunity, before the appeal is brought to a hearing, of applying to the court for an order that the justice return specifically in respect to any matter which may be essential to a full and fair review of the case."

In *Williams* v. *Cunningham*, 2 Sandf., 632, the court said, "The appellant must put his finger on the point relied upon, or distinctly inform his adversary on what ground he alleges that there is error in the judgment." See also *Sullivan* v. *McDonald*, Id., note *a*; *Irwin* v. *Muir*, 13 How., 409.

In *Derby* v. *Hannin*, 15 How., 32, the grounds of appeal were that "The judgment is clearly against the law and the evidence of the case," but this was held to be insufficient, and the court said, page 35, "It is clearly right that the party appealing from a judgment should distinctly take his ground when he appeals, so that the opposite party, if in error, may abandon his judgment and stop the further prosecution of the suit; and so that, if it goes on, the justice may see and know to what point he is called upon to make a return. It is in analogy with all the judicial proceedings, under the Code, to make the parties take their ground and make their objections and exceptions in the first stages of the litigation, that the errors complained of may be corrected when practicable, and the attention of the court of review be chiefly directed to distinct points of law or evidence fairly presented, and expressly decided by the court below."

In *Deuchars* v. *Wheaton*, 16 How., 471, the errors assigned were, "that material testimony offered on the trial was excluded; that material testimony was admitted which ought to have been excluded; that the evidence was insufficient on the question of damages, and that the judgment was against the law of the case;" but the statement was held to be insufficient, and the court said, page 472, "The ground stated should refer to some par-

ticular error of the justice, or decision made during the trial, as that the justice improperly received the witness John Doe, or rejected the testimony of Richard Roe, on a particular point, or overruled an objection to such testimony in whole or on some particular subject of inquiry. If a motion for a nonsuit was made and denied, the ground may then be general that the justice refused to nonsuit. Such an objection will necessarily call for a review of the whole testimony at the time when such a motion was made and denied."

In the cases which have thus far been noticed, it will be observed that the courts with great unanimity enforce the rule which requires that the notice shall state the grounds of appeal. But they do not all harmonize upon the question what is a sufficient statement of such grounds. My own views in relation to the matter can be stated in a few words. Where an appeal is brought because of some defect in the process by which the action was commenced, or in consequence of some defect in the affidavit upon which such process was founded, the notice ought briefly to state such defect. If a motion was made to set aside the process, and it was denied, then state that as a ground of error. The same rule applies to a defective return to process.

If the justice erred in his decision as to the sufficiency of a pleading, and an appeal is founded upon that ground, let that be briefly stated as the error complained of. If the proceedings for the impanneling of a jury were erroneous, such fact can be briefly alleged. So, if the justice errs by rejecting a witness who ought to have been received; or if he improperly receives a witness, or evidence which ought to have been rejected, the notice should state briefly, but plainly, the particular witness or evidence which was so received or rejected. If the justice should err in any other proceeding during the trial, as to any matter of practice, or should deliver an erroneous charge to the jury, the notice ought, in all such cases, to specify distinctly, but briefly, the precise point of objection. When such a mode of stating the grounds of appeal is adopted, the law will be complied with, and the notice be sufficient.

In the classes of cases thus pointed out, it is possible to take a precise objection in the court below, and it is also easy to state that ground of objection in the notice of appeal. But there may be cases in which such a mode of stating the grounds of appeal cannot be adopted. It is true that a defendant may move for a nonsuit in those cases in which he thinks the law does not authorize a recovery by the plaintiff, or where the evidence is entirely insufficient, and if the nonsuit is denied, that decision may be stated as the ground of error. But suppose that a plaintiff proves a plain case as to law and evidence, and the justice or a jury find for the defendant. In such a case it would not be possible for the plaintiff to allege, as grounds of error, anything more than that the judgment was against the evidence given on the trial, and contrary to the law of the case. In such a case no

one could be mistaken as to the cause of complaint. The justice would know that the entire evidence was to be returned; and the respondent would clearly see what he was called upon to answer; and so, too, the appellate court would readily ascertain what matters the appellant desired to review on the appeal. But more than this, the notice in such a case would be as specific as it could be made, and, therefore, it would state the particular grounds on which the appeal was founded. The same rule ought to prevail when a defendant appeals on the ground that the judgment against him is against the law and the whole evidence in the case. But in either case, the appellant would be restricted to the grounds taken, and he must show that the judgment is erroneous as to the law upon all the facts appearing in the case, or that the judgment is contrary to the evidence, or is unsupported by evidence, as the case may be. Under such general grounds of error, the appellant would not be permitted to raise particular questions as to the admissibility of evidence, or the like, since those could, and ought to have been, pointed out specifically.

Such a rule protects the rights of both parties, and it is not difficult in its application to practice. The whole question is of less importance now than formerly, because causes of much consequence will be retried in the county court, and the form of the notice will not be a question in the case. Thus much has been said upon this question, with a view to point out a course of practice which is consistent and practical, as well as convenient and just to the parties.

There is a very important class of cases in which it is not important to state any particular grounds upon which the appeal is founded. In those cases in which a new trial is to be had in the county court, as a matter of course, there is no reason for requiring any statement as to the rulings of the court below, since they are not reviewed in the appellate court. The evidence is not to be returned in such a case, nor anything else but the process, proof of its service, the pleadings or copies thereof, the proceedings and judgment, and a brief statement of the claims litigated. Vol. I, 30, § 360.

In all such cases of appeals, where a new trial must be had in the county court, it will be a sufficient compliance to state, in general terms, that the judgment is contrary to law and evidence. *Fowler* v. *Westervelt*, 40 Barb., 374, 376. The court said: "The amount of the claim of the plaintiffs, litigated in the justice's court, exceeded $50, and on appeal to the county court, the appellant was entitled to a new trial as a matter of right, not dependent upon error in the proceedings in the justice's court. He can only take his appeal by the notice prescribed by § 353, of the Code of Procedure, and it is necessary that he state therein the grounds upon which the appeal is founded; but as the appellate court, in such cases, cannot pass upon any question suggested by the grounds of appeal, but must proceed to a

new trial of the action, whether they can be sustained or not, there can be no reason for requiring particularity in their statement; and an allegation that the judgment was against law and evidence is, therefore, on an appeal in such cases, a sufficient compliance with the requirement that the grounds of appeal shall be stated in the notice."

Consequences of defective statement, &c.] The practice as to the disposition which should be made of a notice which does not properly state the grounds of appeal, has not been entirely uniform. Several different modes have been adopted by the courts in different districts. In some cases the notice is held to be a nullity, and the appeal is dismissed if the statement of the grounds is insufficient. In others the cause is not dismissed, but the appellant is limited to the argument of those grounds stated in the notice. In some others the notice is treated as a mere mode of removing the cause to the appellate court, and all errors appearing in the return are available whether specified in the notice or not. In still others the judgment was affirmed, because of the omission to properly state the grounds of appeal. Some of these cases will now be noticed in detail.

In *Schwartz* v. *Bendel*, 2 E. D. Smith, 123, it was held that an omission to state the grounds of the appeal in the notice would warrant a dismissal of the appeal; and yet the court retained the cause and decided it on the merits, no motion having been made for a dismissal.

In *Derby* v. *Hannin*, 15 How., 32; *S. C.*, 5 Abb., 150, it was held that the appellant was limited to the points specified in the notice of appeal as the grounds of error, and that if those objections were untenable the judgment must be affirmed. And it was further held, that the judgment would not be reversed even though the return disclosed errors for which a reversal would have been certain, had the notice of appeal specified them as grounds of error. But *Forman* v. *Forman*, 17 How., 255, is directly opposed on this point.

In *Deuchars* v. *Wheaton*, 16 How., 471, the grounds of error assigned were: "That material testimony offered on the trial was excluded; that material testimony was admitted which ought to have been excluded; that the evidence was insufficient on the question of damages, and that the judgment was against the law of the case," and it was held that the allegations of error were too vague and general to present any particular point for review, and the judgment was affirmed. In *Bush* v. *Dennison*, 14 How., 307, the notice of appeal was not returned by the justice, and the judgment was affirmed, on the ground that no errors were alleged, and the case was disposed of in the same manner as though a notice had been returned which did not state any grounds of appeal.

In *Lee* v. *Schmidt*, 1 Hilt., 537; *S. C.*, 6 Abb., 183, the error assigned was, "that the judgment rendered by the court is contrary to the clear and decided weight of the evidence produced

on the trial of this action;" but this was held to be insufficient to authorize a review of the judgment, on the ground that it was contrary to evidence, or against evidence, because each of them constitutes a distinct ground of error, and if relied upon, must be distinctly stated. At page 541, the court said: "A verdict or judgment may be erroneous for want of evidence to support it, or it may be against evidence, as where there is no conflict in the testimony as to the facts, and the conclusion founded upon them is erroneous in law, or where there is a conflict among the witnesses, or in the testimony offered, the finding may, as above stated, be against the weight of evidence. These are all distinct grounds of error, for either of which the judgment may be reversed, and if any one is relied upon it must be stated in the notice of appeal. To give notice, therefore, that the ground of appeal is, that the judgment is contrary to the weight of evidence, when the error upon which the appellant means to rely is, that the plaintiff failed *prima facie* to establish any cause of action, would have the effect to mislead rather than to apprise the respondent and the justice of the real ground the defendant meant to take before the appellate court for the reversal of the judgment."

In *Moore* v. *Somerindyke*, 1 Hilt., 199, it was held that no errors would be noticed or considered by the court unless they were stated in the notice of appeal. See *Cristman* v. *Paul*, 16 How., 17, to the same effect by Herkimer county court.

In *McEachron* v. *Rawdles*, 34 Barb., 304, one of the grounds of error assigned was, that "when the jury returned to render their verdict, no one appeared or answered for the plaintiff," and this was held to be insufficient to raise the question whether the plaintiff was called, or whether he was absent, when the verdict was received.

In *Saunders* v. *Keough*, 27 How., 477, one ground of error assigned was, that "the judgment should have been for the plaintiff for at least $15 damages, besides costs, instead of being against him for costs;" an other was, that "the judgment was without evidence, and contrary to law," and it was held that both of these statements of error were sufficient.

In *Webster* v. *Hopkins*, 11 How., 140, the error alleged was, that "the judgment is against law and evidence," and it was held that if the return disclosed any errors sufficient to reverse the judgment such judgment must be reversed even though the particular ground of error was not stated in the notice of appeal. It was also held that the cause must be decided upon what appears in the return, and that the notice of appeal was not to be considered as a part of the return for that purpose.

In *Forman* v. *Forman*, 17 How., 255, it was held that when a notice of appeal states even a single ground of error properly, this will be sufficient to authorize the court to examine the return, and to reverse the judgment for any error appearing therein, even though it is not stated in the notice of appeal.

In several cases it has been held that a defective statement of the grounds of error is available as an objection by the respondent. But it is also held that the only proper way to raise the question is by way of a motion to dismiss the appeal, and that if this is not done, the defect will be waived and cannot be insisted upon on the argument of the cause. *Nye* v. *Ayres*, 1 E. D. Smith, 533; *Partridge* v. *Thayer*, 2 Sandf., 228; *Webster* v. *Hopkins*, 11 How., 140; *Williams* v. *Cunningham*, 2 Sandf., 632; *Sullivan* v. *McDonald*, Id., note *a*.

From this review of the cases cited, it is evident that the decisions are not harmonious. But they are not so conflicting as to prevent the adoption of some general rules which ought to be observed. That the notice of appeal shall state the grounds of appeal is a statutory command, and it must be obeyed. But while this is done, it should be so carried out as to give full effect to the object of such a notice. It is true that the justice and the respondent are to be informed of the errors complained of; but this is not the sole object of a notice of appeal.

It is by virtue of this notice that the appellate court acquires jurisdiction of the cause. And when a return is duly made and filed, the appellate court has complete jurisdiction of the entire cause. If the justice has made a full return of all the evidence, proceedings, objections, and the like, that occurred in the court below, and evident injustice has been done to the appellant, common justice would require that the judgment should be reversed. And if this is not done it must be because of the objection that the ground of reversal was not stated in the notice of appeal. One of the principal objects of the Code was to introduce a system which allowed amendments with great liberality. And surely if any case calls for the application of such a rule, this must be one of them. Code, §§ 8, 173. Again, the court is required to render judgment upon the whole case without regard to technical errors or defects. Code, § 366. If it is urged that the respondent may be injured or misled by adopting such a practice, it is easy to provide a full protection for his rights. If the appellant intentionally omits to state the grounds of appeal, the court may dismiss the appeal for that very reason. So, too, if the notice presented a single ground of error which was properly stated, but it was not well taken as a matter of law, the court undoubtedly has power to limit him to that single objection. So, too, the notice may state the grounds very defectively, and yet may have been intended to state the precise grounds complained of, and in such cases the court has power to enforce a strict rule of construction, or to apply a more practical one founded upon the merits of the case. If an appellant should attempt to evade the requirements of the Code as to stating the grounds of appeal, he could not complain if a stringent rule were enforced against him. But when he has acted in entire good faith, the true practice would be to secure his rights,

and at the same time requiring him to submit to such regulations as will prevent injustice to the respondent.

The power to amend a notice of appeal is clear beyond a question. And when justice will be promoted by such an amendment. it ought to be granted upon such terms as are just to the opposite party. Even this liberal view of the practice will be found not to infringe upon well settled rules of construction, nor upon the interests or rights of the respondent. Suppose that a notice of appeal is defective, and a return is made which states fully all that transpired in the court below, the respondent, by examining the return, can fully and clearly know what errors are set forth in the return, and duly objected to in the court below. And, if he has this information, he can readily ask for an amended return, if that is necessary to protect his rights.

It is undoubtedly the duty of the court to prevent an appellant from taking any advantage from a deceptive or secret practice, or from springing any surprises upon his adversary. But, when this is done, the practice ought to be as liberal as possible. It is a familiar fact with the entire profession, that they look to the justice's return for the errors which are to be considered by the appellate court. And since both parties have free access to it, and since either of them may procure an amendment in a proper case, the true practice would be to treat the return as the repository of the matters to be reviewed.

While the utmost liberality in practice is thus advocated, it is not by any means intended to claim that the statute can be disregarded. The utmost that is intended to be suggested is, that the statute shall be so applied and enforced as to subserve the interests of the parties and of justice, instead of being enforced in accordance with a technical rule of construction or of practice.

Where an amendment of the notice of appeal is asked before a return is made, it will be granted by any court, if justice will thereby be promoted. And if an amendment is necessary for the same purpose, even after the return is made and filed, such amendment will be granted upon such terms as will secure the interests and the rights of both parties.

In the higher courts of record no grounds of appeal are stated in the notice of appeal. And since the change in the law requiring new trials in the county courts, the statement of the particular grounds of appeal is dispensed with. *Ante*, 778. There is, therefore, but a limited class of cases, and those of the least importance, in which the grounds of appeal need be stated with any particularity. Under such circumstances the utmost liberality of practice ought to prevail. And while the notice must be sufficient to procure a proper return, and also to inform the respondent and the appellate court of the errors complained of, when this object is accomplished the law will be satisfied. The exercise of the power of granting amendments liberally need not produce any injurious results, nor need it introduce any abuses.

If a party, by negligence, omits to state the grounds of appeal

fully or accurately, he must take the risk of obtaining leave to amend, and when the application is made the court can always require satisfactory evidence of the good faith of the application, and of the propriety of the amendment before it is allowed. With such safeguards the interests of all parties may be promoted, and a liberal system of practice adopted and administered.

The correct practice on the part of the appellant will be to state fully and accurately all the grounds upon which he relies for a reversal of the judgment appealed from; and if this is done with care and in good faith, he may rely upon the liberality of the appellate court in relieving him from all unavoidable errors or omissions, when it will be for the furtherance of justice to supply the defects. If, on the other hand, he should carelessly or negligently omit to state his grounds of error carefully or accurately, or if he should intentionally state them in a deceptive or fraudulent manner, it is certain that the appellate court can and will apply the proper corrective when the question is presented for its consideration. The power of courts to permit amendments of a notice of appeal is now unquestioned. *Wood* v. *Kelly*, 2 Hilt., 334; *Irwin* v. *Moore*, 13 How., 410; and see *ante*, 759 to 762.

Notice of appeal must be returned.] The statute in express terms requires that the notice of appeal shall in all cases be annexed to the return. Vol. I, 30, § 360. And even before this statutory requirement, it was held that an appeal might be dismissed if the notice of appeal was not attached to the return and filed with it. *Cabre* v. *Sturges*, 1 Hilt., 160. So, too, it was held that the judgment would be affirmed for the reason that no grounds of error appeared to be assigned. *Bush* v. *Dennison*, 14 How., 307.

Defective or irregular service of notice.] An objection that a notice of appeal from a justice's court has been served after the time prescribed by the statute, can be taken advantage of only by a motion to dismiss the appeal when that fact does not appear upon the face of the return itself. *Mills* v. *Shult*, 2 E. D. Smith, 139.

Where a notice of appeal is served on the justice within the twenty days allowed by law, but it is not served on the respondent until after that time, the county court is bound to dismiss the appeal upon proper affidavits, and on a motion for that purpose. *People* v. *Eldridge*, 7 How., 108.

It is not a discretionary matter with the county court whether to grant the motion or not; and if the motion is denied upon a proper application, a writ of prohibition will be issued by the supreme court, to prevent further proceedings upon the appeal. *Ib.* This is a jurisdictional question which is not waived by a mere neglect to move at the first term, nor by anything less than some positive act of submission to the jurisdiction of the appellate court. *Ib.* In such a case there can be no amendment since there is nothing to amend, nor anything to amend by; if the notice had been served, and it was defective, such notice might be amended upon a proper motion. *Ib.*

Where, however, an appellant has served his notice of appeal within the proper time, and in good faith, the court has power to correct errors in any other matters necessary to perfect the appeal; and where, in such a case, the amount of costs paid to the justice is insufficient, the court may allow the appellant to pay the balance. *Aldritch* v. *Ketchum*, 12 N. Y. Leg. Obs., 319.

Notice of appeal to county court.

JUSTICE'S COURT.

John Doe *agst.* Richard Roe.	Before RICHARDSON P. CLARK, Esq., a Justice of the Peace of the town of Johnstown, Fulton county.

Take notice that the defendant appeals to the county court of Fulton county, from the judgment rendered herein on the 20th day of July, 1865, in favor of the plaintiff and against the defendant, for the sum of two hundred dollars, damages and costs, and that the following are the grounds upon which this appeal is founded:

1. The justice erred in refusing to quash the warrant issued in this action, as the defendant requested him to do, on the ground that no affidavit had been made or furnished to authorize the issuing of such process.

2. The justice erred in not setting aside the attachment issued in this action, as the defendant requested him to do, for the reason that no bond or other security had been given before the issuing of such process.

3. The justice erroneously refused to grant an adjournment of this cause on the proofs made for that purpose, at the time of applying therefor, as will appear by the facts stated in the return of such justice; such application having been made for the purpose of securing the evidence of A. B., an absent and material witness for the defendant on the trial of said action.

4. The justice erred in excluding A. B. as a witness, when offered by the defendant on the said trial.

5. The justice erred in receiving C. D. as a witness on the part of the plaintiff, and against the objection of the defendant.

6. The justice erred in allowing the plaintiff to put, and to receive an answer to, the following question put to A. B., a witness on the part of the plaintiff, viz.: Do you believe that a legal cause of action has been proved on this trial against the defendant?

7. The justice erred in refusing to allow A. B., a witness for the defendant, to answer the following question: Have you ever heard the plaintiff say anything in relation to the demand sued on in this action?

8. The justice erred in refusing to nonsuit the plaintiff, on motion of the defendant, duly made at the trial.

9. The justice erred in charging the jury that the plaintiff was not entitled to recover upon the note sued upon in this action, notwithstanding the proof of the execution of the note, and its delivery by the defendant to the plaintiff.

10. The verdict and judgment are against the weight of the entire evidence given on the said trial.

11. The verdict and the judgment are entirely unsupported by the evidence given on said trial.

12. On the whole evidence given, the plaintiff was not entitled to recover a verdict and judgment.

13. The verdict and judgment are contrary to law, upon the facts proved on the said trial.

14. The justice erred in not rendering judgment in favor of the defendant.

15. The jury erred in not finding their verdict in favor of the defendant.

16. The defendant failed to appear before the justice, in the action in the court below, by reason of an excusable error or mistake, and manifest injustice has been done to the defendant in this, to wit: the justice rendered a judgment in favor of the plaintiff, and against the defendant for the sum of $200, for goods alleged to have been sold by the plaintiff to the defendant, and the plaintiff and the justice neglected or refused to credit the defendant with the sum of $100, which had been paid on said demand; and the appellant claims that the judgment in favor of the plaintiff against the defendant ought not to have been for a greater sum than $100, with costs, instead of the sum of $200, and costs, as it now stands.

17. The justice erred in not rendering judgment within the time prescribed by law, in this, to wit: the cause was tried without a jury, and submitted to the justice for his decision, on the first day of July, 1865, and said justice did not render any judgment therein until the tenth day of July, 1865.

18. The said judgment is erroneous in this, to wit: that no process was ever served upon the defendant, and the justice erred in refusing to dismiss the action for that reason, on a motion made by the defendant for that purpose.

19. The jury erred in casting lots to determine in whose favor the verdict should be given, instead of determining that question upon the evidence given on the trial.

20. The judgment is erroneous in this: that the defendant is an infant, and did not appear in the action below, and no guardian was appointed by the justice to protect his rights, but he nevertheless rendered judgment in favor of the plaintiff against the defendant.

21. The judgment is erroneous in this: that the justice and the plaintiff were and are cousins, and therefore such judgment was against law.

22. The appeal in this action is taken upon questions of law only, and a new trial in the county court is not desired or intended.

23. The judgment rendered against this appellant was for the sum of $150 damages, and $5 costs, and he claims that the judgment should have been more favorable to him in the following particulars: that the judgment for damages is for too large a sum, and ought not to have been given for more than the sum of $75 damages, with $3.75 costs, instead of $5. (If there are any other particulars in which the appellant claims that the judgment is improper or unjust, state them with particularity.)

24. The justice is hereby required to return all the evidence and proceedings in the cause, and to certify that he has done so.

Dated Johnstown, July 22, 1865.

RICHARD ROE,
or, JOHN M. CARROLL,
Att'y for appellant.

To Richardson P. Clark, *Justice*, and
John Doe, *Plaintiff.*

Where the appeal is brought by one of several defendants the notice ought to state that "the defendant A. B. appeals, &c.," specifying the name of the appealing party. Where a new trial is sought on the ground that "manifest injustice" has been done, it is always prudent, if not absolutely necessary, to state that as one of the grounds of appeal. *Silkman* v. *Boiger*, 4 E. D. Smith, 236. See No. 16 in notice of appeal, above.

Stamps.] Upon every notice of appeal from a justice's or other inferior court, there must be a stamp of the value of fifty cents. Vol. I, 1104, 1109. The stamp ought to be affixed and canceled before the notice of appeal is served; but the copy served need not show that the original was stamped. Vol. I, 1109, *Watson* v. *Morton*, 27 How., 294. As to the power of the appellate court to permit a stamp to be affixed upon a notice of appeal after its service, see Vol. I, 1109.

Time of serving notice of appeal.] The statute has declared explicitly, that as a general rule, the notice of appeal must be served within twenty days after the rendition of the judgment. Vol. I, 28, § 353. To this general rule, there is an exception which allows an appeal to be taken within twenty days after personal notice of the judgment, if it was rendered upon process not personally served upon the defendant. *Ib.*

It is exceedingly important that a party should be vigilant in securing his rights, if he intends to bring an appeal from a judgment rendered against him. The statute which limits the time for bringing an appeal is imperative, and the courts have no power to dispense with the limitation prescribed by the statute. *Figaniere* v. *Jackson*, 4 E. D. Smith, 477; *S. C.*, 2 Abb., 286; *Wait* v. *Van Allen*, 8 E. P. Smith, 319; *People* v. *Eldridge*, 7 How., 108. The cases relating to the power of the court to dispense with the limitations fixed by the statute by extending the time to appeal, are many of them collected in 2 Whit. Pr., 720, 721, 722. But it has been held, that a respondent who gives an admission of "due service" of a notice of appeal, which is not served in time, will be estopped from raising any objection or question as to the time of the service. *Struver* v. *Ocean Ins. Co.*, 9 Abb., 23, 27. Where a judgment has been rendered in the district courts of New York, a notice of appeal may be served immediately after the justice renders judgment, and before it is docketed by the clerk of the court. *Griswold* v. *Van Deusen*, 2 E. D. Smith, 178. The same rule is equally applicable to justices' courts. The statutes relating to the rendition of judgments, are given in full. Vol. I, 55, 56. The statute also requires a justice to enter judgments in his docket. Vol. I, 68, 69; Id., 56, § 115. In giving construction to these statutes, the courts have held that there may be a valid rendition of judgment, although it is not entered in the docket, but merely in the minutes of the justice. *Hall* v. *Tuttle*, 6 Hill, 38; *Walrod* v. *Shuler*, 2 Comst., 134. Ordinarily, a justice enters judgment in his docket about the time of rendering it; and usually it is done by entering it in the docket at once, if it is not so entered in the first instance.

There is one aspect in which it is important to observe the fact that an appeal may be taken as soon as judgment is rendered and entered in the justice's minutes, even though it is not immediately docketed. As soon as a judgment is rendered from which an appeal may be taken, the time for appealing begins to run; and if an appeal is not taken within twenty days from that

time, the right of appeal will be lost. And it may therefore happen, that an appeal is brought within twenty days after a judgment is docketed, and yet not be in time on account of the fact that it was not docketed on the same day it was entered in the justice's minutes. It has been held that a judgment is legal and valid, although not transcribed into the docket until two, three or four days after its rendition and entry in the justice's minutes. *Hall* v. *Tuttle*, 6 Hill, 38; *Walrod* v. *Shuler*, 2 Comst., 134. Every vigilant party, and every careful practitioner, will, therefore, be certain to ascertain when an appealable judgment has been rendered, and to take such action as shall secure an appeal in due season. It will be observed, that a right of appeal is given in those cases in which it is taken within twenty days after judgment; but the statute does not declare that it must be a docketed judgment before the appeal is taken; and this leaves the question to be settled by the common law rules, which have already been stated, as enforced by our courts.

Manner of serving the notice of appeal.] The statute is so clear and so explicit upon this point, that comment is unnecessary. Vol. I, 28, § 354. But an analysis and a separate statement of some of the provisions of this section may be convenient.

1. All such notices must be in writing, and the service is made by delivering or serving a copy of it in the manner prescribed by law; 2. The service must be made in due season; 3. It must be made upon the respondent; and if there are several, a separate service must be made upon each, where the service is personal; 4. It must be served upon the justice personally, if he is living and within the county, or if he holds a court which has a clerk, which is the case with some of the city courts, the service may be made upon such clerk personally; (5. Where such service cannot be made as prescribed by this section, it may be made by filing the same with the clerk of the appellate court. Vol. I, 29, § 359;) 6. Where a respondent cannot be found so as to make a personal service of a copy of the notice, it may be left with some member of his family, of suitable age and discretion, if he is a resident of the county; 7. If such respondent is a non-resident of the county, or he cannot, after due diligence, be found therein, such service may be made upon the attorney or agent who appeared on the trial, if he is a resident of the county; 7. If such respondent is a non-resident, and neither he nor such agent or attorney can be found in the county, the service of such copy may be made by leaving it with the clerk of the appellate court.

Where the respondent is a resident of the county, it must be shown that due diligence was used, and that the respondent could not be found in the county, or a service upon his attorney or agent will be insufficient. *Duffy* v. *Morgan*, 2 Sandf., 631. In this case it was held that due diligence had not been shown. But see *Loescher* v. *Nordmeyer*, 13 How., 146; *S. C.*, 3 Abb., 244.

To render the service of a notice of appeal effectual, such copy must be delivered absolutely, and if it is delivered to the attorney

of the respondent, and then immediately received back with an understanding that efforts will be made to serve it upon the respondent, the service upon such attorney will be a nullity, even though the respondent should prove to be a non-resident of the county. *Earll* v. *Chapman*, 3 E. D. Smith, 216.

Where there is a regular clerk of a court, the service of a notice of appeal upon him is as valid as a service upon the justice who holds the court; and the service upon the clerk dispenses with any service upon the justice. *Irwin* v. *Muir*, 13 How., 409; *S. C.*, 4 Abb., 133. And the rule is the same although there may be several justices of the court. *Ib.*

Under the old system of practice, appeal papers might have been served upon a member of the justice's family, at his residence, if they were of suitable age and discretion, as in case of a service upon his wife, if he was absent from the county so that a service could not be made upon him. *People* v. *Ulster Com. Pleas*, 7 Wend., 492; *People* v. *Judges of Dutchess Com. Pleas*, 7 Cow., 487. This practice, however, seems to be abrogated, for in such cases it is provided that the service may be made upon the clerk of the appellate court. Vol. I, 29, § 359.

The service of the notice must be by a written or printed copy, for a verbal notice is a nullity. *People* v. *Eldridge*, 7 How., 108.

Payment of costs, &c.] One of the prerequisites of a valid appeal is the payment of the costs of the action below, together with the justice's fee for making a return.

The statute declares that this must be done at the time of making the service of the notice of appeal. Vol. I, 28, § 354. If this payment of the justice's fee is not made in due time he cannot be compelled to make a return. *Van Heusen* v. *Kirkpatrick*, 5 How., 422. The justice may, however, accept the money at a subsequent time, and if he does so he will then be bound to make a return. *Ib.*

The proper remedy for non-payment of the fee is by motion to dismiss the appeal. *Ib.*; *Griswold* v. *Van Deusen*, 2 E. D. Smith, 178. If the appellant has, in good faith, served a notice of appeal in proper time, the appellate court has power to relieve him from the consequences of an accidental omission to pay the full amount of costs or fees to the justice, by allowing him to pay the balance at a subsequent time. *Aldrich* v. *Ketchum*, 12 Leg. Obs., 319. Although a justice may refuse to make a return until his fees are paid, yet, if he voluntarily makes a return, the non-payment of his fees is no ground of motion by the respondent to dismiss the appeal. *Bray* v. *Redman*, 6 Cali., 287.

Under the old system of practice, the non-payment of the costs and fees in due time was a most important matter, as it deprived the appellant of his right of appeal. *Ex parte Stevens*, 6 Cow., 69; *People* v. *Dutchess Com. Pleas*, 7 Cow., 487; *People* v. *Saratoga Com. Pleas*, 1 Wend., 282. And the amount must have been paid in money, and merely crediting the justice with the amount of his fee, was held not to be such a payment as

would sustain an appeal. *Ex parte La Farge*, 6 Cow., 61. But, as the law now stands, an appeal will be effectual if the justice can be induced to make a return, whether his fee has been paid or not. *Van Heusen* v. *Charles*, 5 How., 422, 424. Where there is a clerk of an inferior court, the payment of the fee may be made to the justice, or to such clerk. Vol. I, 28, § 354; *Loescher* v. *Nordmeyer*, 3 Abb., 244.

New York city.] The proceedings on appeals from the district and marine courts in New York city are explicitly pointed out by statute. Vol. I, 28, § 354. Where the general term of the marine court merely reverses a judgment which had been rendered in favor of the plaintiff, but without ordering a new trial, or rendering a final judgment in favor of the defendant, no appeal will lie to the common pleas, for the reason that such a decision is not a final determination of the rights of the parties to the action. *Howe* v. *Julien*, 2 Hilt., 453. That court at general term may reverse, affirm or modify the judgment appealed from, and upon a reversal may order a new trial, or may give final judgment for the defendant, when it is apparent that the plaintiff cannot recover upon any possible state of proofs applicable to the issues in the case. *Ib.*

Staying execution.] As the law stood before the amendment of the Code in 1863, all judgments were reviewed upon the facts appearing in the justice's return. And it was entirely optional with the respondent whether to give security or not, for at that time section 355 read as follows: "If the appellant desire a stay of execution of the judgment, he shall give security as provided in the next section." But when the law was changed so as to provide for a new trial of the cause in the county court, this section was amended so as to read as follows: "When, by the terms of section three hundred and fifty-two, the appellant is entitled to a new trial in the appellate court, he shall, at the time of taking his appeal, and in all other cases, if he desires a stay of execution of the judgment, give security as provided in the next section." Vol. I, 29, § 355. The first thing to be observed is, that a material change has been made in the phraseology of section 355. As it stood before 1863, the appellant clearly might give security and stay execution, or he might omit it, at his option. If the legislature did not intend to change the rule, they certainly would not have changed the language of this section, because, if it was intended to leave it optional with the appellant, whether to give security or not, as he might desire, the statute was sufficient for that purpose as it then stood.

As the statute now stands, an appellant must give security, in every case of an appeal where a new trial is a right and a matter of course. The statute, by declaring that in certain cases a new trial shall be had in the county court, have, in effect, declared that on serving a notice of appeal, a new trial is ordered, and the effect of such an order would be to supersede the judgment in the court below. But to provide for a new trial in this man-

ner, and thus deprive the respondent of any remedy upon the judgment below, would work a great injustice to respondents in many cases, if no provision were made for their protection. And for this reason, it is provided that in all cases an undertaking shall be given by the appellant, if the appeal is taken in a case in which a new trial takes place as a matter of course, and as a legal right. This operates to prevent a party against whom a judgment has been rendered from avoiding its effect by merely serving a notice of appeal, and then squandering property which would be liable to execution if the judgment below could be enforced. And it also requires the appellant to provide for the increased costs which always follow a new trial in the county court. Vol. I, 29, § 356.

If a notice of appeal is served in such a case in good faith, and there is an accidental omission to execute the proper undertaking, or if the one served is defective, the appellate court may undoubtedly relieve an appellant upon proper terms. Code, §§ 173, 327, 328; and see also *Onderdonk* v. *Emmons*, 2 Hilt., 504; *Wood* v. *Kelly*, Id., 334. The true construction of section 355 is to require an undertaking in all cases in which a new trial is to be had in the county court. 2 Till. & Shear., 1000. If this is not given, the appeal will not be perfected, and it may be dismissed on motion, unless the court should, for good reasons, permit an undertaking to be subsequently executed and served. In all other cases, that is, where the cause is heard and decided upon the justice's return, the appellant may give security or not as he may elect. If he furnishes it, the proceedings on the judgment below will be stayed; if he neglects to give it, the judgment may be enforced by execution in the same manner as though no appeal had been taken.

An appeal from a judgment, even where a new trial may be had, does not extinguish the judgment in the court below; it merely supersedes all proceedings upon it, and if the appeal is dismissed, or is discontinued, the justice's judgment remains in full force and effect, and may be enforced as though no appeal had been taken. *Van Slyke* v. *Lettice*, 6 Hill, 610, 612; *Miller* v. *Van Anken*, 1 Wend., 516, 517; and see *Sholts* v. *Judges of Yates Co.*, 2 Cow., 506; *Seymour* v. *Dascomb*, 12 Wend., 584.

The appellant may, in all cases, avoid the necessity for executing an undertaking, if he prefers to do so, but in order to effect this, he must state in his notice of appeal that the appeal is taken upon questions of law only, and in that case the cause will be heard and decided upon the facts appearing in the return, without any reference to the amount of the judgment, or the claim made in the pleadings. Vol. I, 27, § 352; Id., 29, § 355. But if no undertaking is given, the respondent may take out an execution in the court below and collect the judgment, just as though no appeal had been taken.

But where an appeal entitles a party to a new trial as a matter of right, the law is imperative that an undertaking shall be given

in every case. And even though the judgment of the court below could be enforced by issuing an execution upon the judgment, that fact would not make any difference as to the construction of the statute, for the construction of the statute depends upon its language, rather than upon the effects which may follow from any particular construction which may happen to be adopted.

Undertaking on appeal.

IN JUSTICE'S COURT.

John Doe *agst.* Richard Roe.	Before R. P. CLARK, Esq., a Justice, &c., of Johnstown, Fulton county.

Whereas, on the 20th day of July, 1865, the plaintiff recovered judgment against the defendant for two hundred dollars damages and costs (or for the recovery of certain personal property, *or otherwise as the case may be*).

And, whereas, the appellant intends to appeal from the said judgment to the county court of Fulton county. Now, therefore, we, Eli Pierson and Daniel Stewart, of the village of Johnstown and county of Fulton (or of No. street, in the city of , county of , merchant, &c.), undertake, pursuant to the statute, that if judgment is rendered against the appellant on such appeal, and execution thereon is returned unsatisfied in whole or in part, we will pay the amount unsatisfied.

ELI PIERSON.
DANIEL STEWART.

Dated this 20th day of July, 1865.

The statute requires that the undertaking shall be approved by the county judge or by the court below. Vol. I, 29, § 356. This approval may be indorsed upon the undertaking, and may be in the following form:

Approval of undertaking.

I approve of the within undertaking, and of the sufficiency of the sureties named therein.

R. P. CLARK, *Justice, &c.,*
or, JOHN STEWART, *County Judge.*

Dated July 20th, 1865.

If a sufficient undertaking, properly approved, is delivered to the court below before an execution has been issued, it will prevent the issuing of an execution. Vol. I, 29, § 357. So, if an execution has actually been issued, the service of a certified copy of the undertaking upon the officer holding such execution, will stay further proceedings thereon. *Ib.*

The certificate is to be made by the court below, and ought to be indorsed upon the copy of the undertaking which is served upon the officer. The certificate may be in the following form:

Form of certificate.

I, R. P. Clark, the justice before whom the judgment in the within entitled action was rendered, do certify that an appeal has been taken

upon the said judgment, and that an undertaking, in due form of law, has been executed and duly approved by me (or by John Stewart, county judge of Fulton county).

R. P. CLARK, *Justice, &c.*

Dated July 20th, 1865.

Although a certified copy of the undertaking must be served upon the officer where an execution has been issued or levied, it is not necessary to serve any copy thereof upon the respondent or his attorney. *Jackson* v. *Smith*, 16 Abb., 201.

The original undertaking is usually delivered to the court below or to the clerk, where there is one; but where such service cannot be made by reason of the death of the justice, his removal from the county, or from any other cause, the undertaking must then be filed with the clerk of the appellate court. Vol. I, 29, § 358. Notice of such filing must then be given to the respondent or his attorney, in the same manner that notices of appeal are served. *Ib.*

Form of notice.

IN JUSTICE'S COURT.

John Doe *agst.* Richard Roe.	Before R. P. CLARK, Esq., a Justice, &c., of Johnstown, Fulton county.

To JOHN DOE, plaintiff:

You will take notice that the undertaking executed for the purpose of staying execution in the above entitled action, on the appeal therein to the Fulton county court, was duly filed with Mortimer Wade, Esq., clerk of Fulton county, on the 20th day of July, 1865.

RICHARD ROE,
or, McINTYRE FRASER,
Att'y for appellant.

Where an appellant desires a stay of execution upon the judgment in the court below, he must be careful to execute and deliver a proper undertaking in the manner prescribed by statute, for, until this is done, there will not be any stay of proceedings on the judgment by the court below. *Conway* v. *Hitchins*, 9 Barb., 378; *Onderdonk* v. *Emmons*, 2 Hilt., 504; *S. C.*, 17 How., 545; 9 Abb., 187.

If a levy has been made by an officer, under an execution, before the execution and delivery of the undertaking required by law, the service of a duly certified copy thereof upon the officer will arrest the proceedings in the state they may be at the time of the service, but the levy is not thereby discharged, nor can the appellant require that the goods levied upon shall be returned to him before the appeal is disposed of. *Smith* v. *Allen*, 2 E. D. Smith, 259; *Rathbone* v. *Morris*, 9 Abb., 213; *In matter of Berry*, 26 Barb., 55; and see *Bowman* v. *Cornell*, 39 Barb., 71.

But the levy must be one which was made in good faith, and before security was given and approved. And where an execu-

tion was handed to an officer, but before a levy was made, the appellant served a proper undertaking upon the justice, and a copy thereof upon the plaintiff, but not upon the constable, whereupon the plaintiff directed the officer to make a levy, which was done, the court set the levy aside as fraudulent. *Jones* v. *McCarl*, 7 Abb., 418. And whenever an execution is issued and levied upon the appellant's property, after the service of a proper undertaking, the execution and levy will be set aside. *Jackson* v. *Smith*, 16 Abb., 201. If an undertaking is defective, the appellate court has power to allow an amendment, and will grant an order for that purpose in a proper case. *Wood* v. *Kelly*, 2 Hilt., 334; and see *Teall* v. *Van Wyck*, 10 Barb., 376. So the court may, in such a case, allow the filing of a further undertaking. *Sternhaus* v. *Schmidt*, 5 Abb., 66. The appellate court has no power to stay proceedings upon the judgment below, on any other grounds than those prescribed by the statute. *Hawkins* v. *Mayor of N. Y.*, 5 Abb., 344. As to the effect of an appeal upon a judgment when offered as a set-off, or is claimed to be a bar by way of a former adjudication, see Vol. I, 950, 968.

Offer to correct judgment.] By a recent change in the law, the litigant parties are permitted to avoid an unnecessary increase of costs. Vol. I, 33, § 371. If a judgment is rendered against a defendant for too large an amount, he may, by making a proper offer to allow a judgment to stand against him for such sum as is justly due, avoid the costs of a new trial, provided he succeeds in obtaining a more favorable judgment than the one in the court below. But to enable an appellant to avail himself of the benefits of this statute, he must comply with its terms. He must state in his notice of appeal in what particular or particulars he claims that the judgment should have been more favorable to him. When this has been done, the respondent may, within fifteen days after the service of the notice of appeal, serve a written offer upon the justice, and upon the appellant, proposing to correct the judgment in the particulars mentioned in the notice of appeal. If this offer is satisfactory to the appellant, he may, within five days after the service, file with the justice a written acceptance of the offer; and if this is done, the justice must make a minute thereof in his docket, and correct the judgment in accordance with the terms so offered and accepted. When this correction has been made, the amended judgment will stand as the judgment in the action, and be enforced accordingly. The execution must be made to correspond with the amended judgment, and any undertaking, given to stay execution, cannot be enforced for more than the amount of the corrected judgment.

Where the notice of appeal specifies the particulars in which the judgment ought to have been more favorable to the appellant than it is, and the respondent does not offer in writing to allow the judgment to be corrected in any of the particulars mentioned in the notice of appeal, the appellant will recover the costs of the

appeal, if the judgment is more favorable to him than the judgment in the court below.

So, too, if such offer be made by the respondent, but it is not accepted, and the judgment in the county court is more favorable to the appellant than the offer of the respondent, the appellant will then be entitled to recover the costs of the appeal. But if the appellant does not state in his notice of appeal in what particular or particulars he claims the judgment should have been more favorable to him, he cannot recover costs unless the judgment be wholly reversed. Vol. I, 34, § 371. The respondent is entitled to costs where the appellant is not; and the appellant cannot recover costs except as provided by the statute, Vol. I, 33, § 371.

The principal controversy which arises under this statute is that in relation to the taxation of costs. To entitle a party to costs under this statute, he must have complied with its terms. And in the order of things prescribed to be done, the first act must be done by the appellant, who is required to state in his notice of appeal the *particular* or *the particulars* in which the judgment below should have been more favorable to him.

The language of the statute is so explicit that it would seem difficult to find any ground for a difference of opinion as to its meaning or construction. It does not declare that a *general* statement may be made that the judgment ought to have been more favorable; but it requires the appellant to specify the *particulars* in which the judgment is unjust or improper. A particular specification, within the meaning of this statute, is one which points out the precise point complained of, or if there are several points, then all should be specified. This construction is still more evident when the whole section is considered.

After such *particulars* are specified, the respondent may offer, in writing, to allow the judgment to be corrected in *any* of the *particulars* mentioned in the notice of appeal. If an offer is made by the respondent, and accepted by the appellant, the justice is authorized and required to modify the judgment in the manner proposed and accepted. This construction will provide a clear, a just, and a safe rule to follow. Each party knows precisely what the other claims, and what he is willing to do to avoid a further litigation of the cause, and the justice and the appellate court have definite grounds upon which they may proceed in the action.

Any other rule of construction would violate the clear language and intent of the statute. Suppose that the appellant should state in *general* language that the judgment below was rendered against him for too large an amount, can it be fairly argued that he specifies the *particulars* in which he claims to be aggrieved? Again, upon such a statement, could the respondent offer to correct the judgment in the *particulars* mentioned? It is true that the respondent might make an offer in which he might specify some *particulars* in which he was willing to change

the judgment; but this would not be a compliance with the intent of the statute, for the object of the law was to permit the respondent, first, to *accept* the terms proposed by the appellant, and not to become an active party by *making offer* of terms. It was intended that the appellant should state just what he claims, and if he admits that a judgment ought to be rendered against him for some amount, he is required to say so, and thus enable the respondent to make an offer to accept a judgment for that amount, or to take the risk of paying the costs of the appeal, in case his refusal to accept is found to be unjust, or, in other words, if the judgment on the appeal is less favorable to him than the offer rejected. These general principles of construction are now well settled. *Barnard* v. *Pierce*, 28 How., 232; *Forsyth* v. *Ferguson*, 27 How., 67; *Wynkoop* v. *Holbert*, 25 How., 158; *Wallace* v. *Patterson*, 29 How., 171. These cases may be harmonized with *Fox* v. *Nellis*, 25 How., 144; and with *Loomis* v. *Higbie*, 29 How., 232, as will be seen in a subsequent place. *Post*, 797.

In *Barnard* v. *Pierce*, 28 How., 232, the statement in the notice of appeal was, "The judgment is for too much," but this was held to be entirely insufficient to entitle the appellant to costs, even though he recovered a more favorable judgment in the appellate court than that rendered below. The court said: "A party appeals because he thinks himself aggrieved.

This statute requires him in his notice of appeal to specify with particularity in what he feels himself aggrieved, so that the respondent may consider upon his judgment and conscience the specifications, and stop the litigation by allowing the judgment to be corrected according to all of the specifications, or such of them in respect to which he thinks the judgment in the appellate court may be more favorable to the appellant than the judgment in the court below. "In the notice of appeal, the appellant shall state in what particular or particulars he claims the judgment should have been made favorable to him." That is, he is not to generalize, but to particularize; to specify minutely and in detail in what the judgment should have been more favorable to him. These statements or specifications must be made separately, and with such precision that the justice, if the respondent shall allow any of them, can correct the judgment from the statement or specification in the notice of appeal. "Within fifteen days after the service of the notice of appeal, the respondent may serve upon the appellant and justice an offer in writing to allow the judgment to be corrected in any of the particulars mentioned in the notice of appeal." All the respondent can do is to offer to allow the judgment to be corrected according to the specifications in the notice of appeal, or any one or more of them, to be designated in the offer. If he should make an offer to allow the judgment to be corrected different from the statement or claim in the notice of appeal, the offer would be nugatory. Under this statute the appellant is the actor, the respondent the person acted upon."

The right of the appellant to costs in the appellate court depends upon the question whether his notice of appeal was sufficient. and not upon the question whether the judgment in the appellate court was more favorable to him than that rendered in the court below. *Forsyth* v. *Ferguson*, 27 How., 67. And where the notice of appeal is defective because it does not specify the particulars as required by statute, the appellant will have to pay costs, even though he recovers a more favorable judgment than that appealed from. *Ib.*

In the case last cited the notice of appeal stated the grounds thus: "The judgment should have been in favor of the defendant and against the plaintiff." In the justice's court the plaintiff recovered $60, besides costs, but in the county court he recovered a verdict for only $55, thus being more favorable to the appellant than the judgment appealed from. But notwithstanding this, the respondent was adjudged to be entitled to costs, for the reason that the notice of appeal did not sufficiently specify the particulars in which the judgment should have been more favorable to the appellant. The court said: "The construction to be given to the terms used in this statute must, to a certain extent, depend upon the object intended to be accomplished by the enactment. Before this amendment, the law required the notice of appeal to state "the grounds upon which the appeal was founded," which were commonly set forth in the form used in the notice in this case. By other provisions enacted with this amendment, the right is secured to the parties to try the cause in the appellate court, where the amount of the claim or claims of either party litigated in the court below exceed fifty dollars. The changes made are substantial and important in this and other respects, rendering the proceeding complicated and expensive. The object of the law in requiring the notice of appeal to state the particular or particulars in which the appellant claims the judgment should be more favorable to him, is indicated in the next sentence of the amendment. It is that the respondent may afterwards serve upon him and the justice, an offer to allow the judgment to be corrected in any of the particulars mentioned in the notice of appeal. To prepare the case for the offer, the notice should indicate clearly to the respondent the particular or particulars in which the judgment should be modified. It is solely for his consideration and action, upon the theory that the further litigation of the matter may be thus arrested. The statute should be so construed as to render it a valuable and practicable improvement, as the legislature designed it to be. It then affords the parties an opportunity to deliberately examine their controversy after one trial and determination of it, and before they enter upon an other. To secure this result, the appellant should do something more than to allege general grounds of error affecting the entire judgment. The terms used in the law, as well as the objects to be attained in its alteration, require it. He must specify, separate, or distinguish in a tangible form, so that the respond-

ent may comprehend the precise change in the judgment to which he is willing to consent. Terms of a general nature are not sufficient. The proceeding will then be plain, intelligible and valuable, affording facilities for the correction of errors, mistakes and misapprehensions, without the intervention of an appellate court." A part of this language is quoted, and with approbation, in *Wallace* v. *Patterson*, 29 How., 170.

If the appellant's notice of appeal properly specifies the particulars in which he claims the judgment should have been more favorable to him, as where he specifies the particular sum to which the judgment ought to be reduced, the respondent may then accept the proposition, or he may himself offer to accept a judgment for some other particular sum, and if the appellant rejects this offer, and he does not recover a more favorable judgment in the appellate court than the offer made by the respondent, then the appellant must pay costs. Vol. I, 33, § 371. This rule of construction will require each party to be the actor in a proper case, and it is in accordance with the suggestions made by the court in *Wallace* v. *Patterson*, 29 How., 175, 176, and the decision in *Loomis* v. *Higbie*, 29 How., 237 to 239.

The offer must be in writing, and served upon the justice and the appellant. The proper practice will be to draw a sufficient offer, and then make copies thereof, and follow this by delivering the original to the justice, and a copy thereof to the appellant, and retaining a copy to prove service.

There need not be any particular form of offer if it clearly specifies what is offered by the respondent. And an offer in the following form will be sufficient:

Form of offer by respondent.

IN JUSTICE'S COURT.

John Doe *agst.* Richard Roe.	Before R. P. CLARK, a Justice, &c., of Johnstown, Fulton county.

Judgment rendered in favor of the plaintiff and against the defendant, on the 20th day of July, 1865, for $150 damages and $5 costs.

Appeal brought by the defendant on said judgment, to the Fulton county court, on the 20th day of July, 1865.

I, John Doe, the plaintiff and respondent in said action, do hereby offer to correct or modify the judgment appealed from, as specified in the notice of appeal, by reducing the judgment for damages from $150 down to the sum of $75; and also, by reducing the amount of costs from $5 to the sum of $3.75.

Dated Johnstown, July 30, 1865. JOHN DOE,
Respondent.

If the appellant concludes to accept this offer, he must do so within five days after its service upon him. And he must, within that time, file a written acceptance thereof with the justice who rendered the judgment. The statute does not require the service of a copy of the acceptance upon the respondent.

Form of acceptance.

[Title same as in offer.]

I, Richard Roe, the defendant and appellant in the above entitled action, hereby accept the offer made by John Doe, the respondent, to correct or modify the judgment appealed from, in the manner specified in his offer of the date of July 30, 1865.

Dated Johnstown, August 3, 1865. RICHARD ROE.

SECTION III.

RETURN ON APPEAL.

General object and features.] The practice in justices' courts differs so materially in some respects from courts of record, that a peculiar system of reviews is indispensable. There is no such thing as a case or bill of exceptions in these inferior courts; and yet there are decisions and questions which are as much reviewable as similar decisions or questions made by or in a court of record. For the purpose of determining what matters transpired in the court below, in inferior jurisdictions, it has long been a general practice to require the justice to make a *return* of his proceedings. This return, however, is not ordered or required unless an appeal is taken in some legal form, to an appellate court.

The party appealing has usually been required to state the causes for his appeal. Under the old *certiorari* system, the grounds of appeal were required to be stated in the affidavit upon which the writ was founded. And under the present system the party must state the grounds of his appeal in the notice of appeal. And it is in response to these specified grounds that a particular return is supposed to be important.

In common practice, however, the justice makes a full return of the evidence and proceedings had before him, including all objections taken on the trial, or preliminarily thereto. This return, when made and filed in the appellate court, constitutes the record of the proceedings in the court below, and it is upon this that the judgment of the appellate court is founded, in those cases in which the cause is decided upon the facts set forth in the return. What intendments will be made in relation to the contents of the return, will be explained in a subsequent place. *Post*, 907. Until a return is made the appellate court cannot review the judgment rendered in the court below; and when a return has been made, the cause will not be heard unless the original return or a certified copy of it is submitted to the court. *Smith* v. *Van Brunt*, 2 E. D. Smith, 534. If the original return is lost, the parties may procure a new one, or, by their consent, the justice may sign the copy presented. *Ib.*

When to be made.] The statute has prescribed a rule in relation to the time of making a return on appeal. It must be done after ten and within thirty days after the notice of appeal is served. Vol. I, 29, § 360. In the ordinary practice, the statute rule is

not enforced with strictness, and the justice is permitted to consult his own interests and convenience within reasonable limits. This, however, is a mere matter of courtesy, for a return must be made in the manner prescribed by statute, if this is insisted upon, and if the justice fails to discharge his duty, he may be subjected to the costs of an attachment, or of a motion.

Statutes which fix a time for making such returns are usually construed to be merely directory so far as their validity depends upon a compliance with the requirements. And, under a former statute, which required the justice to make a return "as soon as conveniently may be, and not exceeding ten days thereafter," that is, after the appeal was brought, it was held that the statute was merely directory; that the return was legal and valid whenever filed, and that after the return was filed the appeal would not be dismissed on a motion for that purpose. *Ex parte Kellogg*, 3 Cow., 372; see Laws 1824, ch. 238, §§ 36, 37. This rule applies to those cases only in which the appeal is properly brought and perfected. And where a justice refuses to make any return because his fees were not paid by the appellant at the time of serving the notice of appeal, the appellate court may dismiss the appeal on the respondent's motion. *Van Heusen* v. *Charles*, 5 How., 422. And the same rule would be applicable in any case in which the negligence, omissions, or frauds of the appellant were the cause of delay in filing the return. *Ib.* The court may, however, relieve the appellant, in a proper case, by extending the time within which he may be able to procure a return. *Ib.*

The time within which a justice is required to make a return is not limited by his term of office; and he is as much required to make a return after he has gone out of office as before that time. Vol. I, 30. § 361.

What to contain.] The practice has not been entirely uniform in this state as to the form of the return. Usually, however, there has been but one form of return. The Revised Statutes of 1830 required two different forms of returns, one in the case of a *certiorari*, and the other when an appeal was taken.

The Code restored the old system of a single form of return in all cases. But, by a recent amendment of the Code, the law has been so modified as to require two different kinds of return, which are quite analogous to the practice under the Revised Statutes. As the law now stands, if an appeal is taken in a case in which there cannot be a new trial, but the case is disposed of upon the facts appearing upon the face of the return, such return must contain the evidence, the proceedings and the judgment. Vol. I, 29, § 360. But where an appeal is taken in a case in which a new trial is to be had in the county court, the justice does *not* return the *evidence*. In such a case, he must return the process by which the action was commenced, with the proof of the service thereof, the pleadings or copies of them, the proceedings and judgment, together with a brief statement of the amount

and nature of the claims litigated by the respective parties. Vol. I, 30, § 360. The forms of proper returns will be given in a subsequent place. *Post*, 807 to 809.

In those cases in which a new trial cannot be had in the county court, the justice is required to return the *testimony, proceedings* and judgment. Vol. I, 29, § 360. And it is now a settled rule of construction, that in such cases the justice must return *all* the *evidence* and *proceedings* in the cause. *Orcutt* v. *Cahill*, 10 E. P. Smith, 578; *Hance* v. *Cayuga & Susquehanna R. R.*, 12 Id., 431; *Calligan* v. *Stiles*, 12 How., 495. The head note of this last case is wrong. See 13 How., 96, *erratum; Belshaw* v. *Colie*, 3 Code R., 184; *McCafferty* v. *Kelley*, 2 Sandf., 637.

In *Orcutt* v. *Cahill*, 10 E. P. Smith, 578, this subject was fully and carefully considered by the court of appeals. The court said: "The only question which can be made is the one argued by the defendant's counsel, namely, that it does not appear by the justice's return that all the evidence is set forth; and, in such a case, it is argued that a judgment cannot be reversed upon the facts, because it may be that, if all the evidence had been stated, a defense would have been established. I do not think that position can be sustained. The provision of the Code of Procedure bearing upon the subject, is section three hundred and sixty, which makes it the duty of the justice to make a return to the appellate court 'of the testimony, proceedings and judgment, and file the same in the appellate court, &c.' In obedience to this direction, the return under consideration professes to set out the testimony given on the trial. It states that the plaintiff, to maintain his action, called a person who is named as a witness, and whose testimony on direct and cross-examination is then given; and this is followed by the statement of the calling and examination of an other witness whose testimony is also given, and then it is said that the plaintiff rested. The defendant's testimony is then set out in the same way, and then this remark is made: '*The testimony here closed.*' It is not said in so many words, that what is thus given is all the testimony produced in the case; but if we read the return in connection with the law pursuant to which it was made, I think it would be excessively hypercritical to say that it does not appear that all the testimony is stated in the return. Indeed, I think that a justice's return under this act, setting out testimony in detail, should be understood as stating the whole evidence, unless the contrary distinctly appears; and such is the judgment of the court." The court also notice the fact that a different practice formerly prevailed under the old statute, but that practice is expressly overruled.

There are some facts of a general nature that ought to be stated in every return which is made in a case in which the decision of the cause is founded upon the return.

It ought to appear how the action was commenced, whether by a voluntary joining of issue without process, or by process, and if by the latter, what kind of process; when issued, served

and returned; the time and place of joining issue; the nature of the pleadings; the various adjournments; the time and place of trial; the evidence given and the disposition of the various questions and objections arising during such trial; the verdict of the jury, if any; the judgment and the time of its rendition; and the time when the appeal papers were served. The notice of appeal must also be returned with the return, since the statute expressly requires it. Vol. I, 30, § 360; and see *Cabre* v. *Sturges*, 1 Hilt., 160. The return is intended to be a complete and authentic report of all the material proceedings in the court below; and no return will be such as the law demands unless it complies with this requirement of the law.

A return will be defective when it does not make any reference to any process issued in the cause, nor mention any date of the appearance of the parties, or of the trial, but merely sets forth the pleadings and the evidence, and that a judgment was rendered on a day specified. *Peters* v. *Diossy*, 3 E. D. Smith, 115.

The return ought either to state the substance of the pleadings of the respective parties, or to set forth copies of them.

In *Roulston* v. *McClelland*, 2 E. D. Smith, 60, 61, the court said: "The return in this case does not inform us of the nature of the action, what was the ground of complaint, nor what was the issue between the parties; and no arguments are submitted from which we can infer what was the precise point in contest before the court below.

"The justice appears to have rendered judgment against the defendant for the value of certain goods. We might, with great propriety, decline reviewing that judgment, where nothing is before us but the evidence in the cause, upon which the broad question is presented, whether that evidence would warrant *any judgment* against the defendant under any supposable state of the pleadings, or upon any possible issues between the parties. We are not willing to sanction such a precedent. The return is grossly imperfect, and a review of a case in appeal, without the pleadings before us, must, in general, be to a great extent a review founded in conjecture."

If a return does not state the substance of the pleadings, nor set them out, a copy of them ought to be annexed to it and referred to in such return. *Spring* v. *Baker*, 1 Hilt., 526; and see *Smith* v. *Van Brunt*, 2 E. D. Smith, 534.

Where a return shows that important questions were raised as to the admissibility of evidence in the court below, but it does not disclose what disposition was made of such questions, the appellate court may, and usually will, allow the appeal to stand over for the purpose of procuring a further return. *Matthews* v. *Fiestel*, 2 E. D. Smith, 91. And upon the coming in of such further return the court will render judgment upon the questions involved in the appeal. *Ib.*

A return ought to show what judgment, if any, was rendered in the court below, and if it omits to do this, the appeal will be

dismissed. *Woodside* v. *Pender*, 2 E. D. Smith, 390. This, however, need not be done by any particular phraseology, for if the court can satisfactorily determine what judgment was rendered this will be sufficient. *Slaman* v. *Buckley*, 29 Barb., 289; *ante*, 704.

The statutory provision that the evidence shall be returned, requires that documentary evidence used on the trial below shall be returned as well as the oral evidence. *Ogden* v. *Sanderson*, 3 E. D. Smith, 167.

The proper way to furnish such evidence is by returning a true copy of the document with the return, and referring therein to such copy as a part of the return filed.

Where a justice omits to return material documentary evidence, the appellate court will not decide the appeal without it, but will order the cause to stand over until it can be returned. *Taylor* v. *Mayor, &c., of N. Y.*, 4 E. D. Smith, 559; *Foley* v. *Alger*, Id., 719. But where it is entirely clear that the omitted paper would not have any effect upon the decision of the appellate court, that court will not order the cause to stand over for its return, nor even order it to be returned on application for an amended return to that effect. *Keeler* v. *Adams*, 3 Caines, 84. Where a paper or a document is annexed to a return, and is not included in it, there must be some reference in the return to such paper or document, or it will not be considered as a part of it. *Spring* v. *Baker*, 1 Hilt., 526. But where the return refers explicitly to a paper as a part of the proceedings, and it is returned with the return, it will be considered as a part of the return although not annexed to it. *Stolp* v. *Van Cortland*, 3 Wend., 492. All material facts ought to be stated in the body of the return, and it is not a proper practice to add them by way of a postscript or memorandum. *Logue* v. *Gillick*, 1 E. D. Smith, 398.

Where a justice omits to return papers or documents which were introduced as evidence in the court below, the return is imperfect, and the parties ought not to bring the cause on for argument, but procure a further return. *McAllister* v. *Sexton*, 4 E. D. Smith, 41. The return ought to contain within itself a complete history of the entire proceedings in the court below, without reference to any extrinsic papers. And where an affidavit was formerly used as the foundation for a *certiorari*, it was held that the justice's return was not sufficient when it adopted such affidavit, and stated that the facts therein contained were substantially true. *Mann* v. *Swift*, 3 Cow., 61. It is the duty of the justice to take full minutes of the evidence and proceedings, as has already been seen, *ante*, 584, 631, 632; and he will not be excused from returning such evidence and proceedings on the ground that he omitted to take minutes. *Schuyler* v. *Warner*, 1 Cow., 59.

The return ought also to show that the justice had jurisdiction of the person of the defendant, and of the subject matter of the action, when the defendant did not appear in the action below, and in such a case if the action is commenced by sum-

mons, but the return does not show that the summons stated any *place* of appearance, or that the constable's return stated any *time* of the service of the process, the judgment will be reversed. *Stewart* v. *Smith*, 17 Wend., 517.

So where an action is commenced by a short summons, and the defendant does not appear, and the return does not show any facts authorizing a short summons, the judgment will be erroneous. *Allen* v. *Stone*, 9 Barb., 61. In the last case it appeared from the return that the plaintiff was a non-resident, the defendant a resident, and that no proof was furnished as to the plaintiff's non-residence, nor any security for costs given.

A return ought also to show that the proceedings below were regular, and that there was a compliance with statutory requirements in matters of practice; and if it should clearly appear that a cause was tried by a jury, and that they retired to deliberate without a constable being sworn to attend them, the judgment would be reversed. *Douglass* v. *Blackman*, 14 Barb., 381; *Hatch* v. *Mann*, 9 Wend., 262; *ante*, 618.

A justice's return need not be under seal; it is as valid without it as with it; and the justice will be as liable for a false return as though it had been sealed. *Scott* v. *Rushman*, 1 Cow., 212.

A justice is not required to make any return in relation to matters which did not occur within his knowledge, as in the case of the misconduct of a jury after they have retired to deliberate upon their verdict. *Anon.*, 3 Caines, 106. Such matters are to be assigned as error in fact, and decided upon affidavits or such other evidence as may be required. The practice as to error in fact will be fully explained in a subsequent place. *Post*, .

The law does not permit a justice to make a motion to quash an appeal for irregularities. It is his duty to obey the notice by returning what can be legally required of him, and by omitting what he is not bound by law to return. *Van Patten* v. *Ouderkirk*, 2 Johns. Cas., 108.

A recital in a return that an action was commenced on a particular day is not sufficient proof that it was commenced in time to save the demand sued on from the statute of limitations. *Cornell* v. *Moulton*, 3 Denio, 12; *McGraw* v. *Walker*, 2 Hilt., 404. Such a fact must be proved before the justice like any other fact, and the evidence of it returned. *Ib.* In the absence of such proof showing when the summons was issued or actually delivered for service, the legal intendment will be that the action was commenced on the day of the service of the summons. *Ib.*

If a notice of appeal were defective in not stating the grounds of appeal sufficiently, this would not be any excuse for a justice in not making a return. But, if his fees were not paid at the time of the service of the notice of appeal, he will be justifiable in refusing to make a return. *Ante*, 799.

Who to draw the return.] The statute makes it the duty of the justice to draw his return and to file it in the appellate court.

Vol. I, 29, § 360. It is evident that the intention of the statute is that the act shall be performed by the justice himself, and this is ordinarily done in practice. The act of making a return, however, is a ministerial, and not a judicial one. *Ante*, 747. And for this reason a justice may, in some cases, employ an amanuensis to draw the return. This, however, ought never to be done unless in those cases in which there is an imperative necessity for it; and, even in those cases, the justice ought not to employ the attorney of either the appellant or of the respondent, but he should select some impartial third person for the purpose. There are several cases reported upon this question, but they were decided in relation to the practice under the old system, and although good authorities as to the principles involved, it will be observed that none of those cases do more than to tolerate the employment of the attorney of one of the parties in some particular instances. No case requires the employment of such an attorney, and it ought never to be done. In *Fox* v. *Johnson*, 3 Cow., 20, the return was set aside on motion of the respondent, upon affidavits showing that it was all drawn by the attorney for the appellant, at the request of the justice himself. The court, in speaking of the act of the justice in this respect, said: "He should have employed some one other than the attorney for the plaintiff. The practice of resorting to the attorney for the plaintiff in error (appellant) is a dangerous one. It is liable to great abuse, being in the hands of one who is interested to reverse the judgment. The rights of the defendant in error are concluded by the return, who must submit or be put to the expense and delay of an action if the return be false." See also *Rudd* v. *Baker*, 7 Johns., 548. In the subsequent case of *Philips* v. *Caswell*, 4 Cow., 505, it appeared that the attorney for the plaintiff in error (appellant) wrote the entire return; but it also appeared that the justice voluntarily went to the attorney's office and desired him to write it, and that the justice dictated the whole of the facts. The court refused to set this return aside on motion, for the reason that the attorney was a mere amanuensis.

In the still later case of *Hunter* v. *Graves*, 4 Cow., 537, the court refused to set a return aside where it had been drawn by the attorney for the respondent, and where it did not appear that any improper influence was exerted over the justice.

From these cases it appears that the power of the appellate court to set aside a return is clear, when the facts show that it ought to be done. And appellate courts will best subserve the public interests by setting aside all returns which are drawn by the attorneys of either of the parties, unless done under circumstances such as can seldom occur. The law does not permit parties to seek their rights by taking the law into their own hands, nor does it permit them to be judges in their own causes, and it ought not to permit them to make the records of the courts through the instrumentalities of their attorneys or agents.

Evidence in place of return.] In case of the death or insanity

of the justice, or of his removal from the state, the appellate court may ascertain what facts transpired below by examining witnesses in relation thereto. Vol. I, 30, § 363.

Where the justice has removed from the state, and the county court hears the appeal upon evidence taken in that court, and it is impossible for the supreme court, upon an appeal thereto, to say that the county court had before it all the material evidence given before the justice, the judgment of the county court will not be reversed. *Bush* v. *Dennison*, 14 How., 307. And where, in such a case, it appears that the objections raised by the appellant to the validity of the judgment, were of such a nature that they might have been supplied by evidence, the intendment of the supreme court will be that they were so supplied. *Ib.*

The mere removal of a justice from one county to an other within this state, does not excuse the justice from making a return, nor does it authorize a resort to oral evidence as to the matters which transpired in the court below. Vol. I, 30, § 363. The justice may be compelled by the appellate court to make a return in such a case. *Ib.*

Conclusiveness of the return.] The return made by the justice is the record of the evidence and proceedings in the court below, and, being an official act, it is held to be conclusive as to what occurred there. The operation of this rule is to exclude all extrinsic evidence which may be offered for the purpose of contradicting the return, or of adding to or diminishing the facts stated in it. There are some cases in which a return is required to be made, and yet extrinsic evidence is admissible in determining some of the questions involved in the appeals. But even when such evidence is admitted, it is not done in violation of the rule already stated. The return is still conclusive as to the matters stated in it, but the allegations of error are founded upon matters which are not properly a subject to be included in the return. When error in fact is assigned, or when a default has been taken and a new trial is the relief sought, it will be proper to use affidavits for the purpose of showing the true facts in the case. And even oral evidence is admissible for the same purpose. Vol. I, 31, § 366. There are some cases, also, in which no return is made, and the facts are proved by other evidence. See above. But where a return is made, and relief is sought in relation to matters which are properly a subject of return by the justice, his return as to those facts or matters is entirely conclusive. This is illustrated by numerous cases, a few of which will be noticed.

In the first place the return cannot be contradicted by showing that it is untrue, or that it states more than really occurred. If a justice's return states that four defendants were impleaded as defendants, and that they joined issue in the action, evidence will not be admissible on the trial in the county court to show that only two of the defendants were brought into court. *Bates* v. *Conkling*, 10 Wend., 389.

A return is so far conclusive that it cannot be contradicted by an assignment of errors, even when the errors assigned relate to a question of jurisdiction, if the return affirmatively states that jurisdiction exists. *Haines* v. *Judges of Westchester*, 20 Wend., 625.

Where the return states the manner in which the cause was tried, the questions made, the offers proposed, and the proceedings had, it is conclusive as to these matters, and affidavits are not admissible to contradict the return. *Spence* v. *Beck*, 1 Hilt., 276; *Beebe* v. *Roberts*, 3 E. D. Smith, 195. The aggrieved party should move to correct the matters by an amended return. *Ib.*, and see *Rawson* v. *Adams*, 17 Johns., 130.

Where the return is defective and does not state the facts relied upon as showing error, the remedy is by procuring an amended return which will show them.

Where important matter is omitted in the return, the party aggrieved should cause it to be amended, and affidavits may be used as the foundation of an order directing a more full and specific return. *Lynsky* v. *Pendegrast*, 2 E. D. Smith, 43.

Such a motion is the only remedy for correcting the return, and if the party proceeds to argument without procuring an amendment he will be bound by the facts stated in the return. *Capewell* v. *Ormsby*, 2 E. D. Smith, 180.

If exceptions were taken to rulings made by the court below, and these are not stated in the return, an amended return must be procured which sets them out, for affidavits are not admissible for the purpose of proving their existence. *Hyland* v. *Sherman*, Id., 235; *Rawson* v. *Grow*, 4 E. D. Smith, 18.

It is of no consequence how many erroneous rulings or decisions a justice may make, if they do not appear in the return, since the court will not look into affidavits for the proof of their existence, and if a party neglects to procure an amended or further return which shows them, the judgment will be affirmed. *Trust* v. *Delaplaine*, 3 E. D. Smith, 219; *Kilpatrick* v. *Carr*, 3 Abb., 117.

Where the alleged error consists in the disallowance of questions proposed in the court below, by the appellant, he should be careful to see that the questions and rulings are set out in the return, or he will lose the benefit of them. *Peck* v. *Richmond*, 2 E. D. Smith, 381, 383.

Forms of returns.] The number of cases appealed is so great that the convenience of parties cannot be more effectually consulted than by furnishing appropriate precedents as a guide in making a return. But it is of especial importance to recollect that the form of the return is conclusively governed by the nature of the pleadings or judgment in the action appealed from. One form of return is not appropriate in all cases, as it was before the recent change in the law, as has been more fully explained elsewhere, *ante*, 799.

The justice must also be careful to make such a return as the particular case requires.

In the forms given, the first is one which is appropriate in those cases in which the case is heard and decided upon the return itself. The second form is applicable to cases in which a new trial is had in the county court.

Form of return where the evidence is returned, and a new trial is not had in the county court.

IN JUSTICE'S COURT.

John Doe *agst.* Richard Roe.	Before RICHARDSON P. CLARK, Justice. Return on appeal.

To the county court of Fulton county:

In pursuance of the notice of appeal hereto annexed, which was served on me on the first day of August, 1865, and in obedience to the statutes in such case made and provided, I, Richardson P. Clark, a justice of the peace of the town of Johnstown in the county of Fulton, do hereby certify and return to the said court, that, on the 1st day of July, 1865, at the request of the plaintiff, John Doe, I issued a summons, dated on that day, directed to any constable of Fulton county, commanding him to summon Richard Roe to appear before me, at my office in the village of Johnstown, on the 10th day of July, 1865, at 10 o'clock A. M., to answer the complaint of John Doe in a civil action. (*If the summons states a claim for more than* $100, *then add:*) That an internal revenue stamp of the value of fifty cents was duly affixed upon such summons, and duly canceled before the same was issued.

That on or before the return day of said summons, it was duly returned to me by James Pierson, a constable of said county, with a return signed by him, that the same was personally served on the said Richard Roe on the said 1st day of July, 1865.

That on the 10th day of July aforesaid, at the time and place specified for the return of said summons, the parties appeared, the plaintiff in person, and the defendant by his attorney, McIntyre Fraser, and joined issue.

The plaintiff complained upon a promissory note, dated May 1st, 1864, purporting to have been made by the defendant, and payable to the plaintiff for the sum of one hundred dollars, on demand.

The defendant answered the complaint by denying each and every allegation therein contained; and also by alleging that said note had been fully paid. He also alleged that the plaintiff was indebted to him for goods, wares and merchandise sold and delivered to such plaintiff at his request, and claimed to recover judgment for a balance of one hundred dollars.

(*Where the pleadings are in writing, insert copies of them.*)

Issue having been thus joined, the cause was adjourned, on motion and oath of the defendant, to the 15th day of July, 1865, at 10 A. M., at my office.

At the time and place last mentioned, the parties appeared in person (or by attorney), and at the request of the defendant (or plaintiff) I issued a venire to James Pierson, a constable of Johnstown, which venire was returnable forthwith, and the said constable afterwards, and on the same day, returned the said venire with a panel containing the names of twelve jurors, summoned by him for the jury aforesaid. All the jurors so summoned appeared, and the following were duly drawn and sworn as jurors to try the action, viz.: (Here insert the jurors' names.)

On the trial the plaintiff called A. B. as a witness who, being duly sworn, testified: (here set out the evidence in full, either on the direct or the cross-examination.)

The plaintiff then called C. D. as a witness, who testified: (set out the evidence.)

The plaintiff then rested his case, and the defendant moved for a nonsuit on the following grounds: (state the grounds explicitly and fully.)

The motion for a nonsuit was denied, and the defendant excepted to any decision.

The defendant then called E. F. as a witness, and offered to prove by him — (state what was offered). The plaintiff objected to the evidence, on the ground — (state the grounds), and I excluded the evidence, to which ruling and decision the defendant duly excepted.

The defendant then called G. H., as a witness, who testified: (set out the evidence fully.)

The plaintiff then recalled A. B., who testified: (state the evidence.)

Neither party offered any further evidence, and the foregoing is substantially all the evidence given on the trial of said action.

The counsel for the respective parties then summed up the cause to the jury, after which I charged the jury as follows: (state the charge.) After such charge the cause was submitted to the jury, who retired for deliberation, under the charge of a constable, duly sworn for that purpose, and after due deliberation they agreed upon their verdict and returned into court, and after being called by me and severally answering to their names, and the plaintiff being then called and answering, the said jury publicly delivered their verdict in open court, by which they found in favor of the plaintiff for one hundred and fifty dollars damages (or otherwise, as the finding may be).

Whereupon, I, the said justice, did immediately, and on the same day, render judgment in favor of the said plaintiff, and against the said defendant, for the said one hundred and fifty dollars damages, and five dollars costs of the action.

(If the cause was tried by the justice, without a jury, state the fact, and the time and manner of rendering judgment.)

I also certify, that when the notice of appeal before referred to was served upon me, the above costs included in the said judgment, namely, five dollars, and two dollars the costs of this return, were paid to me by the said defendant.

All of which I send, together with the process, pleadings, proceedings and judgment, as I am required by law and the notice of appeal to do.

RICHARDSON P. CLARK,
Dated Johnstown, August 2, 1865. *Justice.*

Form of return where evidence is not returned, but a new trial is had in the county court.

IN JUSTICE'S COURT.

John Doe *agst.* Richard Roe.	Before RICHARDSON P. CLARK, Justice. Return on appeal.

To the county court of Fulton county:

An appeal having been taken in this action by the defendant (or the plaintiff), I, Richardson P. Clark, the justice before whom the same was tried, in pursuance of the notice of appeal hereto annexed, and in obedi-

ence to the statute in such cases made and provided, do hereby certify and return that the following proceedings were had by and before me.

On the 1st day of July, 1865, at the request of the plaintiff, I issued a summons in his favor and against the defendant, of which the following is a copy: (set out a copy of the summons.) Said summons was, on or before the return day thereof, returned to me with a written return thereon, made by James Pierson, a constable of Johnstown, which return was as follows: (set out a copy.)

On the return day of the process, and at the time and place specified for the return thereof, and for the appearance of the parties, the said parties personally appeared.

The plaintiff complained as follows: (set out a copy of the complaint.) To which the defendant answered as follows: (set out a copy of the answer.) The cause was then adjourned, by consent of the parties, to the 20th day of July, 1865, at 10 o'clock A. M., at my office in Johnstown, at which time and place the cause was tried by a jury composed of the following named jurors: (name them.) The plaintiff claimed to recover for goods, wares and merchandise sold to the defendant, to the amount or value of one hundred and fifty dollars. The defendant denied the right of the plaintiff to recover the amount so claimed, on the ground that the goods had been fully paid for; and he also claimed to have a set-off against the plaintiff to the amount of one hundred dollars, for which he claimed to be entitled to recover judgment. Both parties introduced evidence upon the claims so made by them, and after hearing the proofs and allegations of the respective parties, the jury, on the said 20th day of July, 1865, found a verdict in favor of the plaintiff and against the defendant, for the sum of seventy-five dollars damages.

That on the said 20th day of July, 1865, I immediately rendered judgment upon such verdict in favor of the plaintiff and against the defendant, for

Damages,	$75 00
Costs,	5 00
	$80 00

On the 22d day of July, 1865, the defendant served the annexed notice of appeal upon me, and at the same time he paid to me $5, the costs entered in the judgment, together with $2 costs or fees for making my return.

That at the same time the defendant delivered to me an undertaking, a copy of which is hereto annexed, with a copy of the approval indorsed thereon.

RICHARDSON P. CLARK,
Justice.

Dated Johnstown, August 3, 1865.

General facts to be stated in return.] Where a new trial is to be had in the county court, the evidence taken in the court below is not to be returned. But all the process is to be fully and carefully returned. If the action was commenced by attachment, warrant, replevin or short summons, and affidavits and undertakings were furnished, they ought to form a part of the papers returned. If any objections were taken to the sufficiency of the affidavits, the undertakings, or to the form of the process, or to the time or manner of its service, such objections ought to be stated, since such objections, if properly taken in the court below, are available upon an appeal, even in cases in which a new trial is a proper remedy. If no objection is taken in the court below, and issue is joined without objection, all such errors and defects will be waived.

Swartwout v. *Roddis*, 5 Hill, 118. The same case held that a defect in an affidavit on which a warrant was issued by the justice was not available upon an appeal, because the statute did not require a return of the process by which the action was commenced. But the present law does require a return of the process, Vol. I, 30, § 360, and any defects therein, or in the affidavits upon which it is founded, will be available if the objection is properly taken below. *Malone* v. *Clark*, 2 Hill, 657; *Bennett* v. *Ingersoll*, 24 Wend., 113. And the appellant may properly raise the question in the county court by moving that the proceedings in the justice's court be held to be of no effect, and that the plaintiff be nonsuited on account of the insufficiency of the affidavit, or other defect, whatever that may be. *Ib.*

If the county court refuses to entertain the motion at all, or if it refuses to grant it in a proper case, the error may be reviewed in the supreme court. *Ib.* In such a case, if the objection has been properly taken in the court below, that operates to give a right to renew it in the county court before the trial there. But if no objection is taken below, or if it is so improperly taken as not to be available, the right to renew it in the county court may be lost. And so an omission to renew the motion in the county court, even when it has been properly taken below, will be of no avail upon an appeal to the supreme court, because such omission will be deemed a waiver of the error.

A mere motion is sufficient to raise the question, if the objection is properly taken in the justice's court; it is not necessary to set the matter up in the answer by way of abatement of the action. *Bennett* v. *Ingersoll*, 24 Wend., 113. The same matter is, however, available by way of answer in abatement, if the party elects to set it up as a ground of defense. *Swartwout* v. *Roddis*, 5 Hill, 118. If the objection is a proper one to raise by way of answer in abatement, and the defense is thus interposed, it will clearly be available in the county court, since it will be one of the issues in the action, and the county court must try it. Vol. I, 31, § 366. Where the objection is one which does not appear upon the face of the proceedings, an answer in abatement will usually be the most appropriate mode of presenting the defense. But where the objection is apparent upon the face of the papers, as where an affidavit or undertaking upon which the process is founded is defective, the most usual as well as the most convenient course will be to raise the question by way of a motion to dismiss the action. This must, however, be done before any steps are taken in the action, or the objection will be waived. *Ante*, 17 to 20, 50, 234 to 236. But if the objection is properly taken, and it is overruled, the objecting party may then join issue without waiving any rights, and without losing the benefit of his previous objection. *Ante*, 20.

It will be seen, however, that the objections which can be made thus available, must relate mainly to questions of jurisdiction over the person, or as to the subject matter of the action.

For in these cases of new trials in the county court, the evidence is not returned, and there is no review of the questions and objections made in the court below. The whole action is retried on the merits, and the only objections available upon the trial are such as are taken during the trial in the county court. If the appellant desires to review the rulings made in the court below, during the progress of the trial there, he must appeal upon questions of law alone, and have the evidence, objections and proceedings all returned, so that the cause may be decided upon the facts appearing upon the return. *Ante*, 800, 801.

Returning a ministerial act.] The justice does not act judicially, but ministerially, in making his return. His liability for a false return has already been sufficiently noticed. Vol. I, 746, 747.

Defective return.] The statute provides the mode of procuring a further return when the original one is defective. Vol. I, 30, § 362. This subject will, however, be more fully noticed under the title Amended return. As has been already seen, *ante*, 800, the legal intendment of the appellate court is that all the evidence and proceedings have been returned. But this intendment is not conclusive, for either party may show, if he can, by affidavits, or other legal proof, that the return is defective or omissive, and that material evidence has not been returned, and if the fact is established, a further or amended return will be ordered by the appellate court. And the rule is the same where the return is omissive or defective as to any other matters or proceedings which occurred in the court below. The statute, authorizing a further or amended return, was intended to give the courts power to order a further or amended return in any case in which the rights of the litigant parties required it. It is a substantial remedy, and it ought to be liberally extended to every case in which justice will be promoted by its application and enforcement. And the benefits of this remedy are not confined to one party, for a defective return will be required to be amended on the application of either party, when such application is made in proper season, and in due form of law. This power is a most valuable one, since it enables the appellate court to compel such a return as shall give both parties a full and a fair hearing upon all such matters as occurred below, and on all the grounds of appeal.

Compelling return.] The law not only makes it the duty of a justice to make a return to an appeal, but it enforces that duty by attachment when it becomes necessary to do so. Vol. 1, 29, 30, § 360. But if the justice's fee for making a return was not paid at the time of serving the notice of appeal upon him, he cannot be compelled to make a return. *Ib.; Van Heusen* v. *Kirkpatrick*, 5 How., 422, 423.

The proceeding by attachment is in the nature of a punishment for contempt of court. The statute just referred to, Code, § 360, authorizes the issuing of an attachment, but it leaves the mode of doing so to the usual practice of the courts as founded upon statutes and the decisions of the courts. The general pro-

visions of the statute will be found, 3 R. S., 849 to 855, 5th ed., particularly subs. 1, 7, 8, of § 1. There are several works which quite fully explain the practice in relation to contempts. See Crary's Special Proceedings, 375 to 418; 2 Burr. Pract., 212 to 221, 2d ed.; 2 Tiff. and Smith's Pract., 159 to 174.

In this article nothing more will be attempted than to state the general rules applicable to such cases, and to give such practical forms as may assist the practitioner in his proceedings.

Although in proceedings to punish for contempts there are two modes in common practice, viz., by an order to show cause, or by attachment, it is to be observed that the statute declares that a return may be compelled by *attachment*. Vol. I, 30, § 360. It is, therefore, the proper course to adopt that mode of proceeding.

If a justice neglects to make a return within the time allowed by law for that purpose, without procuring an extension of time either from the appellate court, or by stipulation of the parties, he will be liable to an attachment. And he may be proceeded against without any further notice than that given by the notice of appeal served upon him.

But a liberal practice is always best, and therefore it would be advisable to give the justice notice to make and file his return by a specified day, and that in default thereof an attachment will be applied for. Such a notice may be in the following form:

Form of notice to make return.

FULTON COUNTY COURT.

John Doe, Respondent,
agst.
Richard Roe, Appellant.

To Richardson P. Clark, Esq.:

Sir — You will take notice that you are hereby required to make and file a return in the above entitled action, within ten days from the service of this notice upon you; that such appeal was taken from a judgment rendered by you on the 20th day of July, 1865, in favor of John Doe, the plaintiff, and against Richard Roe, the defendant, for the sum of $75 damages, and $5 costs; that the notice of appeal was served upon you on the 22d day of July, 1865; and that in default of your making such return an attachment will be applied for against you.

Yours, &c., RICHARD ROE,
Appellant.

Dated August 4, 1865.

This notice is entitled in the county court, for the reason that the cause may be regarded as in that court, after an appeal has been properly brought and perfected.

If the justice neglects to make his return, and to file it in the county clerk's office within the time specified in the notice, an application may be made for an attachment. This application must be made to the county court, or to the county judge of the county in which the appeal is taken. See 3 R. S., 851, §§ 5, 6, 8, 5th ed.

No notice need be given of the intended application, for by statute the county court is always open for that purpose. Vol. I, 4, § 31. Where the application is for an attachment in the case of a neglect to make a further or amended return, the court is to be deemed always open for that purpose. Vol. I. 30, § 362. But this section does not, in express terms, apply to the case of an omission to make a return in the first instance. In such cases, therefore, it may be proper to make the order to show cause, or the attachment returnable at a term of the county court. There is no reason why an attachment may be enforced at any time in the case of a neglect or omission to make a further or amended return, when that has been ordered, and to refuse to give the same relief in the case of a neglect or omission to make any return in the first instance. And it may be that § 362, Vol. I, 30, was intended to include both cases. But since it is not so declared in terms, the prudent practice will be to follow the practice prescribed in the Revised Statutes in those cases in which an attachment is sought for an omission to make any return.

If the justice neglects or omits to make any return, due proof must be made of that fact before an attachment can properly be issued. This proof ought to be made by affidavit, and may be in the following form:

Affidavit that no return has been made.

[Title as in notice, *ante*, 812.]

FULTON COUNTY, *ss:* Richard Roe being duly sworn, says, that he is the defendant named in the above entitled action; that on the 20th day of July, 1865, a judgment was rendered against this deponent and in favor of John Doe, for the sum of $75 damages and $5 costs, by Richardson P. Clark, a justice of the peace of the town of Johnstown in said county, in a civil action; that on the 22d day of July, 1865, this deponent duly appealed from the said judgment to the county court of Fulton county; that on said 22d day of July, a copy of the notice of appeal was duly served on said justice and said respondent, which said notice was as follows: (*set out a copy of the notice served on the justice. If security was given add the next clause.*) That at the time of serving such notice, this deponent paid the costs entered in the judgment, and $2 fees of the justice for making his return, and he also gave an undertaking in due form of law to stay proceedings on said judgment, &c., which undertaking was duly approved by said justice (or by the county judge), which undertaking and approval were as follows: (set out copies.) That the justice neglected and omitted to make any return to said appeal as required by said notice and by law; that on the 4th day of August, 1865, this deponent served a written notice upon said justice, by delivering the same to him personally, of which the following is a copy: (set out a copy.) That the time for making said return specified in such notice, has elapsed, and said justice has refused, neglected or omitted to make and file any return to said appeal as required by said notices and by law, and deponent asks that an attachment in due form of law may be issued against said justice.

Subscribed and sworn before me, this 15th day of August, 1865, } RICHARD ROE.

JOHN STEWART, *County Judge.*

The county judge may issue an attachment immediately, or he may issue an order to show cause why an attachment should not issue. 3 R. S., 851, § 5, 5th ed. If it is deemed advisable to issue an order to show cause, such order may be in the following form:

Order to show cause, &c.

FULTON COUNTY COURT.

John Doe, Respondent, *agst.* Richard Roe, Appellant.

At a term of the Fulton county court, held at the court house, in the village of Johnstown, on the 15th day of August, 1865. Present, Hon. JOHN STEWART, County Judge, &c.

On reading and filing the affidavit of Richard Roe, the defendant above named (and others, if any), showing that Richardson P. Clark, a justice of the peace of the town of Johnstown, in said county, has refused, neglected or omitted to make any return to the appeal taken in the above action from a judgment rendered by said justice, as specified in the affidavit of the said Richard Roe; and, on motion of Horace E. Smith, attorney for the appellant and defendant, it is ordered, that the justice, Richardson P. Clark, show cause, or at the next term of this court, to be held at the court house, in the village of Johnstown, on the last Tuesday of November, 1865, why an attachment should not issue against him, and why he should not be punished for his alleged misconduct.

And it is further ordered, that copies of the affidavits and other papers on which this order is made, be served upon the defendant personally, at least ten days previous to the said last Tuesday of November, 1865.

Where the attachment is sought because of a neglect or omission to make a further or amended return, the court is always deemed to be open, and the order to show cause may be made returnable at the judge's office, at such reasonable time as may to the judge seem proper.

The order must be served in the manner prescribed by law, which is by personal service upon the justice.

This service is made by delivering a copy of the order to the justice personally, and at the same time showing to him the original order; and this must be done at the least as early as the time specified in them, or if no time is mentioned, then in such time as the rules, practice or the law prescribe.

Due proof must be made of the service of this order, and must be made by affidavit, which may be in the following form:

Proof of service of order, &c.

[Title as in notice, *ante*, 812.]

FULTON COUNTY, *ss:* James Pierson being duly sworn, says, that on the 15th day of August, 1865, he did, at the village of Johnstown, in said county, serve a copy of the annexed order on Richardson P. Clark, the justice therein named, by personally delivering a copy thereof to him, and at the same time showing him the original order, which is hereto annexed.

Subscribed and sworn before me, this 15th day of August, 1865, JAMES PIERSON.

JOHN STEWART, *County Judge.*

This proof of service may be made at any time before it is required for use; but the proper way will be to make the affidavit immediately after the service is complete. This course will avoid any difficulties which might arise from the absence, death or other cause preventing the party serving the order from making proof of its service.

Instead of taking an order to show cause, or of taking an attachment in the first instance, it is sometimes the case that the application is made upon due notice to the justice. When this is the case, the justice is served with copies of the affidavits upon which the motion is founded, and he is at the same time served with notice of the motion, which notice may be in the following form:

Form of notice.

[Title as in notice, *ante*, 812.]

Sir: Take notice that I shall apply to the next term of this court, to be held in the court house, in the village of Johnstown, on the last Tuesday in November, 1865, at the opening of the court on that day, or as soon thereafter as counsel can be heard, for an order that an attachment, as for a contempt, be issued against you, the justice who has refused, neglected or omitted to make a return in this cause as by law required; and for such other or further order or relief, as the court may think proper to grant; which motion will be founded upon the affidavits, with copies whereof you are herewith served. Dated &c.,

Yours, &c., H. E. SMITH,
Att'y for Appellant.

To Richardson P. Clark, *Justice, &c.*

When the justice has neglected or refused to make an amended or further return, pursuant to an order for that purpose, the notice may state that the application will be made to the county court, at the judge's office, at a time and place to be specified, which must be the usual time for the service of a notice of motion. Where the application is made upon notice, as in the last case specified, the justice will appear and show cause by affidavits, or otherwise, why an attachment ought not to be issued against him. If he shows sufficient cause, the attachment will be refused. But if he fails to make any appearance, or if the cause shown, on appearance, be insufficient, an order for an attachment will be made. And the rule is the same where no sufficient cause is shown, on the return of an order to show cause. The order for an attachment may be as follows:

Order for an attachment.

[Title as in notice, *ante*, 812.]

At, &c., on, &c., as *ante*, 814.

On reading and filing the affidavit of Richard Roe (and others if any), showing that Richardson P. Clark, the justice named in the papers in this action, has refused, neglected or omitted to make a return to the appeal in this action, and, on motion of Horace E. Smith, Eeq., attorney for the respondent, and after hearing James M. Dudley, Esq., attorney for the said justice, it is ordered that an attachment, as for a contempt, be issued against

the said justice, Richardson P. Clark, returnable at the next term of this court, to be held at the court house, in the village of Johnstown, on the last Tuesday of November, 1865 (or in case of a neglect to make a further or amended return, make it returnable at the judge's office at a time and place to be specified). And it is further ordered, that the said Richardson P. Clark be held to bail on said attachment in the sum of dollars.

After procuring the order for an attachment, the next proceeding will be to make out the attachment, and to deliver it to the sheriff for service.

Form of attachment.

(Seal.) The People of the State of New York, to the sheriff of the county of Fulton, GREETING: We command you that you attach Richardson P. Clark, so as to have his body before our county court at the next term thereof, to be held at the court house, in the village of Johnstown, on the last Tuesday of November, 1865, there to answer to us, as well touching the contempt which he, as is alleged, hath committed against us, as also such other matters as shall then and there be laid to his charge; and, further, to perform and abide by such order as our said court shall make in this behalf. And have you then and there this writ; and make and return a certificate under your hand of the manner in which you shall have executed the same.

Witness, John Stewart, county judge of Fulton county, at Johnstown, this 15th day of August, 1865.

MORTIMER WADE, *Clerk.*

HORACE E. SMITH, *Attorney.*

If the attachment is issued by the special order of the court, it ought to be indorsed thus: "Issued by the special order of the court. MORTIMER WADE, *Clerk;*" or, "Issued by the special order of the court. Hold the justice to bail in the sum of five hundred dollars. MORTIMER WADE, *Clerk.*"

If the attachment is issued in a case in which it issues without the special order of the court, it may be indorsed thus: "Let the justice give security for his appearance, by bond, in the penalty of one thousand dollars. Dated, &c. JOHN STEWART, *County Judge, &c.*"

The attachment, when complete, should be delivered to the sheriff for execution. And it is the duty of the sheriff to immediately arrest the justice and to keep him in custody, unless he shall entitle himself to be discharged by giving bail in the manner prescribed by law.

If the attachment has been served, and the justice has given bail, the sheriff's return will be as follows: "I have attached the said Richardson P. Clark, and let him at large on bail, and the bond taken by me is herewith returned. JACOB P. MILLER, *Sheriff.*" Where the justice cannot be found, the return will be: "Not found. JACOB P. MILLER, *Sheriff.*" When the justice is attached, and no bail is given, the return is: "By virtue of the within attachment I have arrested the said Richardson P. Clark, and for want of bail, have him now here in custody before the court. JACOB P. MILLER, *Sheriff.*"

Upon the arrest of the justice, he may desire to give a bond for his appearance to answer the attachment. The statute provides for giving security in such a case. 3 R. S., 851, § 13, 5th ed.; Id., 852, §§ 14, 15.

The statute also prescribes some of the conditions which the bond shall contain. The usual form of such bond is as follows:

Form of bond.

Know all men by these presents, that we, Richardson P. Clark, of the village of Johnstown, and Daniel Stewart, merchant, of the same place, and Isaiah Yanney, of the town of Johnstown, farmer, are held and firmly bound unto Jacob P. Miller, sheriff of the county of Fulton, and his assigns, in the penal sum of one thousand dollars, to be paid to the said Jacob P. Miller, sheriff as aforesaid, and his assigns. For which payment well and truly to be made, we bind ourselves jointly and severally, and our and each of our heirs, executors and administrators, firmly by these presents.

Sealed with our seals, and dated the 15th day of August, 1865.

Whereas the above named Richardson P. Clark has been arrested upon an attachment issued out of the county court of Fulton county, in a proceeding as for a contempt, in not making a return to an appeal brought in an action in which John Doe was plaintiff, and Richard Roe was defendant, and which was tried before said Richardson P. Clark, and whereas said Richardson P. Clark is now in the custody of Jacob P. Miller, as sheriff as aforesaid.

Now, therefore, the condition of this obligation is such, that if the above bounden Richardson P. Clark shall appear on the return of said attachment, at the next term of this court, to be held at the court house, in the village of Johnstown, on the last Tuesday of November, 1865, and answer to the said alleged contempt, and abide by the order and judgment of the court thereupon, then this obligation to be void, otherwise to remain in full force and virtue.

RICHARDSON P. CLARK, [L. S.]
DANIEL STEWART, [L. S.]
ISAIAH YANNEY, [L. S.]

Sealed and delivered in the presence of
J. J. DAVIDSON.

When the justice has been arrested and brought into court, an order will be made requiring interrogatories to be filed, specifying the facts and circumstances alleged against him, and requiring his answer thereto, in writing and under oath.

In relation to the entitling of the papers in these proceedings, the rule is as follows: Where the proceedings are against the original parties to the action, the papers are all entitled in the original action. But if the proceedings are against persons who are not parties to the action, the affidavit and papers previous to the attachment and including it, are entitled in the original action, and all the proceedings subsequent to that time ought to be in the name of the people, on the relation of the party prosecuting the attachment.

Order to file interrogatories.

FULTON COUNTY COURT.

The People of the State of New York, *ex rel.* Richard Roe, *agst.* Richardson P. Clark.

At, &c., on, &c., as *ante*, 814.

The defendant, Richardson P. Clark, being charged with a contempt of court, in refusing, neglecting, or omitting to make a return to this court, upon an appeal duly taken thereto by Richard Roe from a judgment rendered in favor of John Doe, by the said Richardson P. Clark, as a justice of the peace, &c., and a writ of attachment having issued against him for contempt, directed to the sheriff of the county of Fulton, returnable on the 22d day of July, 1865; whereupon the said sheriff has returned that he had attached the said defendant, and had let him at large on bail (or, that he had attached the defendant and had him in custody before the court), and the said defendant, now being, by virtue of such attachment, personally before the court, and denying that he is guilty of the misconduct charged, as aforesaid, against him, it is, on motion of Horace E. Smith, attorney for the plaintiff, ordered that the said plaintiff do forthwith (or within ten days) file in the office of the clerk of this court interrogatories, specifying the facts and circumstances alleged against the defendant; and that he serve a copy thereof upon the said defendant (or the attorney of the defendant), and that the said defendant put in written answers to such interrogatories, upon oath, and file the same with said clerk, within twenty-four hours after the time when such interrogatories are served on him.

And it is further ordered, that it be referred to Archibald McFarlan, Esq., counselor-at-law, residing in Johnstown, in said county, to examine the said Richardson P. Clark on oath upon the said interrogatories, and to take such further proofs as either party may produce before him in relation to the alleged misconduct, and that he report such answers and proofs to this court.

And it is further ordered, that the said defendant attend before the said referee, in the custody of the said sheriff, and that the said sheriff detain the said defendant in his custody until the further order of this court.

After procuring this order, filing and serving a copy of it, the next step will be to draw and file interrogatories to be administered to the defendant. These interrogatories may be in the following form:

Form of interrogatories.

[Title as in last form.]

Interrogatories to be administered to Richardson P. Clark above named, for his refusal, neglect or omission to make and file a return to an appeal taken to this court, from a judgment rendered by him in favor of John Doe and against Richard Roe.

First interrogatory. Were you, or were you not, on the 20th day of July, 1865, a justice of the peace of the town of Johnstown, in Fulton county, N. Y.?

Second interrogatory. Did you on that day, as such justice, render a judgment in a civil action, in favor of the said John Doe and against the said Richard Roe, for the sum of $75 damages, and $5 dollars costs?

Third interrogatory. Did the said Richard Roe, on the 22d day of July, 1865, serve upon you a notice of appeal from said judgment to this court,

and did he, at the same time, pay to you the costs entered in said judgment, and did he also, at the same time, pay to you the sum of two dollars for making your return thereto; and, further, did he, at the same time, deliver to you an undertaking with sureties for the stay of execution in said action, and did you approve in writing the sufficiency of the undertaking and of the said sureties?

Fourth interrogatory. Have you at any time made and filed any return to said appeal, and if not, why have you refused, neglected or omitted to do so?

Answer to interrogatories.

[Title as in order for interrogatories, *ante*, 818.]

The answer and examination of Richardson P. Clark above named, to the interrogatories exhibited by the plaintiff for his examination pursuant to an order of this court, dated the day of , 1865.

First. To the first interrogatory this examinant answers and says, that he was such justice at the time mentioned.

Second. He further answers the second interrogatory and says, that he rendered a judgment such as is there described.

Third. He further answers the third interrogatory and says, that a notice of appeal was served upon him at the time mentioned, and that an undertaking was given by said Richard Roe with sureties, and that such undertaking and sureties were approved in writing by this examinant. But he says that his fee of two dollars for making his return was not paid to him at the time of serving the notice of appeal, and that the said sum has never since been paid or tendered to him.

RICHARDSON P. CLARK.

Subscribed and sworn before me, this day of , 1865,

A. McFARLAN, *Referee.*

Order discharging attachment.

[Title as in order for interrogatories, *ante*, 818.]

At, &c., on, &c., as *ante*, 814.

On reading and filing the answer of Richardson P. Clark, to the interrogatories filed against him in this cause, and on motion of James M. Dudley, of counsel for the said Richardson P. Clark, it is ordered that the attachment issued in this cause be and the same is hereby discharged.

Order convicting defendant for contempt.

[Title as in order for interrogatories, *ante*, 818.]

At, &c., on, &c., as *ante*, 814.

A writ of attachment having heretofore issued out of this court against the defendant, Richardson P. Clark, for his contempt in refusing, neglecting or omitting to make his return to an appeal duly brought by Richard Roe, from a judgment rendered by said Richardson P. Clark in favor of John Doe and against said Richard Roe, which attachment was directed to the sheriff of Fulton county, and returnable on the day of , 1865; and the said sheriff having returned that he had attached the said Richardson P. Clark, and had let him at large on bail (or that he had attached the said Richardson P. Clark, and had him in custody before this court), and the said Richardson P. Clark having appeared personally before the court, and interrogatories, specifying the facts and circumstances alleged against the said Richardson P. Clark, having, by order of the court, been filed, and a copy thereof having been served on the said defendant (or on H. E.

Smith, Esq., his attorney), and it having been referred to Archibald McFarlan, Esq., to examine the said Richardson P. Clark on oath upon such interrogatories, and to take such further proofs as either party might produce before him in relation to said alleged contempt; and the said referee having made his report, and it appearing to the court from such report and the answers and proofs thereto, and the original affidavits on which said attachment issued, that the said Richardson P. Clark is guilty of the contempt charged against him, and that such misconduct was calculated to or did actually defeat, impair, impede or prejudice the rights of the plaintiff above named. Now, on motion of H. E. Smith, Esq., attorney for the plaintiff, it is ordered that a fine of dollars be and the same is hereby imposed upon the said Richardson P. Clark for his misconduct. And it is further ordered, that the said Richardson P. Clark pay to the plaintiff the costs and expenses of these proceedings, amounting to the sum of dollars.

It is also further ordered, that the said Richardson P. Clark be and he is hereby directed to stand committed to the common jail of the county of Fulton, there to remain charged upon said contempt, until the fine imposed as aforesaid, together with the said costs and expenses, shall be fully paid, unless he shall be sooner discharged by the court, and that a warrant issue to carry this order into effect.

Warrant of commitment.

(Seal.) The People of the State of New York, to the sheriff of the county of Fulton, GREETING: Whereas, on the day of , 1865, by an order made by the county court of the county of Fulton, at a term thereof, held at the court house, in the village of Johnstown in said county, in an action pending therein, wherein Richard Roe was plaintiff and Richardson P. Clark was defendant, it was ordered that the said Richardson P. Clark be committed to the common jail in said county, there to remain charged with the contempt mentioned in said order, until he should have paid the fine imposed upon him for his misconduct, amounting to dollars, and that a warrant issue to carry the said order into effect. Now, therefore, we command you, that you take the body of the said Richardson P. Clark, and him safely and closely keep in your custody, in the common jail of the county of Fulton, until he shall have fully paid the fine imposed as aforesaid, to wit, the sum of dollars, and also the costs and expenses aforesaid, amounting to dollars, with your fees hereon, or until the said Richardson P. Clark shall be discharged by the further order of the court. And you are to return this writ, and to make and return to our said court a certificate, under your hand, of the manner in which you shall have executed the same.

Witness, John Stewart, county judge of Fulton county court, at Johnstown, the day of , 1865.

MORTIMER WADE, *Clerk.*

H. E. SMITH, *Attorney.*

This warrant should be indorsed thus: "By the court. MORTIMER WADE, *Clerk.*"

This proceeding by attachment for not making a return, is a matter entirely between the appellant and the justice, and for that reason none of the notices, orders or other papers in the matter need be served upon the respondent. When a return is not made, the respondent's remedy is by motion to dismiss the appeal; and when an appellant neglects or refuses to procure a

return, or at least to attempt to do so within a reasonable time, the court may dismiss the appeal for such neglect; and this is especially the rule when the appellant refuses to make an effort to procure a return after a proper request, or after due notice by the respondent to procure it.

The court, however, will not dismiss an appeal until a reasonable time has been allowed for making a return. And, if any reasonable excuse exists for the delay, a considerable length of time will be allowed for the purpose of making and filing such return. And where an appellant moves promptly and diligently in procuring a return, but the matter is delayed without his procurement or fault, the court will refuse to dismiss the appeal for any such delays.

Amended or further return.] The power of the county court to compel a return has just been explained. But when a return has been voluntarily made, it may be omissive or in some other respect defective, and in that case the court possesses the same power to compel a further or amended return that it has to compel an original one. Vol. I, 30, § 362. There is one important point to be observed in relation to the practice in procuring a further or amended return; and that is that the county court is to be deemed always open for that purpose. And therefore an application for an attachment, or an order granting one, may be granted at any time, on reasonable notice, when any notice is necessary. The forms of proceedings for contempts are alike, whether the attachment is sought for a neglect to make any return, or for a refusal or omission to make an amended return when that has been ordered.

Vigilance in protecting a party's legal rights is as important here as elsewhere in legal proceedings. And when a return has been made and filed in the clerk's office, it is the duty of both parties to promptly examine it for the purpose of ascertaining whether it is omissive or defective in any particular. If it is found to be complete and satisfactory, nothing remains to be done but to bring the cause on for a hearing and determination; but if it is found to be defective, the party desiring to have it amended should promptly make a motion for that purpose, and, as we have already seen, *ante*, 813, the court is always open for this purpose. Either party is entitled to an amended or further return when that is required, and therefore either party may apply for it by motion.

When the application is made to the county court, it may be made at any reasonable time before the cause is argued, unless some rule of that court requires the application to be made within some prescribed time. But when the county judge is incapacitated from hearing the cause, and he certifies it into the supreme court, the notice for the application must be given within twenty days after the date of the county judge's certificate, or it will be too late. Rule 53 of sup. court.

The statute requires the original return to be filed, and for that

reason no motion for an amended return need be made until that has been done. And the court would not, probably, before that time, entertain a motion for an amended return. *Fish* v. *Ferris*, 3 E. D. Smith, 568, 569.

There may be instances in which it will be apparent from the face of the return, that it is defective, and in that case the court may order a further or amended return, without other proof, upon the mere production of the original return. But it is almost invariably the case that proof of the defects or omissions must be made by affidavits. Such affidavits are always a sufficient foundation for a motion for an amended return, if they contain facts sufficient to authorize or require such amendment to be made. *Lynsky* v. *Pendegrast*, 2 E. D. Smith, 43.

As a general rule, a motion for an amended return ought to be made before the cause is brought to argument; and if a party should bring the case to a hearing upon his own notice, before procuring an amended return, the court might refuse to entertain the motion at that stage of the action. But, notwithstanding that, the mere fact of noticing the cause and bringing it on for argument does not, in any manner, deprive the court of the power of ordering the cause to stand over, for the purpose of hearing an application for an amendment of the return, and where it is evident that justice will be promoted by suspending the argument and ordering the cause to stand over for an amendment of the return, the courts will sometimes pursue that course. *Foley* v. *Alger*, 4 E. D. Smith, 719; *Matthews* v. *Fiestel*, 2 E. D. Smith, 91. Such a practice is not, however, to be encouraged, since it encourages negligence; and the proper corrective is to require the payment of costs for the favor, especially when it is evident that the omission to move in due season was the result of inexcusable negligence.

The power to order an amended return is not limited, and therefore the county court may order such a return as frequently as the case may require it, and until the return is as complete as either party may be entitled to have it, upon the proofs made.

In those cases which are heard and decided upon the facts appearing on the face of the return, it will be best, as a general rule, to allow amendments liberally, when the facts proved will authorize such a course.

Magistrates sometimes omit matters which seem to them unimportant, while one of the parties may deem them of great value as a part of the case. Such omissions are, usually, unintentional; but there are cases in which the aggrieved party believes that design had quite as much influence in producing the result as any other cause. Such suspicions may be well or ill founded, but however that may be, the applicant is entitled to be fully heard upon the merits of the question whether the return is really omissive in material particulars.

A party who believes, or knows, that a return is defective, ought not to bring it on for a hearing; for, as we have already

seen, *ante*, 805, the return is conclusive as to the facts stated; and it will also be presumed to contain all that transpired below, unless the contrary appears from the return itself, *ante*, 800; and if the party brings the cause to a hearing upon such a return, he will be compelled to abide by what it contains, unless the court should order it to stand over for amendment, which, in some cases, is done for the furtherance of justice. *Ante*, 802.

When an application is made for an amended return, the court ought to examine the matters in respect to which a further or amended return is sought, and the application should be refused in respect to whatever is irrelevant, or is not material and important to the questions presented for review. *Onderdonk* v. *Ranlett*, 3 Hill, 323, 329.

Where it is evident that the judgment must be reversed, even though an amendment were ordered, the motion for an amended return will be denied. A motion for an order for an amended return will be denied when it is evident from the return that the judgment must be reversed, even if the amendment were ordered. *Wightman* v. *Clapp*, 2 Cow., 517. So, where a motion is made by a respondent for amendment, the motion will be denied where it appears by the appellant's affidavits, and by the balance of proof, that the amendment sought is incorrect in point of fact. *Ib.*

The court will not order the return of a notice, or other paper, which cannot affect the decision upon the appeal. *Keeler* v. *Adams*, 3 Caines, 84. And an affidavit, which is made for the purpose of procuring an amended return, must state wherein the errors consist, so that the court may see whether they are material or not. *Leonard* v. *Sunderlin*, 3 Caines, 136.

An appellate court does not compel a justice to return any particular fact as true or false, but merely whether alleged facts are true or untrue. In one case, *Palmer* v. *Peck*, 2 Cow., 461, it was moved that a justice should amend his return, by stating certain things and omitting or denying others, but the court denied the motion, and said: "We never direct the justice to return that such a thing is true or otherwise, but merely order him to supply defects by stating whether the matters to which he is legally called upon to return, and to which he has omitted to answer, be true or false."

Where an order for an amended return is granted by a county court, the return is not complete or perfect until such amended return has been made and filed, and the cause cannot properly be placed upon the calendar before that time. *People* v. *County Judge of Clinton Co.*, 13 How., 277. And if, in such a case, the county court dismisses the appeal for want of prosecution, before the amended return has been filed, the proceeding will be irregular and void, and a mandamus will be issued by the supreme court compelling the county court to reinstate the case and proceed to render a judgment. *Ib.*

Where a return is silent in relation to the matters relied upon as the grounds of reversing the judgment rendered below, it is

the duty of the appellant to procure an amended return which will show the alleged errors. *Baum* v. *Tarpenny*, 3 Hill, 75; *Warring* v. *Loomis*, 4 Barb., 485; *Stafford* v. *Williams*, 4 Denio, 182, 183; *Capewell* v. *Ormsby*, 2 E. D. Smith, 180; *Rawson* v. *Grow*, 4 Id., 18.

The statute does not prescribe any time within which an amended return must be made and filed; and for that reason the order requiring an amended return should specify the time within which it must be done. And if the justice fails to comply with such order, he will be liable to attachment in the same manner as for a neglect or refusal to make and file the original return.

On a motion for an amended return, it is not necessary to serve any notice of the motion, or any copies of the moving affidavits upon the justice. It is sufficient to serve those upon the opposite party. But when an order for an amended return has been obtained, a copy of such order must be served upon the justice. This must be done for the purpose of enabling the justice to know precisely in what particulars he is required to amend his previous return. Full information ought to be given to the justice of those matters or defects which are complained of as omissions, imperfections or errors in the return.

If a return is defective on account of some mistake made by the justice, either in omitting or in erroneously stating material matters, he may apply to the county court for leave to correct or amend his return. And, in one case, a justice was permitted to make the application even after the cause had been noticed for argument, upon his affidavit that a gross imposition had been practiced upon him. *Simpson* v. *Carter*, 5 Johns., 350. In such a case the cause will be ordered to stand over for the purpose of allowing the justice to make an application to the court for leave to amend or correct his return. *Ib.* Notice of the motion, and copies of the affidavits upon which the motion is founded, must be served upon the attorney for the appellant. *Ib.* If the error was caused by the acts of the respondent's attorney, there is the same reason for requiring a similar practice upon the justice's application. After the original return has been filed, the justice is not at liberty to volunteer an amended or supplementary return, but must obtain leave of the appellate court for that purpose. *Barker* v. *Webster*, Superior Court, Buffalo, cited 2 Clint. Dig., 1970.

Where the court thought that its decision might depend upon the construction of a lease which was read in evidence below, but not set forth in the return, the court, of its own motion, ordered the justice to amend the return by setting forth a copy of the lease. *Howland* v. *Miller*, Superior Court, Buffalo, cited 2 Clint. Dig., 1970. In such a case, if the argument had commenced, the court would suspend the hearing until the amended return was made and filed. Since the county court is always open for the purpose of applications for an amended return, such

applications ought to be made promptly after the error or defect is discovered by the justice.

Under the old practice, if a justice returned precisely and specifically as to all the facts stated in the affidavit upon which the *certiorari* was allowed, the court would have refused to order an amended return founded upon supplementary affidavits which stated grounds of error not specified in the original affidavits. *Butler* v. *McIntyre*, 2 Johns., 182. So, too, it has been held, since the Code, that the appellate court would not reverse a judgment for any errors except such as were stated in the notice of appeal, *ante*, 779, though other judges have taken an opposite view of the matter, *ante*, 780. And again, a notice of appeal is amendable, and when it has been amended, it would certainly be proper to require the return to answer as to the points allowed to be inserted in the notice of appeal, and this could be done by an amended return if necessary.

In one case, *Rudd* v. *Baker*, 7 Johns., 548, a justice signed a return which had been drawn by the appellant's agent or attorney; the justice subsequently made a supplementary return declaring the first one incorrect, and he afterwards made a still further return in which he declared that the supplementary return was also erroneous, and that the original return was most nearly correct, and upon a motion for leave to file the returns, the court rejected both of the supplementary returns.

If the return of a justice is evasive, and his conduct is disingenuous, the court will order him to amend it, and require him to pay the costs of the application, upon a proper motion for that purpose, if a proper notice of the application is given to him. *Bird* v. *Silsbie*, 1 Cow., 582.

On a motion for an order requiring a justice to amend his return, one party read a *certificate* from the justice corroborative of the moving papers; but the other party read an *affidavit* made by the justice contradictory of the certificate, and explanatory of the manner in which it was given, and it was held that the affidavit ought to outweigh the certificate. *Keeler* v. *Adams*, 3 Caines, 84.

The effect of an arbitration of a cause after an appeal has been brought, has been explained elsewhere. Vol. I, 1033.

Form of additional return made by justice voluntarily.

To the county court of Fulton county:

In pursuance of the notice of appeal heretofore served upon me, and now on file in the office of the clerk of Fulton county, and in obedience to the law, I do hereby make a further return in the action in which John Doe is plaintiff and Richard Roe defendant, and do certify and return that I accidentally omitted to state the evidence of A. B., a witness sworn in behalf of the said John Doe, on the said trial before me; and that said A. B. testified on the trial as follows: (State the evidence in the usual manner.) I do further certify and return that after the evidence had been closed and the cause summed up by the counsel for the respective parties, I charged the jury as follows: (State the substantial parts of the charge given.) Dated Johnstown, August 7, 1865.

RICHARDSON P. CLARK, *Justice.*

In such an additional return the essential point is to supply the defects or to correct the errors in the return previously made in the cause. In doing this, care should be taken to return fully and particularly all such matters as are necessary to constitute a full return.

In most of the cases in which an amended return is sought, the motion is founded upon affidavits made or furnished by the party who desires an amendment of the return. The essential features of such an affidavit are that it sets forth truly, fully and particularly the points, matters or things in which it is claimed that the original return is defective. A general form for an affidavit will be here given; but the particulars in which a return may be defective are so numerous that scarcely any two cases will be similar in the facts forming a ground of the motion. For this reason any form which may be given, will merely serve as an outline, which must be filled up according to the circumstances of each particular case.

General form of affidavit for an amended return.

FULTON COUNTY COURT.

John Doe, Respondent,
agst.
Richard Roe, Appellant.

FULTON COUNTY, *ss:* Richard Roe being duly sworn, says that he is the appellant in the above entitled cause; that Richardson P. Clark, the justice who tried the said cause in the court below, has made and filed a return in obedience to the notice of appeal served upon him, which return was filed in the Fulton county clerk's office on the day of , 1865. And deponent says that said return is omissive and defective in several material particulars, and among other things it omits to state that this deponent duly made an application to adjourn the trial of the said cause while the same was pending before said justice; that this deponent made due proof and offered sufficient security to entitle him to an adjournment of the same, and that said justice improperly refused to grant the adjournment sought. And deponent further says, that on the application for such adjournment he was duly sworn by the said justice, and testified to the following facts: (state fully such facts as were sworn to, but omitted in the return;) that this deponent also proved by Lucius J. Smith the following facts: (state the facts;) that this deponent also offered to give such a bond as may be by law required for an adjournment in such an action, and that he offered Lucius J. Smith and Francis Burdick as sureties in said bond, which sureties were abundantly responsible and were legally capable of becoming such sureties. And deponent further says, that said justice rejected both of said sureties, and denied the application for an adjournment, and that such decision is one of the grounds upon which this appeal is founded, and is so stated in the notice of appeal.

Subscribed and sworn before me, this 7th day of August, 1865, RICHARD ROE.

PETER W. PLANTZ, *Justice.*

Such an affidavit ought to be folioed as is the practice in courts of record. But no stamp is required upon affidavits in legal proceedings. Vol. I, 1104. After completing it, the proper copies

must be made for service upon the opposite party, and for proving service thereof. If other affidavits are required besides those made by the party, let them be prepared and copies of them made for service. After the affidavits are completed, the next step will be to draw a notice of the motion for such amended return. This notice is brief, and may be in the following form:

Form of notice of motion, &c.

[Title as in affidavit, *ante*, 826.]

Sir: Please to take notice, that upon the return on this appeal, now on file in the Fulton county clerk's office, and upon affidavits, with copies of which you are herewith served, a motion will be made in the Fulton county court, before the Hon. John Stewart, county judge of Fulton county, at his office in Johnstown, on the day of , 1865, at ten o'clock A. M., for a rule, or order, requiring Richardson P. Clark, the justice who tried the cause in the court below, to make a further and amended return, on this appeal, or for such other or further rule, order or relief, as the court may deem proper to grant. Dated August 29th, 1865.

Yours, &c., SMITH & CARROLL,
Attorneys for Appellant.

To WELLS & DUDLEY, Esqs.,
Attorneys for Respondent.

Such a motion may be made at any time, since the county court is always open for such motions. But in giving notice of motion, care should be taken to give as much time as is required in ordinary motions in courts of record. When the affidavits and notices are complete, serve them in the usual manner. But no copies of the affidavit or of the notice of the motion need be served on the justice who made the return, unless it is in a case in which it is sought to subject him to costs for an evasive return, or some similar case. *Ante*, 825.

At the time appointed for the motion, the moving party must attend at the place named in the notice of motion, prepared with proof of the service of copies of the affidavits and of the notice of motion. If no opposition is made, the court will usually grant the motion as of course, if the matter sought by the amended return is material.

If the opposite party concludes to oppose the motion, it will usually be upon the following grounds: 1st. That the moving papers are insufficient, or that they have not been properly served; 2d. If sufficient and properly served, that the facts are not truly or fully stated in the moving affidavits; or, 3d. That the matters are not material, or that the facts, if returned as claimed, would not change the result of the appeal. The grounds of opposing such a motion are as numerous as there are tenable objections to urge against the motion; and the nature of the objections will be matter of fact or of law, as the circumstances of the particular case may demand. If there is a dispute as to the truth of the matters stated in the moving affidavits, the proper way to raise the question is by preparing counter affidavits, and reading them on the hearing of the motion.

Draw the affidavits in the usual form, and state the facts as they may be in the particular case, or so as to present such facts as are deemed important in the disposition of the motion. No copies of the affidavit need be served on the opposite party; it will be sufficient to produce and read them at the hearing of the motion. But the original affidavits used by both parties ought to be filed with the clerk of the court, unless the county judge retains them for the purposes of the motion, in which case he will either file them, or direct it to be done.

After reading the affidavits, and such portions of the return as may be material, the motion is argued in the usual manner.

The moving party ought to be prepared with a draft of an order such as he deems himself to be entitled to; and this ought to be presented to the court at the argument. Such orders are frequently modified by the court, after hearing the arguments of both parties, and such an order as is proper is then granted. After the order is granted it ought to be filed with the county clerk, and copies of it served upon the opposite party and upon the justice who tried the action and made the return. The order may be drawn in the following form:

Form of order for amended return.

FULTON COUNTY COURT.

John Doe, Respondent,
agst.
Richard Roe, Appellant.

At a term of the county court held at the office of the Hon. JOHN STEWART, county judge, &c., &c., at Johnstown, on the 8th day of August, 1865. Present, Hon. JOHN STEWART, county judge.

On reading and filing affidavits and notice of motion and proof of the service of the same, and after hearing Horace E. Smith, Esq., for the motion, and John Wells, Esq., appearing and opposing, it is ordered that Richardson P. Clark, Esq., who tried this cause, amend the return filed therein, and therein state whether or not the said Richard Roe, on the day this cause was tried before him, did or did not ask or move for a further adjournment of the cause on account of the absence of a material witness for him, by the name of Peter Smith, who resided in the county of Fulton, or how otherwise; and whether the said Richard Roe was not sworn, and testified to the said justice that since the last adjournment he had procured two subpœnas for the said Peter Smith, and had endeavored to serve him therewith; that one of the said subpœnas he had given to Alexander Stewart, and hired him to go to the residence of the said witness and subpœna him, and that he had been informed by said Stewart that he had subpœnaed said witness to attend this trial at the day, but that said witness was sick and confined to his bed and could not come, or how otherwise; and whether or not said Richard Roe further testified in said application that Peter Smith was a material witness for him on the trial of this cause, and that he could not safely proceed to the trial of this cause without his testimony, and that he expected the said Alexander Stewart every moment in court, and that he would then prove by him that said Peter Smith had been subpœnaed and was sick and unable to attend court, or how otherwise; and whether or not the said justice refused to wait a few moments for the said Alexander Stewart to come into court, and also refused to grant said Richard Roe a further adjournment on his said application or how other-

wise; and it is further ordered that said Richardson P. Clark make said amended return and file the same with the clerk of Fulton county within ten days after the service upon him of a copy of this rule or order, or that he show cause before the Hon. John Stewart, at his office in the village of Johnstown, on the day of , 1865, at ten o'clock A. M., why an attachment should not issue against him.

MORTIMER WADE, *Clerk.*

In drawing an order for an amended return, the attorney who obtains it ought to be careful to state with particularity every point or fact as to which he seeks information in the amended return. A copy of the order ought then to be served upon the opposite party and upon the justice, with a notice indorsed thereon, in the following form, or some other similar one:

Form of notice of order.

Sir: Take notice that the within is a copy of an order filed in this cause.

Yours, &c., SMITH & CARROLL,
Attorneys for Appellant.

To RICHARD P. CLARK, Esq., and to
WELLS & DUDLEY, Esqs.,
Attorneys for Respondent.

Upon the receipt of a copy of this order and notice, it is the duty of the justice to comply with its terms within the time prescribed therein, unless he has some legal excuse for not complying with it. And in that case he must appear and show cause before the county judge at the time specified therefor in the order. Usually there is no legal reason for not complying with the order by making and filing an amended return. And the justice may comply with the order by making his amended return in a form like the following:

Form of amended return.

FULTON COUNTY COURT.

John Doe, Respondent,
agst.
Richard Roe, Appellant.

To the county court of the county of Fulton:

The undersigned, in obedience to the rule, or order, hereto annexed, returns: that the said Richard Roe, on the day the cause in said rule or order mentioned was tried before me, did ask or move for a further adjournment, on account of the absence of a material witness, as he alleged, by the name of Peter Smith, who, he alleged, resided in the county of Fulton, but he did not produce or offer any evidence that the said Smith had been subpœnaed to attend said trial as a witness.

The undersigned further returns, that the said Richard Roe was sworn, and testified to the undersigned, that since the last adjournment of said cause, he had procured two subpœnas for said Smith, and endeavored to serve him therewith, and that he had given one of the said subpœnas to Alexander Stewart, and hired him to go to the residence of said witness and subpœna him; and that he had been informed by said Stewart that he had subpœnaed said witness to attend the trial of said cause on said day, and that he was sick and confined to his bed, and could not come,

as he was also informed by said Stewart; and that the said Smith was a material witness for him on the trial of said cause, and that he could not safely proceed to the trial thereof without his testimony, and that he expected the said Alexander Stewart in court every moment, and he would then prove by him that said Smith had been subpœnaed, and was sick and unable to attend said trial.

But the undersigned further says, that no evidence whatever was offered to him to show that any subpœna had in fact been served upon the said Smith by the said Stewart, or by any other person, or that Smith was sick or unable to attend, or that said Stewart had ever been to his house to subpœna him. The undersigned denies that he refused to wait a few moments for the said Stewart as requested by said Roe, but, on the contrary, says, that at the request of said Roe, he waited according to his best recollection and belief, about half an hour for said Stewart, who not then having arrived, the undersigned proceeded to the trial of the said cause, and refused to grant said Roe a further adjournment, because it was considered that he had not shown himself to be legally entitled to such adjournment.

Dated Johnstown, August 31, 1865.

RICHARDSON P. CLARK, *Justice.*

When the amended return is filed in the county clerk's office, and neither party desires a further return, the cause will be ready to bring on to argument, which will be the next subject discussed.

SECTION IV.

ARGUMENT OF APPEAL.

When an appeal is taken in a case in which there is no new trial in the county court, but the cause is heard upon the facts appearing in the return, the only points which can usually be made are such as arise upon the facts appearing in the record itself. There are some exceptions to this rule, as in the case of assigning error in fact, which will be explained in a subsequent place. When the cause is heard upon the return, the questions made are usually matters of law, and these are argued before the court. But there is occasionally a case in which a reversal is asked on account of an erroneous finding upon questions of fact; this matter will be hereafter discussed.

In the present section the principal subjects of attention will be such as relate to the practice on the argument or preceding it, omitting the subject of the decision or the rules relating thereto until discussing the title Judgment.

Hearing at what term of the court.] Where the appellate court has several judges, as in the case of the New York common pleas, or the superior court of the city of Buffalo, there are both general and special terms of the court. And in all appeals in which the case is heard and decided upon the return, the argument must be heard at a general term of the court. Vol. I, 30, § 364.

But in the county courts there is but one judge, and every cause is heard by him, unless transferred to some other judge by virtue of some statute. There is not, therefore, any such thing as a distinction between general and special terms of the county

court. A county judge may appoint particular terms for the hearing of law arguments, and others for the trial of issues of fact by a jury, but that would not make one term a general and the other a special one. Any term of the county court at which the argument is heard is, for the purposes of the law, a general term.

Either party may bring cause to argument.] After the return has been made and filed, the cause may be noticed for argument by either party, unless a motion for an amended return should be pending. If the return is not complete and an order is made for an amended return, this will operate as a stay of the proceedings on the argument until the amended return is filed. *Ante*, 823.

If a motion for an amended return has been made and is pending, the court will not hear the argument of the appeal until after the decision of the motion, nor until the return comes in, if an amended return is ordered.

Upon what notice.] A cause cannot be brought to argument upon any notice less than eight days. Vol. I, 30, § 364. Of course this rule may be modified or entirely waived by the parties, if they choose to do so. And if the case is actually argued in open court this will be regular, although the agreement to argue was a mere verbal one. But a mere oral argreement will not be enforced by the courts. Rule 13 of supreme court; see Voorhies' Code, 854, 855, 8th ed.

After a cause has been regularly noticed by either party, and placed upon the calendar, it will continue thereon until the cause is disposed of. Vol. I, 30, § 364. And in such a case, no further notice of argument is necessary, even though the case is moved at a subsequent term of the court. *Townsend* v. *Keenan*, 2 Hilt., 544.

Putting cause on the calendar.] After a return has been filed, if it is complete or satisfactory to the parties, and either party has noticed the cause for argument, it is the duty of the clerk to place it upon the calendar. In doing this, the priority of the causes will be governed by the date of the filing of the return.

To secure the entry of a cause upon the calendar, the party noticing it should furnish the clerk of the appellate court with a note of issue, containing the title of the action, the nature of the issue, whether tried by jury or an argument upon the return, the names of the attorneys, and the date of the filing of the return. This notice ought to be given in due season, so that the clerk may make up the calendar with as little trouble and alteration as possible. The proper mode will be to file a note of issue at the time of serving the notice of argument.

If the case is one in which a new trial can be had, the statute requires the note of issue to be served on the clerk at least eight days before the commencement of the term of court. Vol. I, 30, § 364. A similar rule ought to be enforced in cases which are heard on the return. In cases of new trials the clerk is required

to enter the cause upon the calendar according to date of the return. Vol. I, 31, § 364. This practice differs from that which obtains where the cause is heard upon the return, for the general practice there has been to arrange the causes according to the priority of the filing of the return. Uniformity in practice would require that all causes should be placed upon the calendar according to the date of the return, as required by statute in cases of new trials.

In the county courts it is the common practice to hear both classes of appeals, whether on new trials, or upon the justice's return; and they are either of them heard at the same term as may be convenient to hear them.

The Code prescribes the order of disposing of causes upon the calendar. Code, § 257. And this section is applicable to the county courts. Id., § 8. That order is: 1. Issues of fact to be tried by a jury. 2. Issues of fact to be tried by the court. 3. Issues of law. In making up the calendar, the county clerk ought to arrange the causes in the order thus specified. To do this, he will first insert the causes in which a new trial is to be had in the county court, and these are to be arranged according to the date of the justice's return. The next class of cases will be those appeals which are heard and decided upon the justice's return, and these are arranged in the order of time in which they were filed in the clerk's office, unless the court otherwise orders, either by general rules, or by particular direction.

The note of issue filed with the clerk may be in the following form:

Form of note of issue on argument.

FULTON COUNTY COURT.

John Doe, Respondent, *agst.* Richard Roe, Appellant.	H. E. Smith, *Plaintiff's Attorney.* A. McFarlan, *Defendant's Attorney.*

Appeal to be heard on justice's return. Return filed August 8th, 1865.
Defendant's note.

Where a new trial is to be had in the county court, the note of issue will differ somewhat in form.

Form of note of issue on new trial.

FULTON COUNTY COURT.

John Doe, Respondent, *agst.* Richard Roe, Appellant.	McIntyre Fraser, *Plaintiff's Attorney.* John Wells, *Defendant's Attorney.*

Appeal to be tried by a jury in the county court. Date of the justice's return is August 8th, 1865.
Plaintiff's note.

Dismissing appeal for neglect to bring it to a hearing.] After a cause has been regularly noticed, and then placed upon the calendar, it must be disposed of before the end of the second term following, or the court is required to dismiss the appeal

unless the cause is continued by special order for cause shown. Vol. I, 30, § 364.

This clause of the statute does not seem to apply to any appeals, except those which are heard upon the justice's return. And even in those cases the court will listen favorably to any reasonable cause of delay.

Where the amount of business to be disposed of by the court is large, it is a general rule to require the parties to be ready for the argument at the time when the cause is regularly called on the calendar. *Tryon* v. *Jennings*, 22 How., 421. And in the New York common pleas, the engagements of counsel in an other court is not sufficient cause for postponement. *Ib.* This rule, however, would not be applied by most county courts, since the same reason would not exist for its enforcement. There are so many reasons why it may be proper to postpone the argument of a cause, that it is unnecessary to enumerate them. And yet while a reasonable excuse will induce the court to retain the cause by special order, yet no court would do so for the purpose of permitting an unjust or unreasonable protraction of the cause.

Where the cause is not heard before the close of the second term, it is best to ask for an order continuing the cause, which ought to be done before the end of the second term. An order for that purpose ought to be drawn up and entered, and a copy served upon the opposite party.

The Code does not prescribe any rule as to making proofs or serving any notice upon the opposite party as a prerequisite to the making of the order. To prevent all questions as to regularity, the better practice will be to make and serve affidavits showing cause for the postponement, and then give the usual notice of motion. This will enable the opposite party to be heard upon the question, and the court will then have the whole merits of the motion before it for adjudication.

If the courts shall hold that a cause which is to be retried in the county court is governed by the same rule which applies to cases heard upon the justice's return, then a similar practice of applying for a continuance on affidavits and notice should be adopted. But in causes to be retried there is a provision for noticing the cause, for serving notes of issue, and the like, as in actions in the supreme court. And there are so many causes which would not be heard before the end of the second term, that it is scarcely probable that the legislature intended to require so many special applications for continuances of the cause. There might be cases in which a jury would be found in attendance at the first term, while the second term might be a mere law term without any jury; and in such a case all causes to be retried would have to be continued upon special applications for cause to be shown in each case, or they would have to be dismissed even when they could not be tried at the second term. This could not have been the intention of the legislature, and is not the reasonable construction of the statute.

A notice of *argument* is the proper notice where the cause is heard upon the justice's return, and it must be served at least eight days before the first day of the term. Such notice may be in the following form:

Notice of argument.

FULTON COUNTY COURT.

John Doe, Respondent,
agst.
Richard Roe, Appellant.

Take notice that the appeal in the above entitled action from the judgment rendered by Richardson P. Clark, Esq., will be brought to a hearing before this court, at a term thereof to be held in the court house in the village of Johnstown, on the day of 1865, at the opening of the court on that day, or as soon thereafter as counsel can be heard. Dated Johnstown, August 8th, 1865.

Yours, &c., A. McFARLAN,
Att'y for Appellant.

To H. E. Smith, Esq.,
Respondent's Att'y.

The manner of serving such notices is so familiar to the profession, that no remarks are necessary upon that point. See Code, §§.408 to 415, both inclusive.

Hearing to be on the original papers.] The statute is explicit and express that an appeal shall be heard on the original papers; and it further declares that no copy thereof need be furnished for the use of the court. Vol. I, 31, § 365.

Under the rule prescribed by this statute, the court will refuse to hear or decide an appeal unless the original return, or a duly certified copy, is produced at the argument. *Smith* v. *Van Brunt*, 2 E. D. Smith, 534. If the original return is lost or destroyed the proper course is to procure a new return. *Ib.*

Where a cause is transferred to the supreme court by reason of the incapacity of the county judge to hear it, the case will still be heard upon the original return, and no copy need be furnished for the court. *Wiles* v. *Peck*, 16 How., 541.

If a fair copy of the return should be furnished to the court there is no doubt that the court may use that instead of the original return; and in many cases such a copy would be highly convenient to the judge, since it would save him the labor of reading some manuscripts which are well calculated to try his skill and his patience.

Every careful practitioner will desire a copy of the return, since it will greatly facilitate a full and careful examination of the facts of the case while preparing and arranging his brief for the argument; and nothing conduces more to the success of a good cause than a careful study, and a brief but pertinent presentation of its facts during the argument.

There are few causes in which there is any difficulty in determining what legal questions are involved; but there are innumerable cases in which there is an earnest dispute in relation to

the facts involved in them, and he who best understands the facts of his case, will be able to render most service to the court, and to his own side of the cause.

Practice on the argument.] To attempt a full and minute examination of all matters of practice connected with the argument of an appeal, or relating to it, would open a very wide field for investigation, and for that reason it will not be possible to pursue the subject so minutely as would be desirable to some persons, but notwithstanding this, so much space will be devoted to the subject as the limits of this work will permit.

In bringing on an appeal for argument there are several matters to be taken into consideration; and there are several modifications of the practice, according to the circumstances of the particular case. There are several different classes of cases in which relief is sought, each of which is governed by a practice somewhat peculiar to itself. These classes may be conveniently examined in the following order: 1. Those cases in which the relief sought is a reversal or modification of the judgment appealed from, either because it is against evidence or is contrary to law, which errors are claimed to be apparent on the face of the return; 2. Those cases in which relief is asked from an excusable default which occurred in the court below; 3. Those cases in which extrinsic matters are alleged as error in fact. These several classes will be noticed in the order of arrangement here adopted.

And first, then, of the argument of a cause upon the return. After it has been properly noticed and placed upon the calendar, it will be called in its order, and if ready for argument, will be argued. Upon the argument of an appeal cause, the appellant has the right to open and close the argument. In opening the case the appellant either reads or states such portions of the return as are material to a proper understanding of the points involved in the discussion. And after presenting the facts which show how the points of law are properly raised in the case, the appellant proceeds to argue those questions, and to cite those authorities which are deemed important or conclusive upon their determination.

After the appellant has closed his argument, the respondent is then entitled to be heard in relation to either the facts stated, or the legal propositions advanced by the appellant; and he also cites such authorities as are deemed applicable for the purpose of overturning the propositions of the appellant, or of otherwise answering their effect as authorities. When the respondent has closed his argument, the appellant has a right to be heard in reply to the positions taken by the respondent, and this usually closes the discussion.

It would save much time if county courts would enforce the rule requiring each party, at the opening of the argument, to furnish the court and the other party with a statement of the points made, and of the authorities intended to be cited. If this were generally done, the court and the respective parties would

know precisely what matters and points were deemed important in the discussion, and much time and labor be saved by narrowing the course of the argument to these points.

There may be cases in which it is not possible to anticipate all the questions which may be made on the argument, but it ought to be done as nearly as practicable; and whenever any material point has been accidentally omitted, the parties ought to be permitted to discuss them. When the points are numerous, and the facts complicated, an oral argument is of the greatest importance, for, if properly presented, in as brief a manner as possible, it will save the court much labor, and will prevent any liability to mistakes which might occur if the cause were merely submitted upon written points. But, in many cases, a careful statement of the points made, with a full reference to the authorities relied on, will be the best mode of argument, for in such a case, the court will fully and carefully examine each material point, which will be certain not to escape his attention if the brief is clear, full and accurate as to facts and authorities. But all such matters are governed so much by personal preferences, that every one will consult his own choice in the manner of presenting his views of the case.

The courts favor the submission of proper points, and in the case of *Agreda* v. *Faulberg*, 3 E. D. Smith, 179, 180, the court said: "The appeal in this action raises several questions which are of considerable importance, and I regret that the respondents have submitted no points in support of the judgment. A party has no right to expect the court to be laborious in their investigation, or ingenious in their endeavor to support a judgment; when his own counsel is either unwilling or unable to aid them by any suggestions or examination of authorities on his behalf. The court desire not to reverse, where the judgment might properly be sustained; but where, as in the present case, the proceedings in the court below depend, to some extent, upon various statutory enactments running through a period of forty years; the court are entitled to the aid of the respondent's counsel in pointing out the statutes upon which the regularity of the proceedings depend."

An appeal which is heard upon the justice's return, brings up with it every question which can be made as to the regularity or validity of the judgment rendered in the court below. And where error in fact is assigned, which is established by affidavits outside of the return, this subject forms a part of the proceedings, and it must be heard at the same time with the argument of the questions appearing upon the face of the return. And if the county court refuses to hear and determine the matters so assigned as error in fact, but merely decides upon the questions raised upon the face of the return, this will be error. *Cook* v. *Swift*, 18 How., 454; *S. C.*, 10 Abb., 212. This rule is the same where an application is made for relief from a default by ordering a new

trial, upon sufficient proof that injustice has been done, and that the default was excusable. *Ib.*

Before proceeding to explain the practice in relation to obtaining relief from defaults taken in the court below, it may be proper to mention that no notice will be taken in this place of those matters which are waived by an omission to raise the question below, or of any other matters which cannot be raised for the first time on the argument of the appeal, nor of those other matters which furnish sufficient grounds for affirmance or reversal of the judgment. All these subjects will be fully discussed in a subsequent place.

Relief from default in court below.] Under the practice which existed before the enactment of the Code, a defendant could not be relieved by the appellate court from a judgment taken against him, even in the case of an excusable default. And if a defendant omitted to appear and plead on the return of process, but he appeared on the adjourned day, and offered to plead upon offering a proper excuse for his default, yet it was discretionary with the justice to admit him to defend or to refuse the application, and the appellate court had no power to review the decision or to relieve the defendant. *Sammis* v. *Brice*, 4 Denio, 576. This rule, however, no longer exists; and, under the present practice, the appellate court may always relieve a defendant where he excuses his default and shows that manifest injustice has been done to him in the rendition of the judgment. Vol. I, 31, § 366.

In seeking relief from a judgment by default, there are several points in the practice which must be observed. And, in the first place, it is to be remembered that there is no relief except by way of appeal from the judgment. It is only by an appeal that the county court acquires any jurisdiction of the cause, or has any power to afford relief. A mere motion in the county court, in a case in which no appeal has been taken from the judgment, would be useless, and would be denied because of a want of power to interfere with the judgment rendered by the court below. *Donnell* v. *Carroll*, 1 Code R., N. S., 288.

In the next place, the notice of appeal ought to assign as one of the grounds of the appeal, that manifest injustice has been done by the judgment, and that the defendant's default is excusable. *Haughey* v. *Wilson*, 1 Hilt., 260, 261. The general manner of stating this ground of error may be seen in No. 16 of the notice of appeal. *Ante*, 785. As the relief sought is a new trial in the court below, and as one of the grounds of appeal is that injustice has been done, this ground of appeal must be stated in the notice of appeal, or relief will be denied. *Haughey* v. *Wilson*, 1 Hilt., 260, 261; Vol. I, 28, § 353; *ante*, 773.

The proof excusing the default and showing the injustice of the judgment appealed from may be made by affidavits, or by oral evidence introduced on the hearing of the appeal.

If affidavits are used, they may be served at the same time

with the notice of appeal, or at any time afterwards before the hearing, provided they are served at least eight days before the commencement of the term of the county court; or, in other words, if they are served as early as is required in the case of the service of the notice of argument.

The form of the affidavit is similar to other affidavits, except that it states with particularity the excuse for the default, and it shows clearly that injustice has been done.

In entitling the affidavits served, it will be remembered that no appeal is pending until the notice of appeal is served; and for that reason, if the affidavits are made before the notice of appeal is served, they ought to be entitled in the court below; while if they are served after the service of the notice of appeal, they ought to be entitled in the county court. The title of an action is not changed by an appeal. Code, § 326. But, after an appeal is brought, all affidavits ought to be entitled in the appellate court instead of the court below. *Clickman* v. *Clickman*, 1 Comst., 611. If, however, a mistake should be made in that respect, the court would disregard the error, if the opposite party was not misled in consequence. Code, § 406; *Bowman* v. *Sheldon*, 5 Sandf., 657. Or, if the error could not properly be disregarded, the court would order the cause to stand over for the purpose of allowing new affidavits to be served, in case there was good reason for adopting such a course. And, whenever substantial justice would be promoted by such a practice, that would be the best of reasons for pursuing it.

If the affidavits are made and served after the appeal is perfected, they will be entitled in the county court, and they may be in the following general form:

Form of affidavit to excuse default.

FULTON COUNTY COURT.

John Doe, Respondent,
agst.
Richard Roe, Appellant.

FULTON COUNTY, *ss:* Richard Roe being duly sworn, says, that he is the defendant and appellant named in the above entitled action; that on the 20th day of July, 1865, a judgment was rendered against this deponent, and in favor of John Doe, the respondent and plaintiff, by Richardson P. Clark, a justice of the peace of Johnstown, in Fulton county, for the sum of two hundred dollars damages and costs; that this deponent failed to appear in the action before the said justice in consequence of a sudden and serious illness, which attacked this deponent on the morning of the day on which the trial was had; that deponent was so sick as to be confined to his bed, and to be under the care of a physician; that in consequence of such sickness this deponent was unable to attend the trial before said justice or to go after his counsel to attend the same, as deponent had arranged to do before his said illness; that deponent had retained McIntyre Fraser, Esq., as his counsel to defend said action, and had promised to call and notify him when he was required to attend the cause in court, but that in consequence of such sickness deponent was unable to give such notice to said Fraser as agreed, and therefore said Fraser did not

attend the said trial, as deponent is informed and believes; that the said judgment was rendered in the absence of this deponent, and without any appearance by him in the court below. And deponent further says, that manifest injustice has been done to him by the rendition of said judgment, and he alleges that the judgment was rendered upon a claim made by the plaintiff for goods, wares and merchandise sold and delivered to this deponent; that the plaintiff recovered a judgment for $200, which is the full value of the goods sold by plaintiff to this deponent; that no credit was given to deponent for payments made for such goods, &c.; that on the 1st day of July, 1865, this deponent paid to said plaintiff the sum of $100, to be applied on said purchase price; that no credit was given nor any allowance made on said trial on account of said payment, but the plaintiff recovered judgment for the entire amount of his claim; that by such judgment manifest injustice was done to this deponent, in this, that said judgment ought not to have been more than $100, with costs, &c., instead of the sum of $200, as it now stands. And deponent further says, that on the day of , 1865, he duly appealed to the county court of Fulton county, from said judgment, and that the foregoing injustice is one of the grounds of error alleged in his notice of appeal.

Subscribed and sworn before me, this day of 1865, } RICHARD ROE.

PETER W. PLANTZ, *Justice.*

In a case like that supposed in the foregoing affidavit, let the attorney also make an affidavit showing his non-attendance, and the reasons therefor, as stated in the affidavit of the defendant.

As each case has some peculiarities of its own, so the affidavits must be drawn in such a manner as to correspond with the actual facts of the particular case. And it is a safe general rule to make as strong a case as possible in relation to the excuse for the default, and to show that manifest injustice has been done. The cases relating to these points will be fully noticed in a subsequent place.

After the affidavits are completed copies must be made and served upon the respondent, or his attorney when he has given notice of retainer. No affidavits or notices need be served upon the justice who tried the cause.

The affidavits served upon the respondent ought to be accompanied by a notice stating the object of the affidavits, and that they will be used upon the hearing of the cause.

This notice may be in the following form:

Form of notice served with affidavits.

[Title as in last affidavit, *ante*, 838.]

Sir: Take notice that the affidavits, with copies of which you are herewith served, will be read on the argument of the appeal in this action, for the purpose of obtaining a new trial; to excuse the default of this appellant; and to show that manifest injustice has been done to him by the judgment rendered in the court below. Dated Johnstown, August 9, 1865.

Yours, &c.,

A. McFARLAN,
Attorney for Appellant.

To MARTIN McMARTIN, Esq.,
Attorney for Respondent.

This notice and the copies of affidavits ought to be served at the least as early as eight days before the sitting of the court. And this will enable the respondent to controvert or explain any of the facts stated in the affidavits if he desires to do so.

The statute does not declare in express terms that witnesses may be orally examined for the purpose of determining whether the default is excused, and whether manifest injustice has been done to the appellant. But it provides that a new trial may be ordered, if it appears by the affidavits served by the appellant, *or otherwise*, that injustice has been done, and that a sufficient excuse is shown. It is difficult to see how these facts could appear unless oral evidence is allowed for that purpose, since the fact of injustice and of a reasonable excuse would not usually appear in the return, and some other evidence is intended than the affidavits of the appellant.

If either party intends to call witnesses to be examined orally upon these questions, it would be proper to require them to give notice of such intention, which would enable the opposite party to produce witnesses if he desires.

To require such a notice in this case, is the same in principle as that requiring the service of copies of the affidavits on the part of the appellant.

The statute does not in terms require the service of copies of the affidavits, or the giving of any notice, but the analogies of the practice require it to be done, and for that reason the courts always enforce a rule which is so wise and so just to the parties, and so convenient to the court.

The hearing of the application for a new trial in these cases of default is always heard by the court without the intervention of a jury. Indeed, the statute does not confer any authority to call a jury in such a case. It is only when an issue of fact is joined by the pleadings that a jury trial is authorized, and not in such cases as these in which the application appeals to the discretion of the appellate court. For an application for relief against a default of this kind is a mere matter of discretion with the county court, and if it refuses to grant relief, no redress can be had by an appeal to the supreme court, since that court has no power to review the decision of the county court upon this point. *Wavel* v. *Wiles*, 10 E. P. Smith, 635.

The power to order a new trial is not conferred unless the application is made by a defendant. The statute does not apply to a case in which a plaintiff is nonsuited in consequence of a default. His remedy in such a case is by bringing a new action.

Excusing default.] One of the first things a defendant has to do when he seeks relief from a default is to show satisfactorily to the county court that a reasonable and sufficient excuse exists for the default. What matters have been held sufficient, and what insufficient, will be noticed in a subsequent place. But a practical question of great importance is presented in the question, what constitutes a default within the meaning of this

statute. The statute provides that relief may be granted "if the defendant failed to appear before the justice, &c." Vol. I, 31, § 366.

It has been held, in some cases decided by the New York court of common pleas, that where a defendant has once appeared in the action he cannot have any relief under § 366 of the Code, even though he failed to appear at the trial, and although he offers proof of a sufficient excuse for his default. *Williams* v. *McCauley*, 3 E. D. Smith, 120; *Rawson* v. *Grow*, 4 E. D. Smith, 18; *Hunt* v. *Westervelt*, Id., 225; *Muber* v. *Held*, 3 Abb., 110; *Wilde* v. *N. Y. & Harlem R. R.*, 1 Hilt., 302.

With the utmost respect for the learning of the court which pronounced these decisions, it seems to me that this construction is most clearly erroneous and untenable. And, in the first place, the statute does not declare, in terms, that relief shall be denied in case the defendant has once appeared in the action. The language is that relief may be given "if the defendant failed to appear before the justice." Vol. I, 31, § 366. And the evident intention of the legislature was to provide a mode of relieving a defendant who failed to make his defense in the court below. If the defendant failed to appear at all in the court below, none of the cases would deny his right to relief if a satisfactory excuse is made; and manifest injustice is shown. But how does such a case differ in principle from one where the defendant appears and joins issue, and then, in consequence of some satisfactory cause, he is prevented from appearing at the trial? If the statute made any difference between the cases, it would be the duty of the courts to follow the rule prescribed. But since it does not make any such distinction, the true rule of construction is to carry into effect the intention of the lawmakers. The prominent object of the law is to furnish relief in those cases in which manifest injustice has been done to a party who failed to appear before the justice at the trial, and failed, consequently, of an opportunity for proving his defense. This construction secures the just rights of an unfortunate defendant, and it is guarded by the qualifications that he must render a satisfactory excuse for not appearing at the trial, and also show that injustice has been done to him by the judgment thus rendered against him in his absence. Such a construction secures the rights of both parties, and it also carries into effect the intention of the legislature in providing this remedy for a defendant who would frequently suffer great injustice but for its provisions. The statute is a remedial one, and will be liberally construed for the purpose of advancing the remedy sought to be attained.

The supreme court have expressly adjudged that the mere fact of appearing in an action and joining issue, does not of itself furnish any ground against giving relief against a judgment which is subsequently rendered against the defendant on his default to appear at the trial. *Armstrong* v. *Craig*, 18 Barb., 387. This is unquestionably the true construction of the statute, either

in reference to the language employed, or as to the object of the legislature. This same case holds that the defendant must satisfactorily excuse his default, and must also show that injustice has been done to him. This decision of the supreme court is a controlling authority with county courts, and will undoubtedly be followed by them until it is overruled by the court of appeals, or by the authority of other opposite decisions by the supreme court.

Sufficient excuses.] The statute requires that a defendant must *satisfactorily* excuse his default. Vol. I, 31, § 366. And the excuse must be such as is satisfactory to the county court, or other appellate court. A satisfactory excuse is such as the court can pronounce legally sufficient, and such as is reasonable under the circumstances of the case, and see *ante*, 138, 139.

And upon the whole proof offered, it is left entirely discretionary with the appellate court whether to grant relief or refuse it. *Ante*, 840. But, as a general rule, the court will exercise this power liberally for the furtherance of justice, and in doubtful cases will be inclined to order a new trial, where both parties can have a full and a fair hearing.

There are several cases which decide what constitutes a satisfactory excuse. In *Camp* v. *Stewart*, 2 E. D. Smith, 88, it appeared from the affidavits of the defendant that he was under the necessity of leaving town ; that he had prepared his defense with all proper instructions, and had given the matter in charge of a young man who was specially enjoined to deliver them to the defendant's attorney, with a request that he would attend on the return day of the summons ; and that the young man *forgot* to do it, and this was held to be a sufficient excuse. So, where it appeared that the defendant delivered the summons to his attorney, with a request that he would appear and answer, which he promised to do, but that such attorney was under the necessity of leaving town, and he therefore intrusted the summons to an other attorney, who promised to appear; that the latter, owing to the loss of a key, was unable to procure the summons, and he therefore went to a wrong court, and before his arrival at the proper court, a judgment had been taken by default, and this was considered a sufficient excuse. *Lent* v. *Jones*, 4 E. D. Smith, 52.

So, where the affidavit showed that the defendant had retained an attorney to appear in the action ; that he left his residence for the court room, and in time to reach it at the hour when the summons was returnable ; that the attorney was met in the street by a client, who engaged him in a conversation upon a special matter of business ; that through a misapprehension as to the lapse of time, such attorney failed to reach court until fifteen minutes after the proper time ; that the plaintiff, and his counsel, and witnesses were there in court, and that the plaintiff refused to open the default, and allow a trial upon the payment of costs &c., and this was held to be a reasonable and satisfactory excuse. *Seymour* v. *Elmer*, 4 E. D. Smith, 199.

So, where a summons stated that the defendant was required "to answer the complaint of the plaintiff for professional services," and it appeared that the defendant had good reason to believe, from the wording of the summons, and the facts within his knowledge, that the action was for a claim which he admitted to be due, and for that reason he failed to appear before the justice, whereupon the plaintiff recovered judgment for a greater sum, and upon an entirely different claim, this was held sufficient as an excuse. *Bissell* v. *Dean*, 3 E. D. Smith, 172.

So, where it is shown that the defendant himself mistook the return day of the summons, and for that reason failed to appear, the court may relieve him, *Gottsberger* v. *Harned*, 2 E. D. Smith, 128, especially where it appears that the defendant acted upon his mistaken impression and appeared at the time which he supposed was the correct one. *Gardner* v. *Wight*, 3 Id., 334.

Where it is evident that a defendant really intended to appear and defend an action, and that he has a good defense thereto, either partial or total, and that he failed to appear in consequence of any excusable mistake, he ought to be relieved upon proper terms.

The manner of serving process may be such as to excuse a defendant from appearing in the action, and to entitle him to relief against a judgment entered by default upon such service. And where the appellate court is satisfied, from the affidavits, that the process was not served at all, or that it was so improperly or defectively served that the defendant was not duly apprised of its nature and effect, the default will be opened and a new trial ordered. *Carroll* v. *Goslin*, 2 E. D. Smith, 376; *ante*, 68.

Where an issue has been joined, and the cause adjourned to a specified day for trial, but previous to that day there is a negotiation between the parties relative to the adjournment of the cause to a still further day, and the defendant actually believes that such adjournment has been agreed on, and he consequently remains absent or fails to appear at the trial, this will be a good excuse and a sufficient ground for opening the default, if he also shows that manifest injustice has been done. *Armstrong* v. *Craig*, 18 Barb., 387.

So, where the acts of the plaintiff prevent the defendant from appearing, and a default is taken, this will be a good excuse for the default. And where a plaintiff obtains a judgment by default before the proper time, upon a false statement that the defendant does not intend to appear, and when he does in fact appear at the proper time, but after judgment has been rendered against him, this will be a good ground for reversing the judgment. *Beach* v. *McCann*, 1 Hilt., 256. And if these facts appear in the return, there will not need to be any proof of them by affidavits. *Ib.*

So, where it appeared by the return that the defendant appeared before a justice, at the proper hour, on the return day of a summons which had been served upon him, and asked the justice for

his case, when the justice mistakenly informed him that no such cause was pending before him, upon which the defendant left court, but afterwards the justice, upon discovering the mistake, adjourned the cause to an other day, when a judgment was rendered against the defendant by default, this was held to be erroneous, and the judgment was reversed. *Murling* v. *Grote,* 1 Hilt., 116; *S. C.*, 3 Abb., 109.

So, where a defendant appeared at the proper time and place for the return of a summons which had been served upon him, and the justice informed him that the action was discontinued, whereupon the defendant left court, and the plaintiff soon after appeared, and the justice then proceeded and heard the cause and gave judgment for the plaintiff, in the absence of the defendant, this was held to be error, and the judgment was reversed. *Tyler* v. *Olney*, 12 Johns., 378.

Insufficient excuses.] Where the defendant has appeared and litigated the cause in the court below, the case does not fall within the provisions of § 366 of the Code, because that merely provides for cases in which the defendant failed to appear on the trial before the justice.

And the rule is the same where there is an appearance by an attorney, who swears to his authority to appear for the defendant. *Armstrong* v. *Craig*, 18 Barb., 387. If the attorney is responsible, and appeared without authority, the defendant will be bound by his acts as against the plaintiff in that action, and the remedy of the defendant is by action against the attorney. *Ib.; Allen* v. *Stone*, 10 Barb., 547, affirmed at general term. See note at end of case. If, however, the attorney is irresponsible, the court will relieve the defendant from the consequences of the attorney's acts, and in a case under this section would open the cause as though a default had been taken. *Ib.; Williams* v. *Van Valkenburg*, 16 How., 144; *Denton* v. *Noyes*, 6 Johns., 296; *Meacham* v. *Dudley*, 6 Wend., 514; *Grazebrook* v. *McCreedie*, 9 Wend., 437.

If the attorney appears for a defendant, and at his request, or by his authority, litigates the cause, there will, of course, be no relief under § 366. *Edwards* v. *Drew*, 2 E. D. Smith, 55; *Bunker* v. *Latson*, 1 Id., 410.

Cases sometimes occur, as we have already seen, *ante*, 842, in which relief is granted in cases where an attorney had been retained to appear and defend an action, but failed to do so.

There are some cases in which the negligence of the attorney may deprive a defendant of relief from a default. In *Mulhern* v. *Hyde*, 3 E. D. Smith, 177, the defendant suffered a default and then asked relief upon affidavits showing that he and his counsel were prevented from attending the trial in consequence of engagements elsewhere, but without stating the nature of those engagements. The court refused to open the default, and said, "We can never sanction a practice that a defendant and his counsel may absent themselves from the court on the day of trial, and then offer a mere allegation of other engagements as an

excuse for their failure to appear, and as a ground for setting aside the judgment." In *Fowler* v. *Colyer*, 2 E. D. Smith, 125, 126, the court said: "The default in this case was taken in the court room, after eleven o'clock of the day on which the summons was returnable. The defendant's attorney appears to have absented himself from the court until after that hour, when the summons was returnable at ten. We do not think that going to attend to other business is necessarily a *good excuse* for setting aside a judgment. An application should at least be made to the court below for an opportunity to attend to other business, if necessary, before leaving the court."

Where a summons is served by copy, which the defendant puts into his pocket, and he *forgets* the matter until after a judgment has been rendered against him, the courts will not consider his forgetfulness a sufficient excuse, *Ball v. Mander*, 19 How., 468, especially where it appears that the defendant paid more attention to playing cards than to the process of the court, and where it is evident that there is no substantial defense. *Ib.*

Where issue has been joined and the cause adjourned to a day for trial, the mere fact that the defendant *forgot* the day of trial is not a sufficient excuse when not accompanied by any explanatory circumstances accounting for a default. *Beebe* v. *Roberts*, 3 E. D. Smith, 194. So, where a defendant neglects to attend on the day of trial, until after judgment has been rendered against him, it will not be a sufficient excuse to allege in his affidavits that he was *ignorant of law proceedings*, especially where it appears that he went in search of counsel in due season, and on not finding him did not attend court until after judgment had been rendered. *Mayor, &c., of New York* v. *Green*, 1 Hilt., 393. His alleged ignorance is no excuse for not obeying the summons, by appearing at the time and place named in the summons. *Ib.* This case, however, was mainly decided upon the ground that no proof was made that manifest injustice had been done.

If the case is one which is tried by a court in which numerous causes are pending and called in their order, as in the marine court of New York, it will not be sufficient ground for opening the default where the defendant alleges as an excuse that he was present in court, but did not hear the cause called, if he fails to show that injustice has been done to him. *Forster* v. *Capewell*, 1 Hilt., 47.

So, if the action is one which is founded upon an assigned demand, it will not be a sufficient excuse for a default to show that the defendant was negotiating with the *assignor* for a settlement of the claim, after notice of assignment, and that he omitted to appear at the trial, upon a promise of such assignor to stop the proceedings in the action. *Travis* v. *Bassett*, 3 E. D. Smith, 171. But if such negotiation had occurred between the actual plaintiff and the defendant, and the plaintiff had promised to stop the proceedings, and the defendant, acting upon such promise, had remained absent on the day of the trial, this would be a suffi-

cient excuse for setting aside any judgment obtained in violation of such promise. *Armstrong* v. *Craig*, 18 Barb., 387. And whenever a plaintiff is guilty of a fraudulent practice which prevents the defendant from attending the trial, the court will regard this as a good excuse for not appearing, and will set aside the judgment so fraudulently obtained. *Ib.*

The various cases which have been referred to upon the question of sufficiency or insufficiency of excuse, have not been cited as establishing any particular rule of law, but rather as showing what practice usually prevails upon such facts and circumstances as appeared in those cases.

Since every such appeal is a mere application to the discretion of the court, and since each case differs materially from all others as to facts and circumstances, the citation of cases can effect no other object than to aid in establishing a uniform system of practice. And in deciding each case, the county court will be governed by the same principles that would be applied in case of an application for relief from a default taken in the county court; or by such rules as the supreme court adopts in cases where a motion is made to open a default. In all such cases, the courts uniformly adopt such a course as will tend to the furtherance of justice, and as will allow every person a fair and reasonable opportunity to defend an action where he has a meritorious defense, and he has by any excusable default been prevented from interposing that defense. Justices' courts have no power to open such defaults, and that power was expressly given to the county courts for the purpose of enabling them to see that justice should prevail, and that every man should have a reasonable opportunity for making a legal and a just defense to any action which might be brought against him. And, at the risk of a repetition, it may be again said that the power is a discretionary one, which is to be liberally used for the purpose of advancing the remedy intended by the legislature in enacting the law.

More has been said upon this subject than would ordinarily be deemed necessary. But every experienced practitioner is familiar with the injustice which has too often resulted under the old system of practice, in cases in which it was held that no relief could be given in cases of judgments taken by default, unless, indeed, there could be some legal ground of reversal found in some error in the proceedings in the court below. It was held that relief from defaults could not be given by justices after judgment rendered, and this is still the rule. But it was also held, that in many cases it was discretionary with the justice whether to permit a defendant to appear and defend if he failed to appear on the return day. See the cases cited, *ante*, 220, 221, 222.

The Code adopted the present rule of allowing the county court to grant relief from excusable defaults, for the express purpose of enabling that court to review such matters of discretion in the court below, and also to give relief in a proper case, even when no application was made in that court, but there was

an entire default in appearing, provided such default were properly excused, and manifest injustice had been done in the court below.

Manifest injustice must be shown.] To entitle a defendant to relief against a default in the court below, it is not sufficient to show a good excuse for the failure to appear; it is also indispensable to show that manifest injustice has been done by the rendition of the judgment. Proof, either of a good excuse or of manifest injustice, when taken separately, will not be sufficient, since it fails to meet the statutory requirement that both facts shall be proved before relief is to be granted.

In drawing the affidavits of the defendant, it will not be sufficient to rely upon a mere statement or allegation that injustice has been done. The statute requires that it shall be *shown* that *manifest* injustice has been done. From the language used, it is evident that it was intended that injustice must be shown in a proper manner by legal proof, which, in such a case, may be by affidavits showing the facts and circumstances from which it may be legally inferred that injustice has been done. If the affidavits of the defendant show the nature of the plaintiff's demand, and the nature of the defense which the defendant desires to interpose, and that it is probable that he can establish such defense upon a fair trial, this will be showing enough to authorize the legal inference that injustice has been done. And in every case in which there is a valid or legal defense to an action which has been lost by reason of the default, it is easy to state such facts and circumstances as will satisfy the appellate court that justice requires a new trial, and when this is done, it is showing manifest injustice within the meaning of the statute.

A party may have suffered injustice by being deprived of his defense upon a default taken against him in the court below; and he may also fail to attain a remedy in the appellate court, if he is again so negligent or so unfortunate as not to present proper facts and circumstances entitling him to relief. A defendant may have a case in which a mere statement of the facts and circumstances in his affidavits would entitle him to relief; and yet should he fail to present them to the court, but rely upon a mere affidavit of merits in the usual form, he would fail to secure any relief from the default and judgment below. *Fowler* v. *Colyer*, 2 E. D. Smith, 125; *Armstrong* v. *Craig*, 18 Barb., 387. It is not sufficient to state mere conclusions from facts, but the facts themselves must be stated in such a manner that the court will be authorized to infer from such facts that injustice has been done. *Ib.*

The defendant must show such facts as satisfy the court that he has a valid defense, either in whole or in part, to the action; and merely showing that an answer was interposed which set up a particular defense, without any proof that the defense is true in fact, will not be sufficient. *Mix* v. *White*, 1 E. D. Smith, 614.

In *Mayor, &c., of New York* v. *Green*, 1 Hilt., 394, 395, the court used the following language in reference to a defendant's

affidavit: "Nor does it appear from his affidavit that injustice has been done. He states in it that 'he *denies* that he has violated any of the ordinances of the plaintiffs, in manner and form as set forth in the complaint.' This is a mere matter of opinion, whether or not he has violated them. If he wished to satisfy the court that injustice had been done by the judgment, he should have shown, by a statement of facts, that the charge made out by the evidence on the trial was not true. On the contrary, he does no such thing. He asks this court to decide that injustice has been done him by the judgment, because he swears that he denies that he has violated the ordinances. He does not even swear that he has not violated them, but he affirms that he denies the violation, when the truth of such denial is not sworn to. If a defendant wishes to obtain a new trial in such a case, he must point out the mode in which injustice has been done, and leave to the court, and not assume himself, the decision of that question."

Where the affidavits show that the plaintiff took judgment by default for the entire amount of his demand without crediting payments which had been made thereon, this will be showing that manifest injustice has been done. *Bissell* v. *Dean*, 3 E. D. Smith, 173.

There are cases in which an omission to appear and set off a demand will not bar a subsequent action by the defendant for the amount of his claim; and this is the rule in courts of record, in which a party may set off his claim, or maintain a separate action for it. And, in those instances in which a like rule prevails in inferior courts, it has been held that it will not be any ground for a new trial to show that the plaintiff took judgment by default without allowing a set-off, for the reason that a defendant may still recover the amount of his demand by action. *Travis* v. *Bassett*, 3 E. D. Smith, 171. This last case was where an appeal was taken from the marine court to the court of common pleas in New York city. But, even though the defendant might maintain an action for the recovery of his demand in such a case, it does not follow that such an action would be as advantageous as the right of set-off on a new trial. The plaintiff might be irresponsible, and the defendant entirely solvent; and, in such a case, if the plaintiff were allowed to enforce his judgment, while the defendant could not collect his claim, even if he had a judgment, the proceeding would hardly escape the charge of manifest injustice, and the court would be disposed to open the default and order a new trial, so that the defendant may have an opportunity of deducting the amount of his claim from the plaintiff's demand.

In actions in justices' courts, an omission to appear and set off a demand incurs, in most cases, a forfeiture of the claim, and no subsequent action can be maintained for its recovery. Vol. I, 47, §§ 55, 56, 946, 978. For this reason, a county court will always open a judgment taken by default in a justice's court, when it

appears that the plaintiff has taken a judgment for the full amount of his claim without allowing the amount of a set-off which, in justice, ought to have been allowed to the defendant. In no other way can a county court prevent manifest injustice, and carry into effect the intention of the legislature; although this rule is always subject to the qualification that the defendant has shown a satisfactory excuse for his default.

It is sometimes a matter of difficulty to determine whether manifest injustice has been done, and this doubt arises from a conflict in the statements contained in the affidavits of the respective parties.

It has been suggested that it may be questionable whether it was the intention of the statute to permit the plaintiff to introduce affidavits in contradiction of those upon which the defendant asks for a new trial. *Camp* v. *Stewart*, 2 E. D. Smith, 88, 89; *Lent* v. *Jones*, 4 Id., 52, 53. But notwithstanding these casual remarks, the settled practice of the court is to receive such affidavits, and to act upon them as a part of the proof in the case. *Forster* v. *Capewell*, 1 Hilt., 47; *Gottsberger* v. *Harned*, 2 E. D. Smith, 128; *Silkman* v. *Boiger*, 4 Id., 236; *Armstrong* v. *Craig*, 18 Barb., 387. Besides these cases which received such affidavits, the general analogies of the law favor the reception of such affidavits. If the application is regarded as a motion, then it is clear that the motion may be met by counter affidavits; if it is regarded as a trial, then every party ought to be allowed equal facilities for presenting his views as to his rights; and if the application is regarded as a mere application to the discretionary power of the court to afford relief, it is of the highest importance that both parties should be heard before such discretion is exercised. The court will, therefore, always receive the affidavits of the appellent, and will consider them in disposing of the question as to ordering a new trial. But where it is evident that there is a meritorious defense, which has been shut out by the default, or where it is probable that there is a valid defense, the appellate court will not weigh probabilities very nicely upon conflicting affidavits, but will order a new trial in the court below, upon which the questions may be appropriately settled upon all the evidence given. *Camp* v. *Stewart*, 2 E. D. Smith, 88; *Carroll* v. *Goslin*, Id., 376, 378. If, however, the evidence is so evenly balanced, that there is no preponderance in favor of the defendant, the court may refuse to order a new trial. *Forster* v. *Capewell*, 1 Hilt., 47. The manner of weighing the evidence on these applications for a new trial has been sufficiently explained upon general principles. There are, however, a few cases which require notice before leaving this subject.

Where the evidence is returned, and it appears that the plaintiff proved his case fully by one competent witness, it has been held that the defendant must do more than to offer his own affidavit in contradiction of the witness sworn. *Armstrong* v. *Craig*, 18 Barb., 387; *Lent* v. *Jones*, 4 E. D. Smith, 52, 54. The court said in the

last case cited: "To order a new trial upon the proofs before us; and no other proof is shown by the plaintiff to be within his power; would be of no avail to him. If he cannot produce the affidavit of any witness, he should at least show that there are witnesses who refuse to give their affidavits, and who have knowledge of facts to which they can be compelled to testify, and which, if proved, would reduce or disprove the plaintiff's claim." The case of *Silkman* v. *Boiger*, 4 E. D. Smith, 236, is to the same effect; and it also holds, that when, in addition to such a case, the respondent's affidavits show that entire justice has been done, the defendant's single affidavit must be regarded as overborne by the proofs in the case, and a new trial will be refused. So, where the affidavit of the defendant is met and fully denied by that of the plaintiff, it has been held that the defendant must fail in his application for want of a balance of proof. *Forster* v. *Capewell*, 1 Hilt., 47. The court said, "We cannot say, where the defendant states a fact, and the plaintiff denies it, which of the statements is correct; and the only way to establish it is by the affidavit of the witness by whom the defendants expect to prove their defense." To the same effect is *Van Wyck* v. *Kelly*, cited in note *b*, 2 E. D. Smith, 128. Where the defendant's affidavit is met by that of the plaintiff, and also that of an other witness, the balance of proof will be against the defendant, and his application must fail. *Gottsberger* v. *Harned*, 2 E. D. Smith, 128; *Gardner* v. *Wight*, 3 Id., 334.

The cases which have been cited show a tendency to follow the rule usually adopted of being governed by the balance of proof. But it is not always numbers that control. There may be such a statement of facts in the affidavits of the defendant as will leave no doubt that injustice has been done, even when the plaintiff produces a larger number of affidavits or of witnesses than the defendant. But it does not follow, as of course, that the cause is to be decided merely upon a count of the number of affidavits furnished by the respective parties. The true question is, whether the court is satisfied that injustice has been done, or whether the case is not so doubtful as to require a new trial so that justice may prevail. See *ante*, 534, 539 to 545.

And in pursuance of this principle it has been held that the unsupported evidence of the defendant would be sufficient to authorize a new trial when it appeared that the judgment below was obtained upon the evidence of the plaintiff's assignor of the demand sued on. *Seymour* v. *Elmer*, 4 E. D. Smith, 199, 201.

Terms of opening default.] The statute confers upon the county court the power to impose such terms as it may deem proper upon opening a default. Vol. I, 31, § 366. Such a power is a very valuable one, and it will be freely exercised whenever that may become proper or necessary. Inasmuch as the defendant generally asks relief upon the ground that he failed to appear in the court below in consequence of some excusable mistake or neglect, the court will sometimes impose terms upon him by way of pay-

ing costs, since he ought to bear the consequences of his neglect rather than the diligent party.

The statute does not declare what terms may be imposed, and therefore it is entirely for the county court to declare what they shall be. This power, however, is not to be harshly or arbitrarily exercised; but is to be enforced in such a manner as to secure the just rights and interests of both litigant parties. Upon this question, as upon others of a discretionary character, authorities are not of much value except as illustrations of the practice of the courts under this section. In *Camp* v. *Stewart*, 2 E. D. Smith, 89, cited *ante*, 842, the court ordered a new trial upon the terms that the defendant should pay to the plaintiff $12 costs of the appeal, within five days. In *Seymour* v. *Elmer*, 4 E. D. Smith, 199, 201, cited *ante*, 842, the county court ordered a new trial upon the payment by the defendant of the costs of the respondent upon the appeal, and also of waiving any claim for restitution for the costs paid on appealing. In *Bissell* v. *Dean*, 3 E. D. Smith, 172, 174, cited *ante*, 843, a new trial was ordered upon the payment by the defendant of such sum as his affidavits conceded to be due, and upon the payment by him also of the costs incurred in the court below.

Where a default is opened, and a new trial ordered upon specified conditions, the defendant must comply with those conditions or he will lose the benefit of the order. *Mitchell* v. *Menkle*, 1 Hilt., 142. And on proper proof that such conditions have not been complied with, the county court will vacate the order granting a new trial; although any order vacating it would probably be unnecessary, since a failure to comply with the terms of the original order would prevent it from becoming operative so as to vacate the judgment below. *Ib.*

New trial before the justice.] The county court may order the new trial to take place before the justice who originally rendered judgment, or it may be sent to any other justice in the same county for trial. Vol. I, 31, § 366. In determining this question the county court will consider the convenience of both parties, and also the impartiality of the justice, and will order the trial before such justice as may result in a full and fair trial between the parties. The statute provides that on an appearance before the justice for the purposes of such new trial, the same proceedings shall be had as upon the return of a summons personally served. Vol. I, 31, § 366. The effect of this statute is to set aside everything, even including the former pleadings; and a new issue must be joined, precisely as though no trial or judgment had ever occurred. *Camp* v. *Stewart*, 2 E. D. Smith, 88, 90, at end of opinion of court.

A copy of the order granting a new trial, duly certified by the clerk of the appellate court, will be sufficient evidence to authorize the justice to proceed with the trial precisely as though a summons had been issued by him and it were then returned with

proof of personal service thereof; and see *Manning* v. *Johnson*, 7 Barb., 460, 462.

When a default is opened by order of the county court and a new trial is ordered on a particular day, the cause must be tried upon that day, or it must be legally adjourned to a subsequent day; and if the cause is not tried on the day assigned, nor the cause regularly adjourned, but a judgment is rendered on a subsequent day, in the absence of the defendant, it will be reversed, on the ground that the justice has no jurisdiction to render a judgment upon such subsequent day. *McCollum* v. *McClave*, 1 Hilt., 140. And in such a case, if the trial is proceeded with on the proper day, the justice must hear the proofs and allegations of the plaintiff; he has no authority to make an order that the previous judgment shall stand as his judgment in the action. *Ib.* A judgment once vacated is always vacated, and the defendant stands in reference thereto as if no action had been prosecuted against him. *Ib.*

Where a new trial is ordered upon the terms that the former judgment shall stand as security, and a new trial takes place which results in a second verdict and judgment for the plaintiff, but which is reversed upon an appeal, for errors occurring on such new trial, the first judgment will fall upon the reversal of the second one, since such first judgment was a mere security for the second. *Pierce* v. *Thomas*, 4 E. D. Smith, 354, 356.

The order granting a new trial must specify the name of the justice before whom it is to take place, the day and hour and place for the appearance of the parties, and the terms upon which the order is granted.

The party obtaining the order should see that it is properly filed and entered by the clerk of the appellate court. And he ought also to serve a copy of it upon the justice who is to try the cause, as well as upon the plaintiff in the action.

The service of the order may be made as follows: 1. Procure a certified copy of the order from the clerk; 2. Serve a copy of this certified order upon the justice, and upon the plaintiff, showing the certified copy at the time of making such service.

If the order provides for the service of a copy thereof, and fixes a time for such service, the order must be complied with. But if the order is silent upon this point, the defendant ought immediately to serve a copy of the order upon the justice and the plaintiff. The statute does not provide that the order need be served, but it is best to follow the usual practice of serving copies of orders, so that no question of regularity or of jurisdiction can occur.

An order for a new trial may be in the following form:

Form of order for new trial.

FULTON COUNTY COURT.

John Doe, Respondent,
agst.
Richard Roe, Appellant.

At a term of the county court of Fulton county, held at the court house, in the village of Johnstown, on the day of , 1865. Present, Hon. JOHN STEWART, county judge, &c.

The above named Richard Roe having appealed to this court, from a judgment rendered against him on the day of , 1865, for the sum of damages and costs, by Richardson P. Clark, Esq., a justice of the peace of Johnstown, in Fulton county; and after a hearing of this cause upon the return made and filed by the said justice, and upon the affidavits made by the respective parties and read on the hearing, and filed with the clerk of this court, and after hearing Horace E. Smith in support of the said appeal, and upon hearing Archibald McFarlan, Esq., in opposition thereto; and it appearing to the court that the defendant's default is satisfactorily excused, and that manifest injustice has been done to the appellant and defendant, it is now, on motion of Horace E. Smith, Esq., ORDERED: * That the judgment so rendered by the said Richardson P. Clark, Esq., be set aside (or suspended), and that a new trial be had before the said Richardson P. Clark, on the 25th day of August, 1865, at ten o'clock in the forenoon, at the office of the said justice, or on such other day as the said cause may be legally adjourned to. (If the order is granted upon terms or conditions a clause like the following may be added, though it will conform to the order actually made by the court:) with dollars costs to the appellant (or respondent) (that such new trial be granted upon the terms and conditions that the said Richard Roe pay to the said John Doe, the plaintiff, the sum of ten dollars, on or before the hour appointed for such new trial; or that he leave such sum with said justice at that time for the plaintiff).

It is entirely discretionary with the court whether to impose terms or not. If justice demands it, costs may be imposed upon the defendant as the condition of relief. And there may be cases in which the court may impose the costs of the reversal or of a motion upon the plaintiff where his conduct has been fraudulent in procuring the judgment, or where he fraudulently misleads the defendant and induces him to be absent from trial, or in any other similar manner prevents him from making a defense.

Error in fact.] The statute provides that the county court, or other corresponding appellate court, may reverse the judgment of the justice's court, or other inferior court, for errors of law or of fact. Vol. I, 31, § 366. This is no new power, and it was in common use before the enactment of the Code. And to those who are not familiar with legal principles and proceedings, and especially those who are not familiar with the former practice, there is quite a liability to misapprehension as to the meaning of the terms "error of law," or "error in fact."

When a return is made by a justice upon an appeal taken for the purpose of reviewing the proceedings below, upon the facts appearing in the return, such return is considered as a record, after it is filed. And if there are any errors which appear from

the face of the record itself, those errors are errors of law; and where the return is the only evidence of the erroneous proceeding below, the errors disclosed by the return are always termed errors in law, as distinguished from error in fact in the proceedings. For errors of law a judgment is nearly always reversible.

When a return is made, but it does not set out the errors complained of, although there are errors for which the judgment is reversible, but the return does not disclose them because the facts did not occur within the knowledge of the justice, for which reason he is neither required or allowed to return them, the remedy of the aggrieved party is by assigning error in fact. And error in fact, in such a case, means some error which took place in the proceedings not within the knowledge of the justice, but still of such a character as to require a reversal of the judgment below, if the errors are properly established. From what has been already said, it is evident that error in fact does not mean a mere erroneous decision by a jury or by the justice, upon a question of fact involved in the trial below, for such a matter is clearly within the knowledge of the justice, and he can return all the facts relating to such trial. And it will be remembered, therefore, that a mere erroneous decision upon a question of fact, upon the issues raised in the court below, never constitutes what is known as error in fact. *Biglow* v. *Sanders*, 22 Barb., 147, 149; *Hurd* v. *Beeman*, 8 How., 254; *Adsit* v. *Wilson*, 7 Id., 64, 68, 69; *Lynch* v. *McBeth*, 7 Id., 113, 118. But where the error arises from some incapacity of the parties, such as infancy, coverture or the like, or from some defect or irregularity in the service of the process for the commencement of the action, or for some misconduct of the jury after they have retired for deliberation, or in other similar cases in which proof of such error must be made in some other manner than by the justice's return, such errors are properly termed errors in fact. To illustrate these general views, a few of the numerous cases will now be cited.

Where a constable's return is erroneous or false as to the service of process upon the defendant, he may, if he properly objects thereto before joining issue, or if he does not appear at all in the court below, assign, as error in fact, that the process was never served upon him, or was so defectively served as not to confer jurisdiction upon the justice, or that it was so irregular as to be a ground of reversal of the judgment. *Wavel* v. *Wiles*, 10 E. P. Smith, 635, 637; see the cases cited, *ante*, 74. Errors of this kind sometimes appear upon the face of the justice's return, as in some of the cases just referred to, but where the error does not thus appear, it may be proved by affidavits, as will be fully explained in a subsequent place.

A defendant may assign, as error in fact, that the justice who tried the action was not a resident of the town in which either of the parties resided, nor a resident of any town adjoining either of them. *Tiffany* v. *Gilbert*, 4 Barb., 320; *ante*, 7. So,

where the defendant is a non-resident of the county, and he is sued by a long summons instead of a short one, he may assign this as error in fact. *Willins* v. *Wheeler*, 28 Barb., 669; *S. C.*, 17 How., 93; 8 Abb., 116.

The relationship of the justice to one of the parties is properly assignable as error in fact, although it will be equally available as error in law, if it appears upon the face of the return. *Ante*, 27.

Where the error complained of relates to the manner in which process has been served, or is founded upon the ground that it was served upon the wrong person, or that there was no service of it upon the defendant, he must take the objection before joining issue, or he will waive it. *Ante*, 17, 235. But an appearance and a joinder of issue without objection, will not waive the error that the justice is related to one of the parties. *Ante*, 27, 28.

The appearance of an infant defendant by attorney instead of guardian, is error in fact, and infancy may be shown by the affidavits served. *Arnold* v. *Sandford*, 14 Johns., 417; *Dewitt* v. *Post*, 11 Id., 460. So the appearance of an infant defendant by attorney and not by guardian, is error in fact, and if a judgment is rendered against him it will be reversed, though it is otherwise where the judgment is in his favor. *Camp* v. *Bennett*, 16 Wend., 48. If an entire judgment be rendered against an infant and an other, where the former appears by attorney instead of guardian, it will be reversed upon appeal for error in fact, even though the infant should die after the appeal was brought. *Ib.*

Under the former practice, where a judgment was rendered against two or more, and one of them was an infant and appeared by attorney, the judgment would have been reversed as to all of the defendants for the error. *Cruikshank* v. *Gardner*, 2 Hill, 333; *Arnold* v. *Sandford*, 14 Johns., 417. And the rule was not affected by the fact that the plaintiff might have severed the judgment in the court below by taking a separate judgment against the adult alone. *Ib.* Whether § 366 of the Code introduces a different rule has not yet been decided in any reported case that has fallen under my observation.

Where a judgment is rendered against an infant and an other person as joint debtors, but no process is served upon the infant, and he does not appear in the action, he cannot assign as error in fact that he did not appear by guardian. *Mason* v. *Denison*, 11 Wend., 612; *S. C.*, 15 Id., 64; *ante*, 231.

Where an infant plaintiff appears by attorney instead of guardian or next friend, and a judgment is rendered against him for costs, the appellate court will revoke or set aside the judgment, but they will refuse to allow any costs to the infant. *Maynard* v. *Downer*, 13 Wend., 575.

Misconduct on the part of a jury, or of individual jurors, is a proper matter to be assigned as error in fact; and where the jurors agreed that each of them should mark the sum which he found; that the amounts so marked should be added together, and the total amount divided by the number of jurors; and that

the quotient should be the amount of the verdict without alteration, this was held to be erroneous, and the judgment was reversed. *Harvey* v. *Rickett*, 15 Johns., 87; *Roberts* v. *Failis*, 1 Cow., 238. See further, *ante*, 620, 621. So, where a jury or any of the individual jurors drink intoxicating liquors in the jury room while out for deliberation, this is assignable as error in fact. *Rose* v. *Smith*, 4 Cow., 17.

In relation to the misconduct of jurors, it may be remarked generally, that whenever their conduct is such as to be a ground of setting aside their verdict, then such misconduct is properly assignable as error in fact.

It is to be remembered, however, that the affidavits of jurors will not be received for the purpose of impeaching their verdict, by showing what influenced their minds in finding the verdict. *Brownell* v. *McEwen*, 5 Denio, 367. Nor are they admissible to show error in respect to the merits of the verdict, nor for the purpose of showing irregularity or misconduct on the part of the juror himself or that of his fellow jurors. *Clum* v. *Smith*, 5 Hill, 560; *Dana* v. *Tucker*, 4 Johns., 487. Their affidavits may, however, be received to exculpate the jurors, or in support of their verdict. *Ib.*

While error in fact may be assigned for the purpose of correcting all such errors as may have occurred in the course of the action, or for matters connected with it and forming a legal ground of error, there is still a limit to this general rule, and one qualification of the rule is, that error in fact is not assignable as to matters which contradict the record of the court below; and where a defendant pleaded infancy in the court below, which issue was tried by a jury and found against him, it was held that the decision below was conclusive, and that infancy could not be assigned as error in fact on an appeal. *Ingersoll* v. *Wilson*, 3 Johns., 437.

Must be an appeal.] It is a general rule that no errors, whether of law or of fact, can be reached except by an appeal duly taken to the county court, or other appellate tribunal. And where error in fact exists, which is sufficient to secure a new trial, the first step in the way of securing the remedy is by bringing an appeal. Vol. I, 31, § 366. So, too, the notice of appeal ought to specify in what such error in fact consists. The manner of doing this may be seen in Nos. 18, 19, 20, 21, of the notice of appeal, *ante*, 785. As to the necessity for an appeal and for stating the grounds of appeal in the notice, see the remarks, *ante*, 837, as to obtaining relief from a judgment taken by default, for most of the remarks there made are equally applicable to cases in which error in fact is assigned.

Assigning error in fact.] It has been held by one county court that the practice of assigning error in fact has not been abrogated by the Code. *Craw* v. *Daly*, 2 Code R., 118, L. Tremain, county judge of Greene county. As has just been seen, it is necessary to state the error in fact as one of the grounds of

appeal. And since such errors do not appear upon the face of the return, proof of their existence must be made by affidavits or by the oral evidence of witnesses. The Code provides that either or both kinds of evidence may be received by the court. Vol. I, 31, § 366. If affidavits are used, they will necessarily specify the particular grounds of error, and they will also state the facts and circumstances showing the existence of the error. And it is well settled that such a specification of the errors in the notice of appeal and in the affidavits, is a sufficient assignment of errors; and the counter affidavits of the respondent will constitute a sufficient joinder in error. *Adsit* v. *Wilson*, 7 How., 64, 70; *Lynch* v. *McBeth*, Id., 113, 118; *Hurd* v. *Beeman*, 8 Id., 254, SHELDON, county judge of Erie county. From the fact that the statute provides that the *court* may determine the alleged error in fact upon *affidavits*, it is evident that such questions were not intended to be tried by a jury. And so the court may, in its discretion, determine the question upon the examination of witnesses. Vol. I, 31, § 366. These witnesses may be required to attend in obedience to a subpœna, which may be issued by the attorney of the party requiring their attendance. The form of a subpœna will be given when treating of new trials.

Form of affidavits.] The general form of the affidavit is the same as that used on an application for relief from a default. See *ante*, 838. There will, of course, be this difference, viz.: the affidavits used for the purpose of assigning error in fact will state the particular error assigned, and will also state the particular facts and circumstances relating thereto.

Serving copies of affidavits.] The affidavits ought to be copied, and copies thereof served upon the opposite party in the same manner as in cases of asking relief from a default. *Ante*, 839. And in relation to the time of making such service, it is eminently proper that the appellant should serve these affidavits at least eight days before the sitting of the court at which the hearing is to take place. *Hurd* v. *Beeman*, 8 How., 254; *Cook* v. *Swift*, 18 How., 454, 457; *S. C.*, 10 Abb., 212; *Adsit* v. *Wilson*, 7 Id., 64, 70; and see *ante*, 840.

Notice of hearing.] The notice of hearing, in this case, is similar to that in an application for a new trial, after a default has been taken; and the form of notice, and the time and manner of service may be the same. See *ante*, 839. If any modification of the notice becomes necessary, that may readily be done by the practitioner.

Practice on the hearing.] The practice upon the hearing of an appeal, when error in fact is assigned, is the same as that already pointed out in cases of default. *Ante*, 840. And the court must hear all matters claimed as errors, whether appearing in the return, or in the affidavits, or by the oral evidence of witnesses, *Ante*, 840, 849.

Decision of the court.] There is one material difference between a case in which an appellant seeks relief from a judgment taken

against him by default, and one in which he assigns error in fact as ground of reversal. In the former case, the granting of relief is discretionary with the county court, upon a hearing of all the facts. *Ante*, 840, 846. But where error in fact is assigned, and the truth of the facts assigned is established, the county court is bound to reverse the judgment below, if the matters assigned as error are such as in law require a reversal of the judgment. And if the county court refuses to render a proper judgment, the error may be corrected by an appeal to the supreme court.

And so, too, when error in fact is assigned, the proper judgment is a mere reversal or affirmance of the judgment below, with the costs of the appeal to the successful party.

The decision is not a mere order, but a final judgment. The form of such a judgment will be given in a subsequent place.

Transfer of cause to supreme court.] Whenever any action or proceeding is pending in a county court, and the county judge is, for any cause, incapable of acting, he must make a certificate of that fact and file it in the county clerk's office. Vol. I, 4, § 30, sub. 13. This act vests the supreme court with jurisdiction of the cause or proceeding. *Ib.*

Every such action, cause or proceeding must be heard, in the first instance, at a special term or circuit held in such county. *Ib.*

This was also the settled rule before the Code was amended so as to require the first hearing to be had before the special instead of the general term. *Davis* v. *Stone*, 16 How., 538; *Crandall* v. *Rodgers*, cited Id., 540, and decided at general term.

On the hearing at the special term of the supreme court, the cause is heard upon the original papers in the same manner as it would have been had it been heard in the county court. *Wiles* v. *Peck*, 16 How., 541. No copy need be furnished for the court. *Ib.* And the clerk ought to refuse to permit the return or other papers to be taken from his county for the purpose of a hearing in an other county. *Ib.*

His duty is to retain such papers on file until they are required at the court house in his county for the purposes of a hearing in that county. *Ib.*

The decision of the justice of the supreme court stands as the decision of the county judge, and may be reviewed in the same manner by an appeal to the general term of the supreme court. As to the amendment of a return in a transferred cause, see *ante*, 821.

Re-argument of an appeal cause.] After an appeal has been argued upon the return and decided, and a judgment has been entered upon such decision, the county court has no power to vacate the judgment and to order a rehearing, as that would be equivalent to a review of its own judgments.

But, after a cause has been argued and before a decision has been given, the county court undoubtedly has power to hear a further argument, if such a course is deemed proper. And even where a county judge has decided a cause, but he has not filed

his decision, it may be that he has power to hear further arguments, and to review the decision previously made. But this would be the extent to which his authority would extend for such a purpose.

The exercise of such a power is a matter of discretion with the county court, and will not be exercised without sufficient reason for such a course.

It has been held that a mere want of preparation for the argument, when no sufficient reason is shown therefor, will not be a sufficient cause. *Drucker* v. *Patterson*, 2 Hilt., 135. Nor will it be sufficient to allege that the court did not understand the case on the argument, in consequence of the counsel's want of preparation. *Ib.*

This question, however, is one which is so much controlled by circumstances that it would be difficult to lay down any general rule which ought to control every case, unless it should be that a re-argument will be ordered in those cases in which there is a doubt as to the correctness of the previous decision, or, if not decided, if the court desires to hear a further discussion before disposing of the cause. If the cause is of importance, and the questions are novel and intricate, there is entire propriety in hearing a full and careful discussion of the points, even if a re-argument becomes necessary. But when the points are clear and well settled, and the matter is of little importance, a re-argument would be a mere waste of time.

SECTION V.

NEW TRIAL.

General considerations.] Since the adoption of the Code of Procedure, and down to a recent period, there was no such thing as a new trial of an action upon an appeal from the judgment of a justice's court, or other inferior tribunal. In 1862 the Code was amended so as to allow a new trial in the county court in certain specified cases; and, in 1864 and 1865, the law was again modified, and it now stands as it may be found in Vol. I, 31, § 366. This change in the law is one of the greatest importance and value. And, it may be safely asserted, that few amendments have ever been made to the Code which conferred greater benefits upon the public at large. It is true, that, under the former system of review upon the return alone, there were many cases in which relief could have been obtained against errors committed in the court below. But this was not always the case. The plaintiff always has the selection of the justice before whom the cause is to be tried; and he certainly will not select one who is inimical to himself, and friendly with the defendant. Again, a jury is selected from the neighborhood where the justice resides; and, besides that, the selection of a constable is not a matter of entire indifference, since his selection of jurors may be for the advantage of one of the litigant parties, while it may be a detri-

ment or injury to the other. If a cause is tried under such circumstances, where there is favoritism on the part of the justice, the constable or the jury, there must, of necessity, be injustice as the result of the trial. Such things are not so common as they might be, but every practitioner of any experience will readily recall instances of injustice, which have occurred within his own personal knowledge.

It may be said that an appeal would correct such evils, and in some instances this is true. But suppose a case in which the cause turns upon a question of fact, and that there is a conflict in the evidence, though the balance of evidence clearly lies upon the side of the party against whom the verdict or decision is given. In such a case, an appeal under the former system would be of no avail, because of the settled rule that an appellate court could not interfere upon a question of fact, when there was evidence upon both sides of the question. Under such a state of things, an unjust judgment of two hundred dollars might be rendered against a party, and he be utterly remediless.

Again, the injured party may have taken exceptions upon the trial which ought to secure a new trial, or rather a reversal of the justice's judgment; but it has sometimes been found that the return did not contain the exceptions which were taken, or, if stated in some form, it was in such a manner as to be of no avail to the appellant. It is true that these things are not common, but that they have occurred sometimes, no one will venture to deny.

By providing for a new trial in important causes, the occurrence of such results will be prevented; or, at all events, an adequate remedy will be afforded to the injured party by an appeal, where the findings of fact below will be of no consequence, and where the exceptions below are not returned because a new trial of the whole matter is to take place in the appellate court. Under such circumstances, an unjust verdict and judgment in favor of a plaintiff will be of no advantage to him, since it will be certain to be superseded by a just one on the new trial. And no plaintiff will desire to obtain a verdict for a sum larger than is his just due, since he may incur the costs of an appeal by taking it.

The principal value, however, of the rule ordering a new trial is, that it provides the injured party, whether plaintiff or defendant, from the evils of an unjust verdict, whether procured by error or by fraud; and such a remedy cannot be over estimated. This system of new trials might be extended to some new cases with profit to the public. There are many cases which are now excluded from the jurisdiction of justices' courts, such as assault, battery, slander and the like. Vol. I, 8, § 54. In most of these actions the recovery is usually much less than $200, or less than the amount of a justice's jurisdiction, and for that reason these causes might advantageously be tried by justices' courts in the first instance, subject to a new trial in the county court. Such a

practice would relieve the circuits of many causes which never ought to find their way upon the calendar to take up the time of that court, while they could be more economically and quite as justly disposed of in an other manner.

New trial in what cases.] A new trial may be had upon either questions of law or of fact arising upon the pleadings in the court below. Vol. I, 31, § 366.

But the right to a new trial is not absolute in all cases. Before it can be claimed as a matter of right, it must appear that the recovery below exceeded fifty dollars, or that the value of the property recovered exceeded that sum, or that either party demanded judgment in his pleadings for a greater amount than that sum. Vol. I, 30, § 360; Id. 27, § 352. So, too, it is important that there should have been an issue joined, either of law or of fact, for if that has not been done, there cannot be any new trial in the county court, but the case must be heard upon the return, or upon a motion for relief from any default taken in the court below. See the practice, *ante*, 837. If an issue of fact was joined between the parties below, it is not essential that the defendant should have been present at the trial, for if the claim in the pleadings, or the sum found by the justice or jury in the court below, exceeds fifty dollars, he may have a new trial. Vol. I, 27, § 352.

If the judgment below is for less than fifty dollars, and the defendant did not appear at the trial in consequence of an excusable default, he may obtain relief by asking to have the default opened. *Ante*, 842. If the amount exceeds fifty dollars and an issue of fact has been joined, he may have a new trial if he desires it, or he may, if he prefers it, appeal upon the law of the case, and have the cause decided upon the return, without any new trial in the county court, except the argument of the questions which properly arise upon the face of the return itself. *Ante*, 770.

Return must be made.] A return must be made in every case in which an appeal is properly brought. But in those cases in which a new trial is to be had, it must be recollected that proper security must be given to render the appeal effectual. *Ante*, 789. So, too, the justice's fee for making his return must be paid, as well as the costs entered in the judgment below. *Ante*, 788, and Vol. I, 28, § 354.

And although the perfecting of the appeal will give the county court jurisdiction of the cause for the purpose of dismissing the appeal, or for compelling a return, yet such court cannot proceed to try the cause upon the merits until the justice's return has been made, unless it may be otherwise in those cases in which no return is made by reason of the death, insanity or absence of the justice. *Ante*, 804, 805.

What is to be returned.] The statute is explicit as to the matters or things which the justice ought to return. These are: 1. The process by which the action was commenced; 2. The proof

of the service thereof; 3. The pleadings or copies of them; 4. The proceedings and judgment; 5. A true statement of the amount and the nature of the claims litigated; and, 6. He must also return the notice of appeal. Vol. I, 30, § 360. For the form of a return in such a case, see *ante*, 808, 809. See also the general remarks following it. *Ante*, 809, 810.

No part of the evidence given on the trial in the court below need be returned. Nor need any of the objections or exceptions taken on the trial as to the admission or rejection of evidence.

These matters are entirely unimportant, since the cause is to be retried in the county court, where the witnesses will be sworn anew, and the whole cause disposed of upon such evidence as may be introduced upon such new trial. If the return is defective in relation to those matters or things which ought to have been returned, an amended return may be procured in the ordinary manner. See *ante*, 821.

Preliminaries to notice of trial.] If for any cause there is good ground for moving to dismiss an appeal, this ought to be done promptly, and before taking any steps in the action which can be construed into a waiver of the objection. When any ground exists for which the appeal may be dismissed, the remedy is by motion founded upon affidavits showing the facts and circumstances which entitle the moving party to a dismissal of the appeal. If a motion is made, affidavits must be prepared, and copies served upon the opposite party, as well as a proper notice of motion, which must be served at least eight days before the time for making the motion. In such a case, the notice and appearance must show that it is for the purposes of the motion only, and not as a general appearance, which might waive the objection complained of.

Again, if the action is one in which the justice had no jurisdiction, a motion should be made for the purpose of obtaining an order of the county court refusing to try the cause for that reason. This clearly is an objection which must be taken before the cause is tried in the county court, or it will be waived. See *ante*, 809, 810.

So, if the return is defective, an amended return ought to be procured before noticing the cause for trial. And, if the pleadings require amendment, it is always best to move in the matter promptly, and to secure an order for the amendment at the earliest day, so that the pleadings may be corrected and completed before noticing the cause for trial. The particulars which have been mentioned are mere illustrations of the general rule that the practice requires early and prompt action for the purpose of raising objections founded upon irregularities, as well as vigilance in attending to the completion or correction of the record contained in the appeal return.

If no grounds exist for a motion to dismiss the appeal, and if the return is entirely satisfactory, the next step will be to bring the action to trial, which is done by serving a proper notice for that

purpose, putting the cause upon the calendar, and subpœnaing the proper witnesses, or procuring the other material evidence.

Notice of trial.] Where the cause is to be retried in the county court, it is brought to a hearing at any jury term, upon the same notice as that given on the trial of a cause at the circuit. Vol. I, 30, § 364. In the supreme court, a notice of trial must be given at least fourteen days before the court. Code, § 256. And although, in ordinary cases, a service by mail is required to be given for double time, an exception is made as to notices of trial, which may be served by mail if sixteen days' notice is given Code, § 412.

It will be observed, therefore, that a notice of trial in a case in which the cause is to be tried by a jury, differs materially from the notice of argument of a cause heard upon the justice's return, in which case a notice of eight days is sufficient. *Ante*, 831.

There is no particular form of notice required, since the object of the notice is merely to inform the opposite party of the intention to bring the cause to trial, and when this object is properly accomplished, the notice will be held to be sufficient. The following will be sufficient as the usual form:

Form of notice of trial.

FULTON COUNTY COURT.

John Doe, Respondent,
agst.
Richard Roe, Appellant.

Please take notice, that the above entitled action will be brought to trial at a county court appointed to be held in and for the county of Fulton, at the court house, in the village of Johnstown, on the day of , 1865, at the opening of the court on that day, or as soon thereafter as counsel can be heard. Dated, Johnstown, August 15th, 1865.

Yours, &c., A. McFARLAN,
Attorney for Defendant.

To SMITH & CARROLL, Esqs.,
Attorneys for Plaintiff.

It will be observed that this notice does not contain a clause declaring that a "dismissal of the appeal will be taken." And such words would be of little value, since the county court would dismiss the appeal or nonsuit the plaintiff in case of his non-appearance at the time of calling the cause in its regular order on the calendar.

So, in the case of a notice of trial by the plaintiff, it would not be necessary to insert the words "and an inquest taken therein," after the words "brought to trial," for the reason that the plaintiff would be entitled to proceed and try the cause as soon as the cause is reached and called in its regular order on the calendar. In the courts below no judgment can be taken by default without proving a case, *ante*, 690, and since the trial in the county court is but a retrial of the same cause there ought to be the same proof required in that court.

The party moving the cause for trial ought to be prepared to

prove the service of the notice of trial, if the opposite party does not appear, or if he does appear but disputes such service.

A common practice is to take an admission of service, which is indorsed upon the notice, and may be in the following form:

Admission of service of notice of trial.

Due service of a notice of trial, of which the within (or above) is a copy, is hereby admitted this day of , 1865.

SMITH & CARROLL,
Attorneys for Plaintiff.

Note of issue.] The proper form of a note of issue has been already given; and so the practice as to putting the cause upon the calendar has also been sufficiently explained, *ante*, 832.

Offer of judgment.] The law has provided that in certain specified cases a party may offer to allow judgment to be taken against him. The object of the law doubtless was to enable a party to terminate the litigation upon such terms as he deems just, and to throw the responsibility of a refusal upon the opposite party.

In what actions.] The law does not discriminate as to the form of action in which the offer may be made, and therefore it may be made in any action, whether founded upon contract or upon tort.

Who may offer.] It is expressly provided by the statute that either party may make the offer. Vol. I, 32, § 366, sub. 5.

This will enable a defendant to offer to permit a judgment to be taken against him in the manner specified in his offer, and thus terminate the litigation without further trouble or costs.

So, where a plaintiff is satisfied that he cannot gain anything by continuing the litigation, he may close the litigation by a proper offer to allow judgment to be entered against him in such manner as may be proper under the circumstances.

This power thus conferred by the statute is a valuable one, and parties would do well to consider carefully whether a proper offer had not better be made to the opposite party, since the costs of the entire appeal may turn upon such an offer, and a refusal to accept it, or in consequence of a refusal to make a proper offer when it ought to have been done. Where there are several defendants, the offer must be made on behalf of all of them, or it will be ineffectual for the purpose of charging the other party with the costs of the action for refusing to accept the offer. *Griffiths* v. *DeForest*, 16 Abb., 292. And even though an offer by one of several defendants might be sufficient to authorize the plaintiff to sever the action and take a separate judgment against the party offering it, this would not affect the question of costs, since a recovery against all of the defendants would be a more favorable judgment than a judgment against only a part of them. *Ib.* See also the remarks in relation to an offer of judgment in a justice's court, *ante*, 255 to 258.

The offer in the county court may be made by an attorney, although it will be best for the party himself to make or sign

the offer in person in all cases in which it can conveniently be done. This course will remove all question as to the validity of the offer on the score of its being made by a duly authorized person.

At what time, and in what cases offer is to be made.] At first sight, and on a casual reading, it may seem that there is no difficulty in determining when, and in what cases, a party may make an offer of judgment. And if there were no provisions of the statute but those of § 366, the matter would not be intricate nor perplexing. In the first place, this section declares that the offer may be made in those cases in which a new trial may be had in the county court; so it provides that the offer of judgment may be made at any time before the trial takes place in the county court, and the reasonable construction of this section would be that the offer might be made at any time after the appeal is perfected, and before the trial of the cause, so that a notice could be properly served whenever the notice of appeal had been properly served, and the proper security given, if done before trial. But before determining finally upon the question when this offer may be made, or in what cases it is proper, it will be important to examine some of the other provisions of the statute. By section 371 of the Code, Vol. I, 33, it is provided, that an appellant may state in his notice of appeal, in what particular or particulars he claims that the judgment appealed from should have been more favorable to him. That section also allows the respondent fifteen days, after the service of the notice of appeal, within which to determine whether he will offer to correct or modify the judgment in the particulars specified. And if he concludes to make such offer, the appellant has five days within which to accept it. If the respondent does not make any offer, and the judgment in the appellate court is more favorable to the appellant than that in the court below; or if an offer is made by the respondent, but not accepted by the appellant, and the judgment in the appellate court is more favorable to the latter than the offer of the respondent, then in either case the appellant will recover costs. But if the appellant may make such an offer in his notice of appeal, and also under the provisions of § 366, it is evident that he may make two different offers in relation to the same judgment; and this could scarcely have been intended by the legislature. If an attempt is made to avoid this difficulty by limiting the offers under § 366, to cases in which a new trial is had in the county court, and confining the provisions of § 371 to cases heard and decided upon the justice's return, there will still be difficulties to overcome.

The last clause of § 371, Vol. I, 34, would favor the construction that it was intended that the notice of appeal should specify the particulars in which a more favorable judgment was claimed, in those cases only on which the cause is heard and decided upon the return. But it has been held that the notice must be thus specific even in those cases in which a new trial is had in the

county court, or that the appellant could not recover costs, even though he obtained a more favorable judgment in the county court than that in the court below. *Ante*, 794 to 796.

It is clear that § 366 has no application to cases heard and decided upon the return alone, and therefore an offer would, in such a case, be a nullity. But whether the notice of appeal must be thus specific in a case in which a new trial is to be had, is not so easily determined. If such a specification is necessary, then the result will be that the appellant must make an offer in his notice of appeal, and he may also make an other before the notice of trial. If this construction is to prevail, it still brings up the question when the offer is to be made in cases in which a new trial is to be had in the county court.

In determining this, it is important to recollect that the law allows a respondent fifteen days after the notice of appeal has been served, during which he may offer to correct the judgment below; and, if the offer is made, the appellant has five days further in which to determine whether he will accept or reject the proposition. This allows the parties to consume twenty days in negotiating in relation to a compromise in the court below, and it is not to be supposed that the legislature intended that an offer could be made in the court above, while the same matters might be pending in the court below.

For this reason the most convenient practice, and the most natural construction which could be given to these statutes, if they are to be taken together, would be that during the twenty days allowed for offers and acceptances in the courts below, no offer could properly be made in the court above. But if no compromise is effected in the court below, then the right of making an offer in the county court, at any time after the twenty days, and the trial of the action, ought to be allowed. Such a construction would come nearest to harmonizing all the various provisions of the statute.

That the offer may be made in the county court, before the return has been filed, is evident from the fact that it is provided that the party to whom the offer is made may file the return and the offer made, which language would not have been employed if it had been intended that the offer should not be made until after such return has been filed.

That the offer may be made after the return is filed, is equally clear, since it is expressly declared that such offer may be made at any time before the trial in the county court. And to hold that the offer may be made in the county court before the expiration of twenty days, or the time allowed for compromise in the court below, would be to interfere with the provisions of the statute, as to correcting the judgment in the court below.

It may, therefore, be considered as the best practice not to serve any offer in the county court, until after the time for correcting the judgment in the court below has elapsed, provided it is determined that sections 366 and 371 are both to be applied to cases in

which a new trial is had in the county court. But a far more convenient practice would exist if a construction were adopted which would limit § 371 to cases in which the cause is heard and decided upon the justice's return, while § 366 is allowed to operate in those cases which are retried in the county court. Such a construction would prevent any serious question as to the time when the offers must be made or accepted. If the case is one heard upon the return, the time is fixed definitely. See the practice, *ante*, 793.

If, on the other hand, the case is one in which a new trial is to be had in the county court, the offer may be made at any time after the appeal is perfected, and before the trial in the county court.

This construction would also avoid an other difficulty which must be met in case both sections are applicable to new trials in the county court. Suppose that two offers were made in the same case, one in the court below, and one in the court above, and that the offers differ, in such a case it is difficult to say which would prevail upon the question of costs. But if the sections are applied as already suggested, no such question could occur. Besides this, the allowance of an offer like this in the county court was probably intended to give the parties the same rights which they would have in an action in the supreme court, while in those cases in which the notice of appeal is required to specify the particulars in the notice of appeal, it was intended to require the parties to settle the matter in the court below, or to abide by the result of a modification of the judgment by the county court on hearing the appeal upon an argument upon the facts appearing in the return.

These remarks have been extended to a greater length than was at first intended, but, since the question is entirely unsettled, a few suggestions were deemed proper for the purpose of calling attention to the views thus presented.

Form of offer and its service.] The statute expressly requires a written offer, and therefore a verbal offer of judgment would be a nullity. This offer may be to the effect that the opposite party may take judgment for the sum or property in litigation, or it may be for such other purpose or to such other effect as the offer may specify. So, too, the offer may be with or without a tender of the costs of the action, according to the election of the party making the offer, and as the offer may specify in that respect. Vol. I, 32, § 366, sub. 5. The offer may be in the following form:

Offer of judgment.

FULTON COUNTY COURT.

John Doe, Respondent.
agst.
Richard Roe, Appellant.

Richard Roe, the defendant in the above entitled action, offers to allow judgment to be taken against him by the plaintiff, John Doe, for the sum of one hundred and fifty dollars with costs. Dated Johnstown, August 15th, 1865.

RICHARD ROE.

To John Doe.

Instead of making the offer in person, it may be made by the defendant's attorney, and may be made to the plaintiff's attorney instead of the plaintiff. The service of this order is made by the delivery of a copy of it to the plaintiff or his attorney, which may be done by the defendant in person or by his attorney. If the offer be made by the plaintiff, the same general principles of practice prevail, except that the necessary changes in the phraseology will be made.

The party upon whom such offer is served, has ten days in which to elect whether to accept or refuse it. If he concludes to refuse it, he need not give any notice thereof, because his omission to give notice of acceptance will be a sufficient notice of refusal. But in case the offer is accepted, a written notice of acceptance must be served within ten days after the offer, upon the party making it. This notice of acceptance may be as follows:

Notice of acceptance.

[Title as in last form.]

Take notice that the plaintiff accepts the offer of the defendant, by which he offers to allow the plaintiff to take judgment in this action against him for the sum of one hundred and fifty dollars with costs.

Dated Johnstown, August 15th, 1865.

JOHN DOE.

To RICHARD ROE, Esq.

This acceptance may be made by attorney, as well as in the case of the offer of judgment.

The offer of acceptance must be in writing, and must be served within ten days after the service of the offer of judgment. Vol. I, 32, § 366, sub. 5. Upon serving notice of the acceptance of the offer of judgment, the plaintiff may file the return and the offer, together with an affidavit of the acceptance of the offer, and thereupon the clerk is required to enter a judgment in pursuance of the offer. This affidavit may be as follows:

Form of affidavit.

[Title as in offer, *ante*, 867.]

FULTON COUNTY, *ss*: John Doe, of the town of Johnstown, in the county of Fulton, being duly sworn, says, that he is the plaintiff in the above entitled action; that the annexed offer to allow judgment, was made by the defendant therein, and was served on this deponent on the 15th day of August, 1865, at the village of Johnstown aforesaid; that within ten days after such offer was served, to wit, on the 15th day of August, 1865, he served upon the defendant, at Johnstown aforesaid, a written notice, that the plaintiff accepted the same, and that the foregoing (or the annexed) is a copy thereof.

Subscribed and sworn before me, this 15th day of August, 1865, } JOHN DOE.

PETER W. PLANTZ, *Justice*.

The acceptance may be by attorney, and in that case the necessary changes in the affidavit must be made. If the return has been filed before the offer or acceptance take place, this will be a sufficient filing. And in that case the plaintiff would annex the

offer, the acceptance and the affidavit to the return, and leave them with the clerk of the appellate court, who is then required to enter judgment in accordance with the offer. The judgment may be as follows:

Form of judgment on offer.

[Title as in the offer, *ante*, 867.]

This action having been brought into this court by an appeal from a judgment rendered in favor of the plaintiff, and against the defendant, by Richardson P. Clark, a justice of the peace of the town of Johnstown, in Fulton county, for the sum of $150 damages and costs, which appeal was brought upon the day of , 1865, by the defendant in said action; and the said defendant, after such appeal, and before the trial thereof in the county court, having offered in writing to allow the plaintiff to take judgment against him for the sum of $100 and costs, which offer the plaintiff within ten days thereafter duly accepted in writing, and gave the defendant due notice thereof, pursuant to § 366, of the Code of Procedure. Now, on motion of A. McFarlan, Esq., plaintiff's counsel, it is adjudged, that the plaintiff recover of the defendant $100, with $10 costs and disbursements, making together the sum of $110.

Effect of refusing offer of judgment.] If the party to whom judgment is offered refuses to accept it, the offer will be deemed to be withdrawn, and it cannot be given in evidence. Vol. I, 32, § 366, sub. 5. The party thus refusing the offer will not be permitted to show that an offer of a particular kind or sum was made, and thus influence the verdict on the trial. By a refusal of the offer, the law declares that no more effect shall be given to such offer, for the benefit of the party offered, than would have resulted had no offer whatever been made. His refusal may, however, subject him to costs which would not be imposed upon him but for his refusal. For if he fails to recover a judgment more favorable to him than that specified in the offer, he will not only lose his costs, but he will be compelled to pay all the costs of the other party which are incurred after such offer was made. Vol. I, 32, § 366, sub. 5.

More favorable judgment.] There are many cases in which there will be no dispute whether the judgment recovered is more or less favorable to the party recovering it, than the offer made to him by the opposite party. As illustrations, suppose that the defendant, in an action for a trespass to personal property, should offer to allow a judgment to be taken against him for $100 damages, but, on the trial, the plaintiff recovers only $25; in such a case no one would question a claim made by the defendant that the judgment was less favorable to the plaintiff than the offer made, and that he must consequently pay costs under the statute.

So, too, in an action for damages for the breach of a special contract, if the defendant were to offer to allow a judgment for $150 damages, and the plaintiff should recover but $75 damages, it is clear that the same result must follow. But there may be cases in which the mere amount of the verdict is not alone the

matter which is to control the determination of the question as to the liability for costs. No cases have been reported as to the construction of sub. 5 of § 366, Vol. I, 32. But a similar statute is applicable to actions in the supreme court, and several cases have been decided upon the construction of that statute; and since the principle of the statute is alike in both cases, the cases thus decided are equally applicable to cases arising under this section.

In *Ruggles* v. *Fogg*, 7 How., 324, the defendant, before answering in the action, offered to allow judgment to be taken against himself for $230 and costs, in a case in which the complaint claimed $274; this offer was refused. The defendant then answered by a general denial, and also interposed a counterclaim for $175. On the trial the plaintiff recovered $241.67, which was less than the offer of $230, with interest from the date of the offer to the day of trial; but this was held to be a more favorable judgment to the plaintiff than that offered, because the judgment extinguished the counterclaim, while that would not have been the result if the offer had been accepted, and that the plaintiff was therefore entitled to costs.

The principle is the same where the plaintiff recovers the precise sum offered, but extinguishes a counterclaim set up by the defendant after the date of the offer and refusal, and where the offer is made before answering in the action. *Fielding* v. *Mills*, 2 Bosw., 489.

Where a complaint sets out a note and account as the causes of action, and the defendant interposes a defense by answer, setting up a counterclaim, or a set-off, and he afterward serves an offer to allow the plaintiff to take judgment against him for a specified sum, which the plaintiff declines to accept, and the plaintiff, on the trial, recovers a verdict for a less amount than the sum offered, with interest thereon to the date of the verdict, the plaintiff must, in such a case, pay costs to the defendant from the time of the offer, because the verdict is less favorable than the offer, since an offer of judgment made at that stage of the case, and its acceptance, and the entry of judgment thereon, would extinguish the counterclaim or set-off. *Schneider* v. *Jacobi*, 1 Duer, 694; *Kilts* v. *Seeber*, 10 How., 270.

The principle applicable to such cases is clearly and forcibly stated by Brown, J., in *Budd* v. *Jackson*, 26 How., 398, 400, 401. "When the plaintiff unites in the same action, as he did in the present case, a claim that is not disputed with one that is, the defendant may remove from the controversy the undisputed claim by the offer under the section quoted, and thus make the subsequent costs of the litigation depend upon the litigation in regard to the disputed claim. The offer must be fully equal to the sum actually and really due to the plaintiff, or he is not bound to accept it, and whether it is equal to that sum or not is to be determined (if it is not accepted) by the sum subsequently proved to be due by the verdict of the jury or the report of the referee.

The plaintiff is at liberty to reject the offer, and to proceed in the action as if it had not been made, but he does this at the peril of losing his own subsequent costs, and also of paying costs to the defendant should he fail to recover a more favorable judgment. This 'more favorable judgment,' spoken of in the section, which he must recover to entitle him to costs, does not mean in the case of a money demand upon which interest is accruing, a sum greater at the time of the report or verdict than the sum offered; because the excess may be made up of the interest accruing since the time of the offer and pending the litigation. Were this construction to obtain, the section would become practically useless, for, as it would be impossible to know how long the litigation has to last, so it would be impossible to know what sum to offer. Besides, if the offer be a greater sum than that actually due at the time of the offer, by accepting it the plaintiff would, in fact, get what did not belong to him. The time of making the offer is a material element in determining whether it is as favorable as the judgment recovered. And if the verdict is made up of principal and the interest which accrued upon that principal, in determining which is most favorable to the plaintiff, the interest which accrued intermediate the time of the offer and the time of the rendition of the judgment is to be rejected therefrom. Thus, in the present case, the sum named in the written offer was $357.44; the sum found due the plaintiff by the referee, is $377.17, being $19.73 in excess of the sum expressed in the offer, but as this excess is not equal to the interest from the time of the offer to the date of the report, the plaintiff has failed to obtain a more favorable judgment. The test is the sum due to the plaintiff for principal, and interest thereon, at the time of the written offer, and not that sum increased and enlarged with the interest intermediate the date of the offer, and the date of the report or verdict." In the case just cited, it was held that the plaintiff was not entitled to recover costs from the time of the offer, but must pay costs to the defendant from that time to the judgment.

In *Howard* v. *Farley*, 29 How., 4; *S. C.*, 18 Abb., 367, the action was upon a money bond, which was secured by a mortgage upon real estate, and the complaint claimed to recover judgment for the penalty of the bond, in consequence of a default in the payment of a half year's interest which was due, although the principal sum was not then due.

The defendants offered to allow judgment to be taken against them for the amount of the sum named in the condition of the bond, with the interest then due, and the costs of the action.

The plaintiff refused to accept the offer, and on the trial she recovered the amount of the interest due, and nothing more, and yet it was held that this judgment was more favorable to the plaintiff than the offer of the defendant, and the reason assigned was, that by an acceptance of the defendant's offer and the entry of a judgment thereon, the defendant would have been entitled

to pay up the judgment immediately, which payment the plaintiff would have been obliged to receive, and she would also have been compelled to cancel the mortgage, which she otherwise would not have been required to do until the mortgage became due. And that the plaintiff might not have been able to reinvest her money without a probable loss of interest and expenses.

Where a proper offer of judgment has been made and refused, the offer or a copy of it ought to be furnished to the county judge on the trial, so as to enable the court to decide intelligently as to the award of costs. *Post* v. *N. Y. C. R. R.*, 12 How., 552.

A refusal by a plaintiff to accept a judgment does not deprive him of all right to costs, even where the judgment recovered by him is less favorable than the offer; he is entitled to such costs as accrued before the offer was made, but liable for those accruing afterwards. *Burnett* v. *Westfall*, 15 How., 420; *Keese* v. *Wyman*, 8 How., 88.

Preparation for trial.] When it is once finally settled that the cause is to be tried in the county court, it is the duty of each party to prepare for the trial. And since most of the remarks made in a previous part of the work are equally applicable to a trial in the county court, they need not be repeated here. See *ante*, 546, &c.

If documentary evidence will be necessary on the trial it is important that the party should be prepared with it. So, too, where witnesses are material, they must be properly subpœnaed in due season.

The subpœna may be in the following form:

Form of subpœna.

The People of the State of New York, to (name the witnesses required), GREETING:

We command you that, all and singular, business and excuses being laid aside, you and each of you appear and attend before our county judge of the county of Fulton, at a county court to be held in and for the county of Fulton, at the court house in the village of Johnstown, on the day of , 1865, at o'clock in the noon, to testify and give evidence in a certain action, now pending in said court, then and there to be tried between John Doe, plaintiff, and Richard Roe, defendant, on the part of the plaintiff (or of the defendant), and for a failure to attend, you will be deemed guilty of a contempt of court, and liable to pay all loss and damages sustained thereby to the party aggrieved, and forfeit fifty dollars in addition thereto.

Witness, JOHN STEWART, Esq., county judge of Fulton county, at the court house in the village of Johnstown, the day of , 1865.

By the court. MORTIMER WADE, *Clerk*.

A. MCFARLAN, *Plaintiff's Attorney*.

Form of subpœna ticket.

By virtue of a writ of subpœna, to you directed and herewith shown, you are commanded that, all business and excuses being laid aside, you appear and attend before our county judge of the county of Fulton, at a

county court to be held in and for the county of Fulton, at the court house in the village of Johnstown, on the day of , 1865, at o'clock in the noon, to testify and give evidence in a certain action now pending in said court, then and there to be tried between John Doe, plaintiff, and Richard Roe, defendant, on the part of the plaintiff (or defendant), and for a failure to attend, you will be deemed guilty of a contempt of court, and liable to pay all loss and damages sustained thereby to the party aggrieved, and forfeit fifty dollars in addition thereto. Dated the day of , 1865.

By the court. A. McFARLAN,
Plaintiff's Attorney.

To Lucius J. Smith, Esq.

A subpœna issued in a cause pending in the county court, is valid to compel the attendance of any witness who resides or who is in any part of this state. 3 R. S., 468, § 1, sub. 1, 5th ed.

The statute prescribes the mode in which a subpœna shall be served upon a witness. 3 R. S., 683, § 56, 5th ed.: 1. The original subpœna must be exhibited to the witness at the time of its service; 2. A copy of the subpœna or a ticket containing its substance must be delivered to the witness; and, 3. The fees allowed by law to such witness for traveling to and returning from the place where he is required to attend, and the fees allowed for one day's attendance, shall be paid or tendered to such witness. The fees to which a witness is entitled in such case will be fifty cents for each day while attending the court, and if the witness resides more than three miles from the place where he is required to attend as a witness, he will also be entitled to the sum of four cents a mile for the distance to be traveled in going and returning. 3 R. S., 925, § 24, 5th ed. The penalties for disobedience to a subpœna are also prescribed by the statute. 3 R. S., 683, § 57, 5th ed.

The practice in relation to the subpœnaing witnesses in the county court is similar to that in actions in the supreme court; and since those who practice in the county court will be familiar with the practice in those cases, or will have the usual books of practice relating to actions in the supreme court, it will not be necessary to state the practice here. It may be proper, however, to refer to the principles which have already been stated, since most of them are equally applicable to a court of record. See *ante*, 549 to 555.

Practice on the trial in the county court.] The practice on trials in the county courts is so similar to that in the causes tried at the circuit, that it is merely necessary to refer to the works of practice which treat of the practice in the supreme court. And see Vol. I, 32, § 366, sub. 4.

It may also be proper to mention that many of the principles relating to practice, pleadings and evidence on trials in justice's courts are equally applicable to all courts. And the discriminating practitioner will readily determine which of them may be applicable to the trial of actions in the county courts. The rules of evidence given in this work are as applicable to the

county court as to a justice's court, and will be found as useful in one court as in the other.

Amendment of pleadings.] By a recent change in the Code, the county court has full power to allow either party to amend his pleadings, upon such terms as shall be just, in those actions in which a new trial is had in the county court. Vol. I, 32, § 366, sub. 5. The rule laid down by the case of *Savage* v. *Cock*, cited *ante*, 334, has been changed by the statute just cited.

Motion for a new trial on a case or exceptions,] After a trial in the county court, in cases in which a new trial is had, the unsuccessful party may move that court for a new trial; and the application may be made upon a case or upon a case and exceptions, or otherwise. Vol. I, 32, § 366, sub. 6. The practice as to the mode of making and settling the case and exceptions is the same as in actions in the supreme court, and for that reason it will be sufficient to refer to the works of practice in the supreme court for the rules of proceeding, and for the forms necessary to be followed.

The practice on appeals to the supreme court, after the decision of the county court upon the application for a new trial, will be discussed in a subsequent place.

Amount of verdict, and its effect upon the question of costs.] The general rule is that the prevailing party recovers costs without any reference to the amount of the recovery. And a judgment in favor of the plaintiff, for the sum of six cents, will carry the full costs of the appeal as much as though the recovery had been for two hundred dollars, provided the case is one in which a new trial is had in the county court, and provided, also, that no offer has been made and refused which deprives the successful party of his costs.

Where a party may lose his costs by refusing to make an offer in compliance with the terms of the notice of appeal, see *ante*, 793. So, also, see *ante*, 864, as to the effect of an offer made after the appeal has been brought, and before the trial in the county court.

The subject of costs will be fully discussed in a subsequent place, and therefore the subject will be dismissed for the present.

SECTION VI.

JUDGMENT ON APPEAL.

General considerations.] The practice of reviewing justices' judgments upon the facts appearing in the return, has generally prevailed since the organization of the state. The mode of bringing causes up for review, and the courts by which the case was heard in the first instance, have differed, but the essential principles governing the review have been the same at all times, and in whatever mode was adopted.

There are some general provisions of the statute which declare what rule shall prevail in rendering judgments upon appeals. Vol. I, 31, § 366. These principles of decision are both wise and just, and the principal points are, that the county court shall

render judgment according to the justice of the case; that technical errors not affecting the merits of the action, shall be disregarded; that the judgment may be reversed in whole or in part; that it may be reversed as to any or all of the parties; and that it may be reversed for errors of law or fact. These rules seem so plain that one would scarcely apprehend any difficulty in their application, and yet a review of the cases will disclose a great discrepancy in the mode of applying them to particular cases. To remedy this defect, and to reduce the practice to a uniform system, would be a most desirable result, and the object of this section will be to contribute something toward the accomplishment of that object.

According to justice.] The statute which prescribes what kind of judgment shall be rendered upon an appeal declares, as the first requisite, that the court shall give judgment according to *the very right of the case, without regard to technical errors and defects which do not affect the merits.* A more wise and just principle for the decision of causes could not have been enunciated by the legislature. And if this rule is liberally enforced and applied by the county courts, it will do much towards accomplishing the object of every review, which is the attainment of justice through the forms of the law. Under the authority thus conferred, the county court has power in every case to see that ample justice is done. The demands of justice are not to be ascertained by technical distinctions, nor by arbitrary rules framed as a matter of convenience, but every litigant has a right to insist that justice shall be meted out according to the facts and circumstances appearing in the return, and upon the broad principles of justice and equity, instead of the technical niceties of a strict practice.

These remarks are not to be construed as advising a disregard of legal rules and principles, since these must always be observed and enforced. And if legal questions are presented in the return, they must be decided in strict accordance with settled legal principles. But appeals so frequently present a case in which all legal rules may be applied, and still leave room for the application of the liberal principles of enforcing justice without the aid of technicalities, that it is worthy of an attempt to give full effect to the intent and object of the statute.

It may be said that these general remarks are entirely true, and that the principle is a just one, but that there will be a difficulty in applying it to practice, and the force of such a remark is very evident. And for the purpose of rendering some service to those whose duty it is to apply these rules to practice, the subject will be discussed in separate propositions, in which the cases will be somewhat fully and carefully noticed.

Reversal in whole or in part.] No language can be more explicit, and no power could be more clearly conferred than that expressed by the statute, which declares that the appellate court may reverse the judgment appealed from, either in whole or in part. Vol. I, 31, § 366. This gives the appellate court full authority

to reverse so much of a judgment as may be contrary to law, or against the justice of the case as developed by the return; while it equally gives power to affirm so much of the same judgment as may be legal and just.

The cases in which this rule may be applied are very numerous, and therefore it is important that it should be well understood and invariably enforced when justice requires it. To review the cases which were decided before the enactment of the Code would be of little use, because the recent cases are conclusive as to the present practice, which is to carry into effect the intention of the law.

When a judgment is recovered upon a complaint founded upon an account consisting of several items, and the evidence warrants a recovery as to some of the items, but is insufficient as to the others, the judgment may be reversed as to the latter items and affirmed as to the others. *Allen* v. *Bates*, 1 Hilt., 221, 223. So, where the action is founded upon contract, and there is a recovery for too large an amount, and the court can clearly see that there ought to be a reversal as to part of the judgment, and an affirmance as to the residue, such judgment will be rendered by the appellate court. *Rawson* v. *Grow*, 4 E. D. Smith, 18, 20; *Thomas* v. *Mills*, Id., 75, 77; *Cook* v. *Clark*, Id., 213, 215; *Mills* v. *Fox*, Id., 220, 224; *Cook* v. *Ritter*, Id., 255, 253; *Pinckney* v. *Keyler*, Id., 469, 473; *Pollock* v. *Hoag*, Id., 473, 476. These cases which have just been cited were decided by the court of common pleas in the city of New York, and they show clearly what practice prevails in that court, which, in such appeal cases, is co-ordinate with the supreme court. But the rule is the same in the supreme court, as has been settled in that court at general term.

In *Decker* v. *Hassel*, 26 How., 528, the plaintiff recovered a judgment before a justice of the peace for $30.42 damages, the items of which were $30 for two months' services, and $0.42 for horse feed and for a dinner furnished to the defendant's son. On an appeal to the Albany county court the judgment was affirmed; and an appeal was then taken to the supreme court, where the judgment was affirmed as to the $30, but reversed as to the $0.42. In this case, the court carefully considered the question whether a county court had power to reverse a judgment in part, and to affirm it as to the residue, and, in delivering the opinion of the court, the following language was used by PECKHAM, J.: "It is further objected by defendant's counsel, that the plaintiff recovered forty-two cents for feed for the horses of defendant, and for a dinner for defendant's son. There was no proof that these were had for the defendant, or that he was in any manner responsible for them. The proof is simply that 'defendant's son had of me (plaintiff) for his horses, one peck of provender, and some hay, also dinner.' The justice, therefore, erred in allowing those items in the judgment against the defendant. What is the consequence? Must the whole judgment be reversed because a

mistake is made as to this small item? I think not. The principle decided in *Staats* v. *H. R. R.*, 23 How., 463; *S. C.*, 39 Barb., 298, will allow this court to do what the county court ought to have done, affirm the judgment as to the contract for the two months' work, and reverse it as to this separate item. This reverses it in part and affirms it in part. We do not assume to weigh evidence, or in any manner to decide a question of fact, but whenever a separate distinct item is erroneously allowed by a justice of the peace, there being a total failure of evidence to sustain it, and a correct judgment is given for other matters, it is the duty of a county court, on appeal, to affirm the judgment in part, and to reverse it in part. If that court fail in its duty, this court, on appeal, must give the judgment the county court ought to have given. The power to give such judgment is as plainly given to the county court as language can express. After enacting 'that the appellate court shall give judgment according to the justice of the case,' it is further declared, that 'in giving judgment, the court may affirm or reverse the judgment of the court below, in whole or in part, or as to any or all the parties, and for errors of law or fact.' Code, § 366; Vol. I, 31. It is difficult to find broader language as to this power. Its justice is equally plain. There is little propriety in reversing an entire judgment, because a small item is allowed without any legal proof. It is plain that the legislature have endeavored to confer this power upon the court. The courts have seemingly inclined to repudiate it. The Code is broader, in some respects, than the Revised Statutes, in its purpose to have the appellate court render the judgment that the court below ought to have rendered. In this case, I think the judgment of the county court should be affirmed in all things except as to the forty-two cents; that as to that item, it should be reversed, without costs to either party on this appeal."

The rule thus established, as to reversing judgments in part and affirming them as to the residue, in actions arising upon contracts, is equally applicable to judgments founded upon torts. In *Staats* v. *Hudson R. R.*, 23 How., 463; *S. C.*, 39 Barb., 298, the action was for the recovery of damages for unlawfully killing a bull and a cow belonging to the plaintiff. The evidence showed a right to recover for killing the bull, but it was equally clear that there was no right of recovery as to the cow. The plaintiff recovered a judgment for $75 damages before the justice, which was made up by allowing $50 for the cow, and $25 for the bull. The county court reversed the entire judgment on appeal, when an appeal was taken to the supreme court, which reversed the judgment of the county court, and also reversed the justice's judgment as to the $50 allowed for the cow, and affirmed it as to the $25 for the bull. The court said, by PECKHAM, J.: "The only remaining question is, could and should the county court have reversed the judgment of the justice as to the damages for the cow, and affirmed it as to the bull? It is objected by the defend-

ant that a county court cannot reverse in part and affirm in part a justice's judgment for entire damages. And the case of *Kasson* v. *Mills*, 8 How. Pr., 377, is cited to that effect. The case sustains the position in terms, but the facts were wholly unlike the facts here. I have carefully examined all the cases referred to in *Kasson* v. *Mills*, and am of opinion that the county court had authority, in this case, to reverse the judgment in part and affirm it in part, and should have exercised it.

The Code, re-enacting the Revised Statutes, expressly gives the power to the court. It is not confined in terms, and there is no reason for confining it to a mere power to reverse or affirm as to costs, and not reverse or affirm as to damages. Where two or three independent causes of action are prosecuted in a justice's court, and the judgment is right as to one and erroneous as to the others, and that can be distinctly and plainly seen on appeal, the power to reverse as to the erroneous and affirm as to the legal part of the judgment, is plain and practical, and in my opinion imperative, with a view "to give judgment according to the justice of the case," as provided for in the Code. After a careful examination, I have been unable to find any case that conflicts with this plain power, and our plain duty in its exercise. In *Kasson* v. *Mills*, it is difficult to perceive, from the report of the case, upon what ground the county court proceeded in reversing the justice's judgment in part and affirming it in part. In the justice's court it was for $100. It was reversed on appeal, except as to $3.36; but why it was valid for that sum does not in any way appear; nor what that amount was for in any manner. It may, therefore, well be that this court was right on the facts as they appeared in that case—a single indivisible cause of action—in holding that the county court committed an error in reversing the judgment in part and affirming it in part.

Suppose an action brought upon two several promissory notes, to one of which the defendant proved a clear legal defense of usury, but none to the other, and the court gave judgment for both. Would there be any difficulty in giving judgment, on appeal, for the valid note, and reversing it as to the void note?

Suppose an action for two penalties alleged to have been incurred on different days, judgment for both, and illegal as to one, on appeal the judgment would be affirmed as to the one, and reversed as to the other. This last case has been expressly decided in Massachusetts by the highest court in that state, and I find nothing in this state in conflict with it. *Commonwealth* v. *Derby*, 13 Mass., 433. I see no reason or principle against the doctrine of this last case, the opinion of which was delivered by Ch. J. Parker; and I am disposed to follow it and the statute of this state re-enacted in the Code which allows it. I see no objection to obeying the statute where, as here, it can be distinctly seen for what the judgment was given, and which separate alleged cause of action is illegal or erroneous. In this case it clearly appears from the proof that the jury allowed $50 for the cow,

and $25 for the bull. The judgment of the county court is reversed, and that of the justice affirmed as to $25 damages and the costs. No costs allowed on this appeal. Judge HOGEBOOM said, "I concur in the above opinion that the justice should have rendered judgment for the plaintiff for $25 (instead of $75), and that the county court should have reversed it as to the $50, and affirmed it as to $25, instead of reversing altogether, and that this error should be corrected." And, therefore, the judgment of the county court was reversed, and that of the justice affirmed as to $25 and costs.

The power to correct an erroneous judgment does not depend upon the question whether the error was committed by a jury or by the justice.

In *Fields* v. *Moul*, 15 Abb., 6, the justice by a clerical error entered a judgment in favor of the plaintiff for $10 too much in an action of trespass for taking personal property. On an appeal taken by the defendant to the county court, the justice certified in his return that he included $10 too much in the judgment by mistake in footing up the figures, and the county court reversed the judgment as to the $10, and affirmed it as to the residue with $5 costs to the appellent. This judgment was affirmed by the supreme court upon an appeal taken to that court. In this last case the principal authorities upon this and similar questions, are fully and ably reviewed by HOGEBOOM, J. A few extracts will be given from the opinion: "The county court corrected the error, and the sole question is whether it had the power; in other words, whether as to entire damages, where there was a clear mistake, and where there was only one plaintiff and one defendent, the county court could reverse in part and affirm in part. But for some adjudications, I should have no doubt upon the subject, as the statute seems to me most singularly clear and unambiguous. It is as follows: 'In giving judgment, the court, (county court) may affirm or reverse the judgment of the court below, in *whole* or in *part*, and as to any or all of the parties, and for errors of law or of fact.'" Code, § 366. The power would appear to be here expressly conferred in distinct terms, both as to *amount* and as to parties, * * * "In *Kasson* v. *Mills*, 8 How., 377, this court in 1852, in the eighth district, came to the conclusion that under the former decisions the county court was incompetent to affirm in part and reverse in part, a judgment of a justice's court rendered for entire damages. They held, that under the Code they might reverse as to some of the parties, and affirm as to the others; but as to the damages or recovery, the former decisions must be upheld. I am not satisfied with the result at which the court arrived in the latter particular, and do not think that in that respect the case ought to be followed. The court say: 'It was never claimed, under this or similar provisions (to give judgment as the right of the matter may appear), that an entire judgment, as for damages, could be reversed in part and affirmed in part. If there was no evidence

to support the judgment, it was reversed; if there was evidence upon both sides, a mere conflict of evidence, the judgment was affirmed.' But suppose as to a portion of the amount of damages it was perfectly clear that there was no evidence to support the judgment, and as to the residue, that it was as clear that the uncontradicted evidence supported the judgment for that precise residue, is it not, upon principle, proper, that as to the former, the judgment should be reversed, and as to the latter, affirmed, more especially when it appears that it was a mere mistake or inadvertence? And as to the question of power, when the statute says the court may affirm or reverse the judgment in whole or in part, and as to any or all the parties, is it not limiting the plain language of the act to say that the court shall not affirm only in part, except where the judgment is for distinct things, as for damages and costs? If by entire damages, it is meant that the evidence makes it impossible to dissect the damages and see with clearness how much is erroneous, and how much well founded, I assent to the correctness of the former adjudications, as applied to the Code of Procedure, otherwise not. I think the power is conferred, and the propriety and extent of its exercise must be left to the enlightened judgment of the court." The power of all appellate courts to reverse in part and to affirm in part, is now conclusively settled by the court of appeals. *Brownell* v. *Winne*, 29 How., 193, 201. *S. C.*, 2 Tiff., 400.

There are some other cases which illustrate the practice under the Code. In *Shannon* v. *Burr*, 1 Hilt., 39, the plaintiff recovered a judgment for $15 damages, in a case in which the law would not give more than nominal damages, and on an appeal the New York common pleas reversed the judgment as to all but the sum of six cents damages, and affirmed the judgment for that amount, without costs of the appeal to either party.

So, in an action for a fraud, if it appears that the judgment is for too large a sum, and that there is a particular amount which ought to have been deducted from the recovery, the appellate court may reverse the judgment for so much as ought to have been deducted, and affirm it as to the residue. *Harris* v. *Bernard*, 4 E. D. Smith, 195. This case is stated in Vol. I, 963, 964. See, also, *Donohue* v. *Henry*, 4 E. D. Smith, 162, 165.

And there is one case which extends the rule still further than any of the cases already cited. In *LaMotte* v. *Archer*, 4 E. D. Smith, 46, the plaintiff recovered a judgment against the plaintiff for $100 damages, in an action of trover. The evidence rendered it certain that this judgment was considerably larger than the law would allow as a measure of damages in that action. But it was a case in which upon the findings of fact in the court below, the plaintiff was entitled to some damages, or about one-half of the amount recovered. Upon an appeal to the common pleas, that court ordered a reversal of the judgment, unless the plaintiff chose to accept the sum of $60, in which case the judgment was to be affirmed for that amount, and reversed as to the

residue. The court said, per WOODRUFF, J.: "The amount of damages given ($100) is wholly without evidence in its support, and upon this ground we would be warranted in reversing it. But the Code requires us to do substantial justice between the parties, if the case has been fully investigated; and my conclusion is, that we should give the plaintiff the privilege of making a reasonable abatement from the amount of the judgment and suffer it to stand for the residue.

"Although a finding for $75 might, perhaps, be sustained, I am not satisfied that the three articles have not depreciated since they were purchased; and in view of all the circumstances disclosed by the evidence, I think that the plaintiff will be fully indemnified by a recovery of $60 damages and her costs below.

"If this be deemed arbitrary and speculative, let it be answered that the court do not require the plaintiff to make such abatement. No injustice is done to her, since there is a sufficient ground for a reversal. She may elect to make the abatement or not at her pleasure. * * * The order should be, that if the plaintiff elect within ten days to reduce the damages to $60, and her costs below, and file written statements of such election with the clerk, the judgment is affirmed to that extent, and reversed as to the residue, without costs to either party on appeal; on default of such election, the judgment is reversed with costs."

This case may seem, at first sight, to go quite as far as the rule can be extended. But it certainly conforms to the spirit of the Code by attempting to do justice between the litigant parties. And since it leaves the successful party entirely at liberty to accept a modified judgment, or to submit to a reversal in a case in which a reversal might with entire propriety be ordered upon points of law, this must be regarded as a wise and a just exercise of the power conferred on the appellate court.

If a plaintiff has recovered an erroneous judgment, as well as an unjust one as to its amount, he is favored when the court permits him to take a reasonable and just judgment without the payment of the costs of the appeal; and if he refuses to do this, he certainly has no ground for complaint when the court enforces the law by an entire reversal of the judgment at his expense. This subject has been pursued at some length, but it was difficult to say less, if the principal authorities were to be presented and considered; and those who do not possess the reports referred to will be least likely to complain.

The form of an order to reduce the judgment, and of the respondent's consent thereto, will be sufficient if it clearly specifies what is ordered and what is accepted by the respondent.

Order for reversal unless respondent consents to a reduction of judgment.

[Title of cause in county court.]

At &c., on &c.

(As in the form, *ante*, 853, to the *, but omitting what is said as to the affidavits, and then continue) that the judgment of the said justice be

reversed with the costs of this appeal, unless within ten days after the service of a copy of this order upon him or his attorney, the respondent makes and files with the clerk of this court a written consent to reduce said judgment, and also serves a copy thereof upon the appellant's attorney within the same time; and such consent shall be to the effect that the respondent consents to reduce the recovery for damages in said action to the sum of $100, as of the day of , 1865; and if the judgment be so reduced then it is ordered that the judgment so reduced be in all things affirmed, with costs to the appellant (or the respondent).

If the respondent elects to reduce the judgment to the amount specified in the order, he ought to make and file a written statement to that effect with the clerk of the appellate court, and also to serve a copy of it upon the appellant's attorney within the time allowed for that purpose.

Form of consent to reduce judgment.

[Title of cause in county court.]

In pursuance of an order made in this cause on the day of , 1865, I, John Doe, the respondent and plaintiff, do hereby consent that the judgment appealed from in this action, be reduced to the sum of $100 damages, as of the day of August, 1865. JOHN DOE,

or JOHN M. CARROLL,

Att'y for Respondent.

The form of a judgment in such a case will be given in a subsequent place. *Post*, .

Reversal as to any or all the parties.] The power to reverse a judgment as to any or all of the parties is as clear as the power to reverse a judgment in whole or in part. Indeed, there never has been as much question upon the right to reverse as to any or all of the parties, as once existed in relation to the power to reverse a judgment in part and affirm it as to the residue.

In actions upon contract, if the plaintiff proves a good cause of action against one defendant, while no proof is made against the other, and if a judgment is rendered against both defendants, it may be reversed as to the one proved liable, and reversed as to the other. *Nixon* v. *Jenkins*, 1 Hilt., 318. So, in actions for a tort, the county court may reverse a judgment as to one defendant, and affirm it as to an other, where the circumstances of the case are such as to authorize such a judgment. *Giraud* v. *Stagg*, 10 How, 369; *S. C.*, 4 E. D. Smith, 27. This case is an elaborate and able exposition of the subject by WOODRUFF, J. See also *Alexander* v. *Hoyt*, 7 Wend., 89, as to the rule before the Code. The case of *Farrell* v. *Calkins*, 10 Barb., 348, is opposed to the cases which have just been cited; but the case is overruled by the current of authority. It is also opposed to all the cases cited upon the analogous principle of a reversal in part, and an affirmance in part. *Ante*, 875. And, more than that, it is opposed to the plain language of the Code, which declares that the county court may reverse a judgment as to *any* or *all* of the *parties*. Vol. I, 31, § 366.

That a reversal as to one defendant, and an affirmance as to an other, would come precisely within the meaning as well as the

letter of the statute, is as evident as anything can be made. It is of no consequence what the old rule was, or what the principles of the common law declare; it is sufficient to say that the statute is so explicit as to the present rule, that no examination of the older cases would be of the least service.

Judgment by default.] A practical question of considerable importance sometimes arises in relation to the power of the county court to reverse or affirm a judgment by default. In *Whitney* v. *Bayard*, 2 Sandf., 634, it was held that on an appeal from a justice's court, the judgment will be reversed by default, if the respondent does not appear to argue the appeal when it is moved for argument by the appellant. So, where an appeal has once been regularly noticed and placed upon the calendar, it may be called up for argument at a subsequent term without further notice, and if the appellant does not appear it will be affirmed by default on motion of the respondent. *Townsend* v. *Keenan*, 2 Hilt., 544; see also, *Geraghty* v. *Malone*, 1 Sandf., 734. Notwithstanding these decisions there are some considerations which ought to weigh with a court in determining whether a judgment ought to be reversed or affirmed by default, when the case is one which is heard and decided upon the facts contained in the return.

The statute does not, in express terms, declare whether a default may be taken or not; but it is evident from the reading of § 366, Vol. I, 31, that the legislature intended that the cause should be decided upon an actual examination of the case, for it provides that "upon the *hearing* of the appeal, the appellate court shall give judgment according to the *justice of the case*," &c. A judgment by default, whether it be an affirmance or a reversal, would not be a judgment according to the *justice of the case*, but a judgment entirely ignoring the question what the justice of the case might be. Again, it is not like a case in which evidence must be introduced and the cause retried; for in such a case the court could not participate in the trial in behalf of either party. And where a new trial is to be had, it is entirely proper to dismiss an appeal or nonsuit a plaintiff who does not appear, or to permit a plaintiff to prove his case if the defendant does not appear to try the cause.

But where a return is made and the court has nothing to do but to examine the return before deciding the cause, no such reason exists to prevent a full examination of the case upon the merits; and in such a case the court can easily comply with the statute by rendering a judgment according to the justice of the case. And in *Bellony* v. *Alexander*, 1 Sandf., 734, the court refused to reverse a judgment by default. It is true that this case was decided under the Code of 1848, which provided for hearing a case upon the affidavits of the parties; but in that case those affidavits took the place of a return, and the case was heard upon them in the same manner as upon a return made.

The court said: "We will not decide the point, but we think we are not at liberty, under the Code, to reverse a judgment by default, without looking into its merits. There is no such provision in terms, and the 310th and 317th sections appear to contemplate an examination as well as a hearing of the appeal. When the respondent alone appears, the judgment below will be affirmed, as a matter of course."

There is still an other reason why a county court should examine a case upon the merits, instead of reversing it by default. If the county court reverses the judgment by default, such decision will prevent any review of the case by the supreme court upon an appeal. *Dorr* v. *Birge*, 8 Barb., 351; *S. C.*, 5 How., 323. And where it is clear that the decision of the county court cannot be reviewed, it certainly ought to be rendered upon the best examination and deliberation which that court can give to the case.

If either party fails to appear and argue the cause, and he has a reasonable excuse for his default, the appellate court will always relieve a party from a default, even if one is allowed to be taken. The practice of the court ought always to be liberal in this respect, so far as it relates to opening the default; but as to the terms upon which this shall be done, much will depend upon the circumstances of each particular case. It has been held that where a judgment of affirmance has been regularly taken by default, the court will require the appellant, on a motion to open the default, and, before hearing his excuse, to show that the case has merits either upon the law or the facts involved in it, which will be ascertained on the motion from a mere statement without argument, or by a careful inspection of the return. *Tryon* v. *Jennings*, 22 How., 421; *S. C.*, 12 Abb., 33. This rule, however, was adopted on account of the press of business in the court which established it; and the extent to which a county court would apply it would be to see that the appeal had no pretense of merits. There are many cases in which intricate questions are involved, and nothing less than a full discussion, and a careful examination of the authorities, can clearly determine whether the case really has merits. In such a case no county court would assume to decide whether the case had merits or not, so long as a doubtful question is involved. But more than this, where an appeal is taken in good faith, and the default was accidental and excusable, the appellate court ought to lean to the liberal side of the matter and grant a full and fair hearing, which will be satisfactory to all reasonable parties, and besides it will comply with that injunction of the Code which requires that the county court shall render judgment according to the justice of the case.

Where a party moves to open a default on the ground of irregularity, instead of asking relief for cause shown, he must show that the practice has been irregular. When a cause has been once properly noticed and placed upon the calendar by an appellant, and it is not heard at the first term, but is regularly called on the calender at a subsequent term of the court, it will be

regular for the respondent to take a judgment of affirmance by default, without any proof that he noticed the cause for argument. *Townsend* v. *Keenan*, 2 Hilt., 544. And if the appellant moves, in such a case, to open the default, upon the ground that the respondent has been irregular in his practice, the motion will be denied, with costs. *Ib.*

Errors not stated in the notice of appeal.] There are some cases which decided that the appellate court either could not or would not hear an argument upon any ground of error not stated in the notice of appeal. See *ante*, 779.

But the balance of authority is decidedly opposed to this view of the question; and whenever a plain error appears upon the face of the return, the judgment ought to be reversed, whether it is particularly specified in the notice of appeal or not. *Ante*, 781. As the courts now construe the statute, it is a legal presumption that the justice has returned all the evidence and proceedings in the court below; and since this is the rule, the notice of appeal ought to be considered as of little more importance than as a mere mode of bringing upon the record for review by the appellate court. This is the rule as to all other notices of appeal, and under the construction which the courts have given to the return, substantial justice will be more likely to be done in this manner than in the more technical one of limiting the argument to the points specified in the notice of appeal. A notice of appeal may be amended on motion, if the court sees fit to grant an order to that effect; and the motion will always be granted for the furtherance of justice. Under such a practice it is difficult to see how a court could consistently refuse to hear the whole case which appears by the return. See the matter more fully discussed, *ante*, 775 to 783.

Review of discretionary decisions.] There are many questions which arise in the course of an action which appeal exclusively to the discretion of the court, instead of depending upon fixed rules of law for their determination. This is true of every court which exercises original jurisdiction in the trial of actions upon the merits, and upon issues of fact. And where a decision has been made upon a matter which is thus within the discretion of the court deciding it, it is a general rule that such decision is not reviewable by an appellate court. The reason of this rule is obvious, since the moment it is determined that a decision must be made in accordance with some particular rule of law, and is erroneous if not so made, the matter immediately ceases to be a discretionary one, but becomes one governed by legal rules.

There are some cases in which a purely discretionary decision may be nullified, although not reviewed as a matter of law. Suppose a justice should refuse to allow a party to appear and answer, and that a judgment is rendered against the defendant after such refusal. It has been seen that the appellate court may relieve the defendant from the effect of the decision by opening

the default and ordering a new trial, *ante*, 837. Such a decision by the county court would not, in strictness, be a review of the justice's discretionary decision, but an exercise of a discretionary power given to the appellate court to grant relief in particular instances. The cases in which a justice may exercise a discretionary power are very numerous, and many of them have been pointed out when discussing other titles of this work. As to a justice's discretion in permitting or refusing to allow a defendant to appear and answer, see *ante*, 221, 222, subs. 4 and 5. As to adjournments, see *ante*, 336. As to leading questions put to a witness on examination, see *ante*, 504. As to matters of practice on the trial, see *ante*, 637 to 640.

There are some cases in which the court reversed the justice's judgment on the ground that he had abused the discretion conferred upon him. *Rose* v. *Stuyvesant*, 8 Johns., 426, stated *ante*, 336; see also *Seymour* v. *Bradfield*, 35 Barb., 49, 51.

It is a little difficult to perceive how a matter can be purely discretionary, and still hold that the decision is reviewable upon common law principles. Suppose that a decision is unjust, and that it was arbitrarily made. Such matters do not change the nature of the decision from a discretionary one to one which is controlled by legal rules. This has been held in a case in which the justice refused to permit a defendant to appear and defend an action. *Ante*, 221. And whenever it is deemed proper to reverse a justice's judgment for the reason that he has unjustly and arbitrarily exercised his authority, the safer ground to rely upon will be to place the decision upon the statute which authorizes a reversal of a judgment whenever the justice of the case requires it. Vol. I, 31, § 366. This section confers power upon the appellate court to see that ample justice is done to parties who have just cause of complaint, and it will subserve the interests of the public if the powers it confers are liberally applied and enforced.

Reversal upon questions of fact.] Before proceeding to discuss this subject, it may be proper to define what is intended by the term questions of fact. This may be done both negatively and affirmatively. And first, then, it does not include those cases in which the county court may reverse a judgment for errors of fact as explained, *ante*, 853. Such cases are founded upon matters entirely outside of the issues joined in the action. By the term question of fact, is intended any case in which an issue of fact is joined in the court below, and tried and decided upon the evidence, either by the justice or by a jury; or any other question in the case which involves a matter of fact that is to be settled by evidence, and is material and relevant to the issues of fact joined in the action; or when it relates to any question of fact which is to be settled in the court below, upon such evidence as may be admissible upon the question involved.

In most of the cases arising in ordinary practice, the term question of fact relates to the decision of the matters involved

in the issues joined between the parties. This decision is founded upon such evidence as may be introduced by the respective parties, and the questions in the case are decided by the justice or by a jury, as the case may happen to be.

Where the questions of fact have been tried in the court below, upon the evidence there introduced, and there was material and relevant evidence given upon both sides, the decision of the questions of fact involved will be regarded as final. No principle of law is more firmly settled than this, and none has been more frequently and invariably enforced. To cite the numerous cases decided upon this point would be a mere waste of labor, time and space. The reason for such a rule is obvious. When a trial takes place upon a question of fact, and witnesses are sworn, the justice or the jury who see the witness and hear the language in which his evidence is given, and they see the manner in which he testifies, they will be much better able to properly estimate the value of the evidence than any appellate court can be when they know nothing of the case, except what appears upon the written or printed record.

Again, the law confides the decision of questions of fact to a justice or to a jury, as the parties may elect, and when such questions of fact have been fully heard and decided upon the evidence, the intention of the law was to hold this decision conclusive, so far as it is considered a mere question of fact. If the judgment is erroneous because of improper decisions made by the court during the trial, or for any other cause the judgment is illegal, that presents a different question, which is a question of law, and not a question of fact. There are some cases in which injustice may be done by holding the decision of a justice or a jury conclusive upon a question of fact; but this result is inevitable, for no means can be devised which will prevent a liability to errors of judgment so long as justices and jurors remain fallible.

But while the general rule is clear and well settled, it is important to prevent a misapplication of it, and to see that it is not extended to cases which do not come within the reason of the rule. A very strong illustration may serve to show what is here intended. Suppose a plaintiff to call twenty witnesses to prove his case, and they each of them testify to facts which are sufficient to entitle the plaintiff to a judgment; and further, suppose that the defendant does not call more than one witness whose evidence is in direct conflict with those of the plaintiff; that no attempt is made to impeach any of the witnesses, and that a verdict and judgment pass in favor of the defendant, is not this such a palpable injustice as to call for a reversal of the judgment, upon the ground that it is not a case in which it can be said that there was any pretense of weighing the evidence?

Courts of record invariably set aside such verdicts when rendered in those courts; and would it not be most remarkable if they would refuse to do the same thing merely because the case

was tried in an inferior court? From the manner in which causes are tried in the lower courts, there is certainly quite as much liability to error as there would be in a court of record which is presided over by a learned and experienced judge.

There are some cases which have been tried in justices' courts and afterwards affirmed upon error, which would be quite differently decided were the same cases to come up for decision now. Those cases, however, are not numerous, and they are clearly opposed to the established practice of the courts at the present time. The cases may be arranged in several different classes, for convenience of citation and illustration.

The cases in which an appellate court will interfere and reverse the judgment of an inferior court upon questions of fact are the following:

1. Where the plaintiff fails to prove a cause of action upon a consideration of the entire evidence given. This may arise from the fact that the law does not entitle the plaintiff to recover upon all the facts proved, though in such a case the error would be one of law; or in the second place, in a case in which there was some material defect in the proofs;

2. Where the verdict is against the undisputed or overwhelming weight of evidence;

3. Where it is evident that the verdict is the result of prejudice, partiality, passion or fraud;

4. Where the court or jury have evidently disregarded unimpeached and controlling evidence.

These principles are not new ones introduced by the Code, but are such as have long been established in this state. And they are equally applicable whether the action is founded upon contract or upon tort.

The cases which will first be noticed are those which show that a judgment will be reversed where there is a total or a material defect in the proofs.

First. The following cases were decided under the old practice which prevailed before the enactment of the Code. In *Baldwin* v. *Delevan*, 2 Hill, 125, the action was for a fraudulent misrepresentation on an exchange of horses; but the evidence did not show any representation whatever by the defendant, except what he had said to a third person, a short time before the exchange with the plaintiff; this proof was held to be insufficient and a judgment in favor of the plaintiff reversed. In *Clark* v. *Denure*, 3 Denio, 319, 320, the action was for fraud in the sale of a span of horses, but there was no proof of a *scienter*, and a judgment for the plaintiff was reversed. In *Palmer* v. *Manning*, 4 Denio, 131, a judgment rendered upon a promissory note was reversed because the identity of the note was not proved, where the note was proved by the admissions of the defendant. See the case stated, *ante*, 384. In *Tifft* v. *Tifft*, 4 Denio, 175, the plaintiff recovered a judgment against the defendant for the acts of his infant child who set a dog upon the plaintiff's hog and killed it;

but there was no proof that the defendant authorized the act, and the judgment was reversed; and the court said: "In actions before justices of the peace, if any material part of the plaintiff's case is wholly unsupported by evidence, a judgment in his favor will be reversed on *certiorari;*" and this is so whether the trial was with or without a jury.

In *Blanchard* v. *Isaacs*, 3 Barb., 388, the plaintiff recovered judgment against the defendant, as a common carrier, for the value of a coat which had been lost, but there was no proof of the delivery of the coat to the defendant, or that the person to whom it was delivered was an agent of the defendant authorized to take charge of such property, and the judgment was reversed.

In *Pryne* v. *Westfall*, 3 Barb., 496, the plaintiff recovered a judgment as a constable for the wrongful taking of property which he had previously levied upon. He had not taken actual possession of the property, and the action was brought for the benefit of the plaintiff in the execution. There was no proof of any judgment upon which the execution was issued, though the execution was proved, but this was held insufficient and the judgment was reversed, and see *Underhill* v. *Reinor*, 2 Hilt., 319.

The cases which will next be cited are such as have been decided since the enactment of the Code, and they rather extend than restrict the former rule in this respect. After the Code was enacted there were some parties who supposed that upon a judgment by default the plaintiff need not prove his case, but might take judgment by default without evidence, but the courts overruled this view and held that the plaintiff must prove his case in the usual manner. *Carter* v. *Dallimore*, 2 Sandf., 222; *Swift* v. *Falconer*, Id., 640; *Alburtis* v. *McCready*, 2 E. D. Smith, 39; see the cases cited, *ante*, 690.

Where a plaintiff claims to recover for services rendered, he must prove that the defendant employed him; and if he obtains a judgment without proving this fact, it will be reversed. *Howard* v. *Brown*, 2 E. D. Smith, 247.

The plaintiff must do more than to prove such facts as would warrant a conjecture that he is entitled to recover. He is bound to make out a *prima facie* cause of action, and he must furnish some criterion by which a right of recovery for some amount can be fixed without danger of doing injustice, and when the plaintiff's evidence leaves in doubt not only the amount which he is entitled to recover, but also the fact whether he is entitled to recover at all, a judgment in his favor will be reversed. *Fox* v. *Decker*, 3 E. D. Smith, 150.

In an action by the holder against the indorser of a note, the plaintiff must prove such facts as fix the liability of the defendant; and if there is no proof of presentment, demand, refusal or notice to the defendant, or a waiver of them, a judgment in favor of the plaintiff will be reversed. *Jones* v. *Pridham*, 3 E. D. Smith, 155; *Storp* v. *Harbutt*, 4 E. D. Smith, 464; see also Vol. I, 458, 460, &c. The same principle applies when the holder

of a bill of exchange seeks to charge the drawer thereof. *Vantrot* v. *McCulloch*, 2 Hilt., 272.

In an action to recover damages for injuries resulting from negligence, the plaintiff must establish by evidence that the injury was in some manner done by the defendants. And in one case, in which the plaintiff recovered a judgment against the defendants, for injuries alleged to have been done to his wagon by the defendants' stage, the court, upon reversing the judgment, said: "Assuming that the plaintiff sufficiently proved that his wagon was injured by the carelessness of a person who was driving a stage, the only evidence that either of these defendants was responsible was that of the plaintiff's son, who testified that two gentlemen called upon his father and conversed on the subject, and one of them answered to the name of 'Lent,' and that the latter wished the wagon sent to his place to be repaired, and both were satisfied that it was their stage by which the injury was caused. This by no means identifies the defendants. The witness does not intimate that he is acquainted with the defendants, or either of them, and it is hardly necessary to say that a defendant cannot legally be charged with liability because some person who assumes to answer to the same surname is shown to have admitted his liability." *Fanning* v. *Lent & Mulford*, 3 E. D. Smith, 206, 207.

In an action by a plaintiff to recover the value of his dog, which is alleged to have been killed by the defendant's dog, the plaintiff must prove that the defendant was the owner of the dog, or that he harbored him, and that such dog was the aggressor in the particular fight; and if he recovers a judgment without such proof, it will be reversed. *Wiley* v. *Slater*, 22 Barb., 506, see case and part of opinion of court, Vol. I, 852.

The principles which govern an appellate court as to reversing judgments which are against evidence, are clearly and forcibly stated in *Rathbone* v. *Stanton*, 6 Barb., 141, 143, 144, by GRIDLEY, J., who said: "There is at this day no doubt, and there never should have been any, that the verdict of a jury should be set aside where there has been no evidence to support it. * * * The true doctrine is this: when there is a *disputed question of fact*, and evidence has been given *on both sides of such question*, the courts will not disturb the finding of the jury. But when, upon any one question which is decisive against either party, there is evidence on one side of such question and none on the other, and the verdict has been given for the party who has given no evidence upon the point in question, the verdict will be set aside, and if the county court does not reverse a judgment founded upon such a verdict, it is the duty of the supreme court to correct the error. In this case, upon the right of the plaintiff to recover, there was no conflict of evidence. It is true that the lease for the two first years was void, inasmuch as it was not in writing; but it was fully executed, the defendant occupied the premises and never paid the rent in full, and, therefore, for that balance, what-

ever it might be, the plaintiff was entitled to recover. So, too, of the subsequent years. If there be no agreement to accept the rent in any other way than in cash, the rent is recoverable in money; but if there was any evidence authorizing the conclusion that the plaintiff by his acquiescence, and that of his agent, in the erection of the barn, of different dimensions from those proposed by the plaintiff, still there is no pretense that the defendant erected a barn of sufficient value to satisfy the rent. The verdict of the jury was therefore without evidence, and to allow it to stand would sanction an act of gross injustice. The judgment of the county court and of the justice must be reversed."

In an action which claims to recover money for services rendered in building a house, and for furnishing materials therefor, and where it appears from the evidence that the work was performed under a written sealed contract which specifies a time for the completion of the work, and that payment was to be made on the completion of the work, the plaintiff must show a performance on his part before he is entitled to recover; and a judgment for the plaintiff, without furnishing such proof, will be reversed. *Lynch* v. *McBeth*, 7 How., 113, 120, 121. In the last case, the supreme court reversed a judgment of the county court, as well as that of the justice, where the plaintiff had recovered in such a case. The court said: "In addition to the above errors, the justice's judgment was *clearly* wrong upon the merits, and contrary to the justice of the case, as it appeared upon the trial. The justice certifies that his return contains the substance of the testimony and proceedings had before him, and yet it does not contain any legal evidence to support his judgment. The defendant proved that the plaintiff was under a covenant to do the work which he did for the defendant. The plaintiff attempted to show that this covenant was varied by a subsequent parol agreement. Besides the incompetency of parol evidence to have that effect, the plaintiff did not, even with the help of his own testimony, prove any parol attempt to vary the sealed contract. There was nothing in the conversation which he testified to, purporting to release him from any of the obligations of his covenant, or to impose any new obligation in that respect, upon the defendant; the most that the plaintiff's testimony on this subject tended to show, was a parol promise of the defendant, without any consideration, to let the plaintiff have money as fast as he wanted it to go on with the work, not as payment for the work, nor in lieu of the payments which the plaintiff had covenanted to receive when the work was done. This was wholly insufficient to produce the effect claimed for it by the plaintiff, and given to it by the justice. In such a case the county court ought to have reversed the judgment of the justice's court, and erred in not doing so." The same principle is enforced in *Jacobs* v. *Kolff*, 2 Hilt., 133, which is stated Vol. I, 178.

It has been held that a failure to prove the proper measure of

damages would be a ground of reversal, in an action for a breach of warranty on the sale of a horse. *Fales* v. *McKeon*, 2 Hilt., 53, see case stated Vol. I, 679; and see *ante*, 533.

Second. A brief examination will now be made of the cases which hold that a county court ought to reverse a judgment which is rendered against the overwhelming balance of evidence. There is scarcely an instance in which a county court can exercise its appellate powers with greater advantage than in that of correcting judgments which have been given in violation of the rights of one of the parties, by entirely disregarding the whole scope, balance and force of the evidence given on the trial. In courts of record it has long been the practice to grant a new trial in such cases, and the power of the county court to do the same thing in cases arising upon an appeal from a justice's court is now clearly established, and daily exercised. This rule is not a new one introduced by the Code, but was well settled in the former practice.

In *Buckley* v. *Leonard*, 4 Denio, 500, the action was for damages done by the defendant's dog. On the trial, which was by jury, the plaintiff proved that while he was passing through a yard used in common by the defendant and a family which occupied an adjoining house as tenants of the defendant, with a view to call at such adjoining house, the dog bit him, and that on account of it he became somewhat lame, and was prevented from laboring for a few days, as a spinner in a factory, which was his employment. The plaintiff also proved that about a year before, the dog had bitten an other person, and there was some evidence that the dog had also bitten a boy. On both the former occasions the defendant had been informed of the injuries; and it was shown that for the most part he had kept the dog chained up in the daytime, and in his store nights.

The defendant offered to prove that the dog was of a quiet and peaceable disposition. The plaintiff objected to the evidence, but the justice admitted it, and several witnesses testified that they were acquainted with the animal and considered him inoffensive. The jury found a verdict for the defendant, upon which the justice rendered judgment, which was affirmed by the county court on appeal. The supreme court reversed both judgments; and the court said:

"The evidence given by the defendant of the mild character of the dog, I think was improperly admitted. It was immaterial. If the evidence proved that the dog bit the plaintiff, that the defendant was the owner, and knew or had notice that the dog had been accustomed to bite others, he was responsible for the injury, however high the character of the dog for mildness stood among the neighbors. Such evidence was well calculated to divert the jury from a proper consideration of the real point in issue. There was no conflicting evidence upon any position which the plaintiff was bound to maintain, nor was there any question as to the credibility of witnesses. It was not, therefore,

one of the classes of cases where the verdict of a jury precludes a court of review from examining the facts. The evidence of the injury to the plaintiff, of the dog having previously bitten others, and that the defendant had notice of it, stands uncontradicted; and these facts were abundantly sufficient to require the jury to find for the plaintiff. I think this is a case where the verdict and judgment are entirely unsupported by the evidence."

This case is but one of numerous cases of a similar character decided before the Code; and several of the cases already cited were the same in principle. And since the Code the same practice is firmly settled and uniformly enforced. In *Robertson* v. *Ketchum*, 11 Barb., 652, an exchange of horses was made between the plaintiff's agent and the defendant upon terms which, as the defendant knew, the plaintiff had himself refused to adopt as the basis of an exchange. The plaintiff did not know of the bargain until after it was made; nor did he know of the terms of it, and that it was contrary to his proposition, until after the death of the horse received in exchange had put it out of his power to return it. He repudiated the bargain as soon as he knew what it was, and brought an action of trover in a justice's court for the value of his horse. The case was tried by a jury, who found a verdict for the defendant, upon which judgment was rendered; and the county court, upon an appeal, affirmed this judgment. The supreme court reversed both judgments, and the court said: "There was no conflict in the evidence, on the fact that the actual exchange of horses, made by the agent, was upon a consideration which the plaintiff had never authorized, and that this was known to the defendant at the time. A verdict finding to the contrary is not merely a verdict against the weight of evidence, but is a verdict without a particle of evidence to support it. The ground on which the county court affirmed the judgment of the justice, was that there was evidence of a subsequent ratification of the bargain by the plaintiff. The evidence was that the plaintiff asked the defendant how he traded, to which the latter replied, "*pretty much as you and I talked*, a little different, and if you are not suited with the trade we will trade back this evening." Upon this the parties drank together and parted. This answer of the defendant was untrue; the trade was made, not as the plaintiff had proposed, but as the defendant had offered, and which offer the plaintiff had expressly rejected. If the defendant had truly disclosed the terms of the bargain, when he was asked, and the plaintiff had silently acquiesced, it would have presented quite a different question. No doctrine is better settled, upon principle and authority, than this: that the ratification of the act of an agent previously unauthorized, must, in order to bind the principal, be with a full knowledge of all the material facts. If the material facts be either suppressed or unknown, the ratification is invalid, because founded upon mistake or fraud. The answer of the defendant to the plaintiff's inquiry was untrue, and was well calculated, and doubtless intended, to prevent further inquiry.

The defendant had agreed with the agent to conceal from the plaintiff the departure from his instructions. It would be a reproach to the law to uphold such a fraud. There was no dispute about the facts; the jury drew an erroneous conclusion from the testimony. They must have held that subsequent assent to the trade was a ratification of the bargain, whether the plaintiff knew of its terms or not. The judgment of the county court and of the justice must be reversed."

In *Fish* v. *Skut*, 21 Barb., 333, the action was trespass for injuring and killing sheep. The plaintiff proved facts entitling him to recover, but the jury found for the defendant, and the county court affirmed the judgment. The supreme court reversed both judgments, and the court said: "The defendant's counsel does not controvert this position, but he insists that the question was purely one of fact, and that the judgment should therefore not be disturbed. It was a question of fact, but there was no conflict whatever in the evidence. The facts stated by the witness, Thayer, were undisputed, and they proved a cause of action entitling the plaintiff to recover.

It is said in the brief that it was not proved that the sheep belonged to the plaintiff. They were in the plaintiff's lot and in his barn yard. Several witnesses went and saw them, and no suggestions were made upon the trial that they were not the plaintiff's sheep. Possession of personal property is *prima facie* evidence of title. The jury had no right to say that it was not proved that the sheep belonged to the plaintiff. Again, it is said that there was contradictory evidence as to the defendant's owning the dog. The witness Thayer saw the dog, and says it was Austin Skut's dog. One Edwin Skut was a witness: he stated that the defendant lived with him; that the plaintiff called upon him on the 7th day of February (the day the sheep was killed), and said to him, the witness, that his dog had been killing the plaintiff's sheep. The witness told the plaintiff that he had killed his dog two years before, but if he had been back killing sheep he would attend to it. This is the contradiction relied upon. The plaintiff probably did not know whether Austin or Edwin owned the dog. They lived together. But this very evidence showed that it was not Edwin Skut's dog, and instead of conflicting with Thayer's statement, goes rather to confirm it. Charles Skut was also sworn, but neither he nor Edwin say anything about the ownership of the dog, although they were both examined as to the damages. They went and saw the dead sheep, and those wounded. It is not a case of conflict of evidence. The evidence was clear and undisputed. I must suppose that the jury, unfortunately for the defendant, was misled upon some question of law."

In *Marselis* v. *Seaman*, 21 Barb., 319, 324, an action was brought for the recovery of a penalty for taking illegal toll upon a plank road. The proof was clear that the plaintiff was entitled to recover, provided the acts done rendered the defendant liable to a penalty within the meaning of the statute. The cause was

tried by a jury, and a verdict and a judgment rendered for the plaintiff, which was affirmed by the county court, but both judgments were reversed by the supreme court, which said, by BOCKES, J.: "The question litigated upon before the justice was whether plaintiff was bound to pay as toll *two* or *three* cents per mile for the distance between gate No. 2, and gate No. 3. If only two cents, the plaintiff was entitled to recover; if three cents, too much toll was not demanded or taken. This question depended on the fact whether the vehicle fell within the description of these specified in the statute as follows: '*For every vehicle used chiefly for carrying passengers, drawn by two animals.*' The proof shows that it was drawn by two animals. Was the vehicle 'used chiefly for carrying passengers?' It is described as a covered sleigh; was called a stage; would carry six passengers inside comfortably; had seats for passengers; and, as the witness testified who had the vehicle (or one similar to it) built, it was constructed for carrying passengers, with a place under the driver's seat to carry the mail, and it was used chiefly for carrying passengers. Unless there is some evidence to explain, modify or contradict this proof, it would be an intolerable perversion of the force and effect to be given to testimony, to say either that the vehicle was not then in fact 'used chiefly for carrying passengers,' or that it was not such as are usually used for that purpose. All the evidence there is to countervail the conclusion to which that proof should lead a court and jury is this: that the plaintiff carried the mail in the vehicle, which mail ordinarily consisted of one bag, and could be carried conveniently in front. This in no way weakens or changes the effect fairly to be given to the other evidence. If it were possible to say on this proof, that the vehicle was used chiefly to carry the mail, it would be preposterous and transcendentally absurd to say, on all the proof, that it was not used chiefly for carrying passengers. There is no conflict of proof in the case. The facts are plain, and admit of but one fair conclusion; and it only remains now for the court to pronounce the judgment which the justice should have rendered, when the defendant insisted that there was no evidence that the defendant or his wife demanded or received more toll then he was allowed by law to collect. The verdict of the jury is irreconcilable to conscience, and must have been rendered under mistake, improper influence, or through fraud."

In *Watts* v. *Cleaveland*, 3 E. D. Smith, 553, an action was brought by a constable to recover the value of goods upon which he had levied. The officer proved a sufficient levy, which was the principal point in the case, but a judgment was rendered in favor of the defendant. This judgment was reversed on an appeal.

In *Goldsmith* v. *Obermier*, 3 E. D. Smith, 121, 122, the plaintiff claimed to recover for his services in procuring the purchase of a horse. The plaintiff proved an employment by the defendant, or at least a full and unequivocal recognition of an original

employment, and an actual calling upon the plaintiff by the defendant, and procuring him to render further services; the actual devotion by the plaintiff of his time, labor and attention for the defendant's benefit, and in aid of the purchase of his horse, and a distinct promise by the defendant that he would pay him well for the services which he admitted the plaintiff had rendered. The court below rendered a judgment in favor of the defendant, which was reversed upon appeal, when the court said: "We do not interfere with the finding in the court below, upon the mere ground that, upon the whole evidence, we think we should have come to a contrary conclusion. But where the evidence, upon which the plaintiff is, in our judgment, clearly entitled to recover, is uncontradicted and unimpeached, we are warranted in saying that a finding, in total disregard of the proof, must be founded in some erroneous view of the law applicable to the case made out by the plaintiff."

In *McCarty* v. *Ely*, 4 E. D. Smith, 375, 376, the action was for the recovery of rent, due upon a written lease. The defendant claimed to deduct a specified sum on account of alleged misrepresentations as to the capacity of the premises for the business for which they were used. There was nothing in the lease showing any representations, nor did the proofs establish any false representations. The jury found for the defendant, but the judgment thereon was reversed, and the court said: "The jury must, I think, have acted under some misapprehension or mistake, as their verdict is, in my judgment, not only against the weight of the evidence, but is without evidence to support it. The judgment should, therefore, be reversed."

In *Lambert* v. *Seely*, 2 Hilt., 429, the plaintiff recovered for goods sold. The evidence showed that the bill of goods claimed to have been sold was receipted by a clerk of the plaintiff, who was authorized to do such acts; and there was no explanation of the receipt. Besides this, there was no proof that the goods were ever actually delivered to the defendant; and there was evidence that the goods were sold to a third person, who had given credit for the amount upon a note held by him against the plaintiff. The plaintiff had a judgment, which was reversed, on the ground that it was not only unsupported by evidence, but was directly contrary to it.

In *Neary* v. *Bostwick*, 2 Hilt., 514, the plaintiff claimed to be a tenant of the defendant, and sought to recover damages for a breach of the covenants contained in the lease. The defense was, an accord and satisfaction. The justice rendered a judgment in favor of the plaintiff for $150 damages, which was reversed upon an appeal. The court states the facts of the case thus: "When the troubles and injuries complained of by the plaintiff would seem to have reached their highest point, and in the month of July, the defendant called on him, and he demanded damages for his injuries at that time, stating what they were and in what they consisted. He then agreed to take $20 for his demands,

and the defendant paid it; the plaintiff saying that he took it to save trouble. Upon this point the plaintiff further testified that he accepted this $20 as a compromise only, for his loss of rent of the addition to that time; but the subsequent testimony on the part of the defendant, and which the plaintiff did not deny, was that the defendant declined to pay anything whatever, claiming that the agreement permitted what was done, and that the plaintiff had no right under it to the addition or extension. The plaintiff threatened a law suit, and was told to sue away; and the defendant arose to go. The plaintiff then said he would take $20 and settle it, and the defendant paid it to prevent a law suit. The plaintiff had previously stated all he complained of, and which was of the hole in the cellar, the timbers under the building, and the addition. On receiving the $20 he pledged his honor that all his claim was settled, and he would not sue. The outline of the case here given is from the plaintiff's evidence, except as to the defense of accord and satisfaction, and that is taken from the whole case. Upon such testimony I am at a loss to discover upon what ground the justice arrived at his conclusion that the plaintiff was entitled to the damages he awarded. * * * The clear weight of the evidence on this point being as I have stated, I do not understand why it was ignored by the justice. The parties were shown to have met respecting the subject matter and injuries complained of in this action. There can be no doubt that the defendant disputed the claim in good faith, and after the parties had considered the matter in dispute, the defendant paid, and the plaintiff accepted $20, saying that all his claim was then settled. In no view that I have been able to take of this case can the judgment of the justice be sustained." See Vol. I, 1040, 1041.

Payment in forged bank bills is a nullity. Vol. I, 411. In *Baker* v. *Bonesteel*, 2 Hilt., 397, the action was for the recovery of goods sold to the defendant, who interposed the defense of payment. The plaintiff proved that one of the bills so paid was a counterfeit, and he also proved that this bill was paid by the defendant. The defendant was sworn in his own behalf, and testified that he had no recollection of paying for the goods with this bill. The justice gave judgment for the defendant, and the plaintiff appealed. The court, upon reversing the judgment, said: "The witness Brant testified that he gave the identical bills received by him from the defendant to Marin, the clerk of the plaintiffs, and Marin testified that the bill in question was one of those he so received from Brant. This testimony was uncontradicted, and there were no circumstances shown which warranted the justice in disregarding it. The evidence of Bliss left no doubt as to the bill being spurious and of no value. It should not, therefore, operate as a payment for the coal shown to have been sold and delivered to the defendant. The finding of the justice was clearly against the evidence. Judgment reversed."

Where the plaintiff swears to a state of facts, and the defend-

ant swears to a directly contrary state of facts, and the defendant also introduces in evidence a letter which was written by the plaintiff before the commencement of the action, and such letter flatly contradicts what he swears to on the trial, the jury are bound to disregard his oath and to find in favor of the defendant, and if they find for the plaintiff, the appellate court will set aside the verdict and judgment. *Boyd* v. *Colt*, 20 How., 384.

The right of a party to abate a nuisance has been already explained. Vol. I, 753, 754.

In *Northrop* v. *Burrows*, 10 Abb., 365, the action was brought against the defendant as a director of a plank road company, for an alleged injury by removing some of the plaintiff's wood from the limits of the plank road. It appeared that the defendant removed some of the wood out of the road, down a bank, and that some of it fell into the Delaware river; that he was a director of the company, and that it was his duty, so far as the road was concerned, to remove obstructions from the road; that he was also overseer of the highways in the district where the wood lay. It also appeared that the defendant was directed by the president and secretary of the company, to remove the wood in question from the road; that the wood lay in the road a week or two, and complaint was made to the officers of the road, and that the plaintiff was then informed that he must take it away, which he did not do, and that about ten days afterwards the defendant removed it; that the road where the wood lay was on a side hill by the Delaware river, and some fifty or sixty feet above it; that the wood lay on the upper side of the road; that some of the witnesses thought two teams could pass by it safely on the road, but most of them were of opinion that it would be unsafe for teams to attempt to pass each other by the wood. It was also shown that horses were afraid of it, and often shied when they passed it; that no reason was shown why the plaintiff left the wood in the road where it lay; that the bank was high and steep on the upper side of the road above the wood, and that the defendant put the wood out of the road in the only place he could, without great inconvenience, unless he had drawn it up or down the road some sixty or seventy rods. On this evidence, the justice rendered a judgment against the defendent, and the county court affirmed it. The supreme court reversed both judgments, and said: "The defendant was not bound to handle the wood in question with that care, or deposit it in such a place as he would household furniture. The plaintiff did not regard the wood as of sufficient value to remove it himself, although he had notice to do so; and it would be unjust to hold that the defendant should have carried it sixty or seventy rods in order to save it for him. * * * Applying this law to the evidence in this case, the conclusion is unavoidable, that the defendant was not guilty of unnecessarily or wantonly destroying the plaintiff's wood. It follows that the judgment of the county court and that of the justice should be reversed, with costs."

Third. In some cases it is evident that the verdict or decision in the court below must have been the result of prejudice, partiality or passion, and in those cases the appellate courts correct the error by reversing the judgment.

In *Pearson* v. *Fiske*, 2 Hilt., 147, the rule was stated thus: "An appellate court will not assume the office of a jury, or of a referee, and weigh the testimony with the view of ascertaining on which side the weight of the probability lies. They will reverse for the want of evidence; or, where the finding is against evidence, in respect to which there is no contradiction nor conflict, and in extreme cases, though there may be some conflict or contradiction in the testimony, they will set aside the verdict, finding or report, if, after full and careful deliberation, they are convinced that it must have been induced by partiality, prejudice, or corruption, or was the result of an obvious and palpable mistake." See also *Marselis* v. *Seaman*, 21 Barb., 324, end of opinion.

In *Westbrook* v. *Douglass*, 21 Barb., 602, 604, the action was against a constable for not returning an execution. The plaintiff proved facts which entitled him to recover, but the jury rendered a verdict in favor of the defendant, and the justice rendered a judgment thereon, which was affirmed by the county court. The supreme court reversed the judgments; and the court said, by HARRIS, J.: "The jury, moved by their sympathy for an officer who had unfortunately lost an execution which he was unable to collect, as it would seem from the evidence in the case, found a verdict entirely against the evidence. The justice, of course, had no alternative but to render a judgment in accordance with the verdict. The county court, willing, perhaps, to find a reason for upholding such a judgment, has relied upon the general and well settled doctrine that in such a proceeding, jurisdiction will never be presumed, but must be proved. Upon the grounds already stated, I think it must be inferred that such jurisdiction was in fact proved. If so, the judgment was contrary to law and the evidence in the case, and should be reversed."

Fourth. There is still another class of cases in which appellate courts feel bound to reverse judgments which have been founded upon a total disregard of unimpeached evidence. And many of the cases which have been already noticed under other preceding heads, were also erroneous because the courts below had entirely disregarded evidence which stood fair and conclusive before the court. An early case in this state explains and enforces this rule in a most satisfactory manner. In *Newton* v. *Pope*, 1 Cow., 109, the plaintiff sued to recover damages for negligence in the use of his horses by the defendant. The plaintiff had a judgment, which the supreme court reversed, and thus expressed its views: "The plaintiff is not entitled to recover, unless the horse was injured through unskillfulness, negligence, or willful misconduct of the defendant; and it is incumbent on the plaintiff to prove the negligence or unskillfulness charged. The defend-

ant stands at least upon as favorable a footing as a bailee for hire; and there is no doubt of the rule in such a case. There is no evidence of negligence or unskillfulness in this case, even excluding the testimony of the defendant's witnesses; and admitting this testimony, the evidence of ordinary care and skill is conclusive. The justice had no right, entirely, and arbitrarily, to disregard the testimony of two unimpeached witnesses on the ground 'that he was satisfied that they were biased in favor of the defendant.' There was no attempt to impeach their characters. The facts sworn to by them were not contradicted by any other witnesses either directly or indirectly; nor was there any intrinsic improbability in the narration given by them. It is difficult to establish a rule which shall regulate and limit the discretion of a court or jury, in the degree of credit to be given to the testimony of different witnesses. Much must depend upon the particular circumstances of each case. But there is no difficulty in saying that where (as in this case) the witness is unimpeached, the facts sworn to by him, uncontradicted either directly or indirectly by other witnesses, and there is no intrinsic improbability in the relation given by him, neither a court nor jury can, in the exercise of a sound discretion, disregard his testimony. It is no less the duty of a court than of a jury to decide according to evidence. But it is mockery to talk of evidence, if it is discretionary with the tribunal to which it is addressed, to disregard it, upon vague suggestion, unsupported by proof of the bias of the witness."

This case was cited with approbation in *Dolsen* v. *Arnold*, 10 How., 528, 532, where it was held that the evidence of even a single witness could not be arbitrarily disregarded where his testimony stands fair, and is uncontradicted, and there is no reason shown for disregarding it, and a verdict in violation of the rule was set aside.

In *Jacks* v. *Darrin*, 3 E. D. Smith, 559, the court, upon reversing a justice's judgment, said: "No reasons are given by the justice for his judgment, but it would seem from the statement made by him, that he discredited the plaintiff's witnesses. The evidence of these witnesses was direct, unequivocal and consistent, and when such is the fact, and the witnesses stand before the court unimpeached and uncontradicted, it is the duty of the court or of a jury to believe them, and when the finding of a justice or of a jury is in conflict with what is expressly sworn to, under such circumstances, it will be set aside as against evidence."

In *Dresser* v. *Van Pelt*, 1 Hilt., 316, the action was for the recovery of an account. The defense was the statute of limitations, and the question was, whether the debt had been renewed by a part payment. The assignor of the plaintiff testified that he believed that the defendant had paid $5 within six years, but of this he was not certain; that he was positive $5 had been paid, but would not swear positively that the payment was within

the last six years. The defendant swore that he did not, within six years, pay $5 to the assignor of the bill in suit. The justice rendered judgment in favor of the plaintiff, which was reversed on appeal, and the court said: "The finding of the justice, therefore, was clearly against evidence. The assignor merely swore to his belief or impression. He did not strengthen it by any circumstance that could guide the justice, except that it was about the time when the defendant and the plaintiff dissolved partnership, without stating when they dissolved. It was not a conflict of testimony upon which the finding of the justice would be conclusive, but of imperfect recollection on one side, and of positive recollection on the other. In such a case there can be no weighing of testimony. The belief of a party to an act, who cannot swear that it occurred within the six years preceding the time that he is examined, who cannot fix it or swear positively that it took place at least within that range of time, amounts to nothing when there is positive evidence that it did not occur within that period. Presumptively, the claim was barred by the statute, and it was for the plaintiff to remove that presumption, by showing that the defendant had made a payment upon it within six years before the commencement of the suit, which he did not do. The defendant having sworn positively that it was not made within that time, and the plaintiff offering nothing but the uncertain impression of the assignor against the positive statement of the defendant, upon such evidence there could be no alternative but to find for the defendant."

Where a cause of action is made out solely by admissions, the whole admission must be taken together, and a refusal to do so will be sufficient ground for reversing a judgment in favor of the plaintiff. *Perego* v. *Purdy*, 1 Hilt., 269; and see *ante*, 381, 382, 383. But it has been held that a verdict in favor of a plaintiff is final upon a question of fact in a case in which the plaintiff swears one way, and the defendants the opposite way. *Justison* v. *Crawford*, 25 How., 465.

If a plaintiff proves a *prima facie* case, and the defendant does not introduce any evidence, it will be error to nonsuit the plaintiff, and an appeal will lie to correct it. *Babcock* v. *Raymond*, 2 Hilt., 62. So, where the uncontradicted evidence of the plaintiff entitles him to a verdict for substantial damages, and the jury disregard the evidence and find a verdict for a mere nominal sum of six cents, the verdict will be set aside. *Robbins* v. *Hudson River R. R.*, 7 Bosw., 1; *Collins* v. *Albany & Schenectady R. R.*, 12 Barb., 492.

In relation to all of these cases in which the finding is without any evidence, or where it is clearly against the overwhelming force of the evidence given, the appellate court will presume that the result is produced by some erroneous view of the law applicable to such a case.

This presumption is more natural than that which presupposes corruption, or a willful violation of official duty and of the juror's oath.

That a jury may err in their application of the law to established facts, is a matter of frequent occurrence, while a criminal disregard of duty or of the obligations of an oath are comparatively rare, and therefore, the courts will incline to the view that the jury erred in their application of the law to that particular case. The numerous cases which have been cited are ample illustrations of the application of this presumption by the courts, as well as conclusive evidence that the courts will reverse judgments founded upon any such erroneous view of the entire case. See *Fish* v. *Skut*, 21 Barb., 333, 335, end of opinion; and *Goldsmith* v. *Obermier*, 3 E. D. Smith, 122; *Fettritch* v. *Dickenson*, 22 How., 249; *Lansing* v. *Stone*, 37 Barb., 15, 22; *Marston* v. *Vultee*, 8 Bosw., 129. As to what are questions of fact, see *ante*, 627 to 630.

Reversal upon questions of law.] The cases in which relief is sought from judgments rendered by default, or against evidence, or for errors in fact, having been sufficiently noticed already, it will now be proper to notice those cases in which a reversal is sought on account of some legal error committed by the court below. The principal part of the appeals which are brought are founded upon some alleged error in the proceedings in the lower court. Such errors may occur in any stage of the preceedings, from the commencement of an action until its final termination in a judgment. To enumerate all the instances in which it has been held that an error had been committed, would be to cite all the cases upon the subject, which is not the object of this article. It will be proper, however, to point out some of the classes of cases in which such errors occur.

To commence with the proceedings in an action is a convenient point to start from. If the justice has no jurisdiction of the subject matter of the action, or if he does not acquire jurisdiction over the person of the defendant, this will be a ground of error. The place where an action must be brought is sometimes limited, and the law must be complied with in this respect. Sometimes the justice is disqualified by reason of relationship, or of some other personal disqualification. So, again, the process which has been issued may not be regular or valid on account of the want of affidavits, bonds, or other proof or securities; and if these are sufficient, the process may not be sufficient or proper in form or kind. The service of process may be irregular or defective. Errors may also occur in the disposition of questions relating to the pleadings, or to an adjournment. And what is still more common, there may be errors committed on the trial of a cause, such as admitting improper evidence, rejecting proper evidence, excluding or receiving witnesses, improperly granting or refusing a nonsuit, charging a jury, receiving verdicts, or entering judgments, and the like. In all of the foregoing proceedings, and in many others not mentioned, there may be errors which may be a good ground of appeal. And all these questions are outside of other questions which arise as to the right of the plaintiff to recover, upon the law applicable to the case, or whether a judg-

ment in favor of the defendant can be sustained when all the facts in the case are duly considered. And whenever it appears from the record that any material error has been committed in the proceedings in the court below, either by the justice or by a jury, the general rule is, that such error may be corrected on an appeal.

For an illustration of the cases in which the proceedings are regular and valid, or irregular and erroneous, the student may examine each of the classes of cases which have been pointed out, such as process, pleadings, evidence, trials, judgments, &c., &c.

And whenever the appellate court can clearly see from the whole record, that the judgment appealed from is against law and the evidence, or in other words is unjust, because against the clear merits of the case, the judgment will be reversed.

Objections first taken on the argument.] It is a general rule that a party must take such objections below, as he wishes to rely upon, if he appears in the action, or participates in the proceedings. This rule is a most important one in its consequences, and it is very uniformly enforced in practice. A few cases will suffice to illustrate the practice.

If a party wishes to take any objections to process, either as to the mode of issuing or service, he must raise the proper objection, at the first opportunity. See the next subdivision, as to waiver, &c. A defect in pleadings must be objected to by demurrer. *Ante,* 330, 334.

If process is defective either in form or in substance, and the defendant wishes to object to it, he must do so before joining issue; and if he fails to do this in the court below, he cannot raise the objection upon an appeal. *Ante,* 19.

If a demurrer is sustained when it has been interposed notwithstanding the legal sufficiency of the pleading demurred to, the injured party may redress the wrong by an appeal. But he must abide by his pleading, and refuse to amend it; or he will waive the right to insist upon the point upon an appeal. *Ante,* 333, 334.

If a complaint is defective the objection must be made in the court below, and if the defendant fails to do this he cannot reverse the judgment for the insufficiency of the complaint, provided a good cause of action was proved by legal evidence. *Stafford* v. *Williams,* 4 Denio, 182, 184; *Hall* v. *McKechnie,* 22 Barb., 244.

If an adjournment is desired, a proper application must be made, and there must be a refusal to grant it before error will lie. As to irregular adjournments, see *ante,* 358 to 360. A refusal of a justice to require a bond on an adjournment on motion of the defendant, will be error, if the plaintiff objects to such a course. *Ante,* 359. There are numerous cases, as we shall soon see, where a party may raise objections, even though he did not appear and object. But there are some objections which must be taken below, or they cannot be raised upon an appeal. A party who does not appear and object to the competency of a

juror on account of his want of a property qualification will lose the right. *Clark* v. *Van Vrancken*, 20 Barb., 278; *Eggleston* v. *Smiley*, 17 Johns., 133. When both parties appear in the court below, an objection on the ground of nonjoinder or misjoinder of parties must be made there, or the question will not be entertained on an appeal. *Tibbits* v. *Percy*, 24 Barb., 39; *Avogadro* v. *Bull*, 4 E. D. Smith, 384; *ante*, 276, 282, 284, 286.

The cases in which objections may and must be taken on trial, and the mode in which it is to be done, have been quite fully noticed, *ante*, 631 to 637, 586.

Where it is evident from the return that the parties assumed the existence of facts which were material to the case, and neither party in any manner raises an objection to the want of proof of the existence of such facts, this assumption will preclude any question from being made upon appeal as to the defect. *Paige* v. *Fazackerly*, 36 Barb., 392, where several cases are cited; *Smith* v. *Hill*, 22 Id., 656; *Austin* v. *Burns*, 16 Barb., 643; *Jencks* v. *Smith*, 1 Comst., 90; *Gelhaar* v. *Ross*, 1 Hilt., 117.

If it is intended to raise a question as to the manner in which a fact is proved this must be done in the court below, or the right of objection will be lost. If there is a formal defect in the proof of the issuing of letters of administration, which form a part of the plaintiff's proofs, the objection must be taken in the court below to render it available. *Donohue* v. *Henry*, 4 E. D. Smith, 162.

So, an objection to evidence, on the ground that it is incompetent and inadmissible, must be made in the court below, and if it is not, the objection cannot be made for the first time on the appeal. *Rouillier* v. *Wernicki*, 3 E. D. Smith, 310. So, where a sealed instrument which has a subscribing witness is proved in the court below without producing the subscribing witness, and without objection, the objection cannot be taken upon the appeal. *Ranney* v. *Gwynne*, Id., 59. So an objection as to the competency of a witness must be taken below to be available. *Fenn* v. *Timpson*, 4 Id., 276, 278. There are cases in which the defendant may raise objections for the first time upon an appeal if he did not appear in the action below. *Ante*, 635.

So, he may, in some cases, raise an objection on appeal, although it was not taken below, where it is clear that the objection could not have been obviated if taken in the court below. *Ante*, 635. But the correct and the safe practice always is to take the proper objection at the earliest opportunity, and to state it so clearly as not to be misunderstood by the court below, or by the opposite party, and so as to be certain that it will be sufficient to be available on the appeal.

Reversal for want of evidence.] The cases relating to this subject have been so fully noticed while treating of reversals upon questions of fact, that little need be added here.

Where the plaintiff fails to make out a case against a defendant who does not appear at the trial, the judgment will be reversed

in the same manner as though he had appeared and objected that the evidence given did not make a case. *Ante*, 635.

Admitting illegal or incompetent evidence.] One of the most common grounds of appeal is that illegal or incompetent evidence was admitted by the court below. And where it is clear that such evidence was admitted under objection, and that it affected the result of the action to the detriment of the appellant, the judgment will be reversed. To determine what evidence is admissible and what inadmissible it will be necessary to consult the various works upon evidence, as well as the digests and reported cases. The subject of evidence has received a due share of consideration in this work, and many cases will be found collected. *Ante*, 362 to 545; and see *ante*, 633 to 636.

It has been held in a few cases that the admission of illegal or incompetent evidence would not be a ground of reversal in those cases in which there was abundant legal evidence in the case to warrant the finding. *Ante*, 633, 634. These cases, however, are against the clear and decided weight of authority, and besides they are overruled by cases decided by the court of appeals.

It will not be of any avail to urge that the case contains abundant evidence to sustain the finding, independently of the illegal or incompetent evidence, when the latter bears upon the material issues to be decided, and such evidence may have had some influence upon the decision of the jury or the justice. *Williams* v. *Fitch*, 4 E. P. Smith, 546, 552; *Worrall* v. *Parmelee*, 1 Comst., 519; *Weber* v. *Kingsland*, 8 Bosw., 417, 443; *Main* v. *Eagle*, 1 E. D. Smith, 619, 621; *Hahn* v. *Van Doren*, Id., 411; *McAllister* v. *Sexton*, 4 Id., 41, 45; *Belden* v. *Nicolay*, Id., 14, 17; *Anthoine* v. *Coit*, 2 Hall, 40; *ante*, 633, 634.

In a justice's court the admission of illegal or incompetent evidence will not be cured by a subsequent direction by the justice to the jury to disregard it. *Penfield* v. *Carpender*, 13 Johns., 350; *Irvine* v. *Cook*, 15 Johns., 239; *Tuttle* v. *Hunt*, 2 Cow., 436.

Where the defendant does not appear at the trial, his absence is no waiver of his right to insist that the plaintiff shall prove his case by legal and competent evidence; and if the evidence given is illegal and incompetent, or if any material portion of it is of that character, the judgment will be reversed upon an appeal. *Perkins* v. *Stebbins*, 29 Barb., 523; *Warnick* v. *Crane*, 4 Denio, 460; *Squier* v. *Gould*, 14 Wend., 159; *Northrup* v. *Jackson*, 13 Id., 85; *Davidson* v. *Hutchins*, 1 Hilt., 123; *Finch* v. *McDowall*, 7 Cow., 537; *McNutt* v. *Johnson*, 7 Johns., 18; *ante*, 635.

A mere ruling in favor of admitting illegal evidence will do no harm if no evidence is given under the decision. *Ante*, 635.

Excluding legal and competent evidence.] The rejection of evidence by the court below is a frequent ground of appeal, and when the complaint is well founded it is a sufficient ground of reversal on an appeal by the injured party. It is a general rule that every party has a right to introduce such legal and compe-

tent evidence as he desires. There are some instances in which the court may limit the number of witnesses upon mere collateral matters. *Ante*, 607. But, with this exception, it is clear that legal and competent evidence, when properly and seasonably offered, cannot be rejected without committing an error which will be sufficient to reverse a judgment rendered against the party offering to introduce the evidence.

But before bringing an appeal, it will be well to ascertain whether the rejected evidence was competent and legal in itself, and that it was offered at a proper time and in a proper manner. The appellant should be certain that the rejected evidence was the best evidence, *ante*, 397; that it was relevant, *ante*, 415; that if it was hearsay, *ante*, 389, or a mere matter of opinion, *ante*, 488, it was of that character which the law allows as evidence. And when it is settled that the rejected evidence was clearly admissible, that it bore upon material issues, that it was duly and properly offered, and that the party appealing was injured by such rejection, the appeal may be safely brought. But if it appears that the evidence was not relevant or material at the time it was offered, the exclusion of the evidence will not be error. *Heroy* v. *Kerr*, 8 Bosw., 194; *Van Amringe* v. *Barnett*, Id., 358; *ante*, 416. When the court below rejects legal and competent evidence, and the result is to prevent the plaintiff from recovering any judgment, when he would have been entitled to recover upon the introduction of such rejected evidence, the right to reverse the judgment is so clear that no one will dispute it. But it is not necessary that the effect of the rejection should be to deprive the plaintiff of any judgment in his favor, for if competent and legal evidence is rejected and the result is to diminish the plaintiff's recovery, he may reverse such judgment so as to enable him to recover the entire amount that may be due to him. *Bissell* v. *Marshall*, 6 Johns., 100; *ante*, 767.

The party who desires to introduce evidence usually does so by putting proper questions to his witness when the evidence offered is oral evidence. If such questions are objected to, and the objections sustained, and the evidence excluded, the question will be properly presented. It is sometimes the case that a party proposes to prove a given state of facts, and the ruling is taken upon this offer. Such a ruling is sufficient to reserve the right of the party making the offer. *Ante*, 637.

Where the evidence is in writing, it will be sufficient to prove the execution of the paper, and then to offer to read it in evidence; and if it is excluded the decision may be reviewed upon an appeal.

Payment of judgment below.] The payment of the judgment in the court below does not prevent the party paying it from bringing on an appeal thereon, nor does a subsequent payment supersede an appeal already brought. *Clark* v. *Ostrander*, 1 Cow., 437.

Under the system of practice introduced by the Revised Statutes, no amendment of the pleadings was allowed in the com-

mon pleas, but the cause was tried upon the issues made in the justice's court; and under that practice if a judgment was settled before an appeal was brought, but the defendant brought an appeal notwithstanding such settlement, the remedy of the plaintiff was to move for a dismissal of the appeal, and not to interpose an answer setting up the matter *puis darrien continuance*. *Schenck* v. *Lincoln*, 17 Wend., 506.

If the justice's judgment is paid during the pendency of the appeal, but without paying the costs of the appeal, the appellant must procure an order staying the respondent's proceedings before a judgment of affirmance is taken by default. *Adams* v. *Kearney*, 2 E. D. Smith, 42. If this is not done the respondent may take a judgment of affirmance for the costs of the appeal. *Ib.* But since the amendment of the Code, which allows the pleadings to be amended in those actions in which a new trial is had, there is no reason why a settlement of the judgment pending the appeal may not be set up by way of answer *puis darrien continuance*.

Intendments by appellate court.] It is a familiar rule that errors must be made to appear affirmatively before a judgment will be reversed. And it is also well settled that all reasonable intendments will be indulged in favor of the judgment of the inferior court. There are some matters, however, in which this rule does not prevail, and when a judgment of an inferior court is brought up for review, the record must show that the court had jurisdiction of the subject matter, and of the person of the defendant. *Ante*, 20, 21. When jurisdiction is shown, there will be the same intendment as to regularity that is indulged in relation to courts of record. *Ante*, 21.

When the return is silent upon the subject, the appellate court will intend, in support of the judgment, that the justice issued a summons in proper form, and that it was delivered to a proper constable, *Potter* v. *Whittaker*, 27 How., 10; that the justice waited an hour for the defendant on the return day of the process, *Stafford* v. *Williams*, 4 Denio, 182; that the justice also waited one hour for the defendant to appear on the adjourned day, *Clark* v. *Garrison*, 3 Barb., 372; that the justice truly and openly stated the grounds upon which he refused an adjournment, *Decker* v. *Hassel*, 26 How., 528; that the witnesses were duly sworn on the trial, or that an oath was waived, *House* v. *Low*, 2 Johns., 378; that a general objection to evidence was properly overruled, where the grounds of objection are not properly stated, and the court can see that a proper objection might have been taken, *Bellows* v. *Sackett*, 15 Barb., 96; that a cause was properly submitted to the court before judgment was rendered, *Peters* v. *Diossy*, 3 E. D. Smith, 115; that a judgment was rendered upon a verdict upon the day of its rendition, when the case might have occupied two days for the trial, as where it appeared that the trial commenced on the 11th day of a certain month, and the judgment was rendered on the 12th, *Beattie* v. *Qua*, 15 Barb., 132; that the

plaintiff was present in court when a verdict was rendered in his favor, *Baum* v. *Tarpenny*, 3 Hill, 75; *McEachron* v. *Randles*, 34 Barb., 301; *Warring* v. *Loomis*, 4 Barb., 485; that there were foreign witnesses when the justice allows more than $5 costs of the action. *Oakley* v. *Van Horn*, 21 Wend., 305; *Fuller* v. *Wilcox*, 19 Id., 351.

These cases which have been cited, are mere illustrations of the general principle, that regularity of proceeding will be presumed when it may properly be done, and where jurisdiction is shown. For other illustrations, see *ante*, 803, &c.

Restitution.] It has been already seen, *ante*, 906, that a voluntary payment of a justice's judgment would not prevent a subsequent appeal from it, nor supersede an appeal previously brought. So, where the judgment has been collected in a case in which no security was given to stay execution, or in any other case where there has been a collection of the judgment, the appellant, if he succeeds in reversing such judgment on the appeal, is entitled to a restitution of the amount paid, with interest from the time of such payment or collection. Vol. I, 32, § 369.

The order for restitution may be made at the hearing of the cause, or afterwards; but in either case a notice of six days is necessary. *Ib.* If the order is made before the judgment is entered, the amount may be included in the judgment. *Ib.* Where it can properly be done, the most convenient way will be to serve notice of application for the order at the time of serving the notice of argument; and in such a case it will only be necessary to change the notice of argument by adding a clause containing a notice of application for an order of restitution, and a reference to the affidavits, papers or records upon which the motion will be made. If affidavits are used, copies must be served in the usual manner, and at least six days before the motion is made. Vol. I, 33, § 369. A proper form for an entry of the order in the judgment, or for a case in which it is made on a separate motion, will be given in a subsequent place.

Where the appellant succeeds on the appeal, and a judgment of reversal is entered generally, without any award of a new trial in the court below, the statute is imperative that the county court shall order restitution of all that the appellant has lost. *Estus* v. *Baldwin*, 9 How., 80; *Jacks* v. *Darrin*, 1 Abb., 232. In such a case there will not be a complete restitution unless the appellant is allowed the costs of defending the action before the justice, and of prosecuting his appeal in the county court. *Ib.*; and see Vol. I, 33, § 371, as to the costs taxable in ordinary cases. The case of *Jacks* v. *Darrin*, 1 Abb., 232, held that the amount of costs paid to the justice by the appellant at the time of taking his appeal could not be taxed in the judgment of reversal upon the appeal, because the money was not received by the respondent, but remained with the justice. But the statute now expressly authorizes the taxation of the money so paid,

Vol. I, 33, § 371; and that case is of no authority upon this point. The language of the statute is that "the appellate court shall order the amount paid or collected to be restored," &c., and the construction of this language is that the order for restitution must be made by the court, and not entered as of course by the clerk. And the courts have adopted this construction in those cases in which the question was presented. *Jacks* v. *Darrin*, 1 Abb., 232; *Kennedy* v. *O'Brien*, 2 E. D. Smith, 41. If the return of the justice shows that the judgment has been paid, this will be sufficient proof of the fact, and the appellate court will order restitution as a part of the judgment, which may be collected by execution in the usual manner, with costs. *Ib.; Sheridan* v. *Mann*, 5 How., 201; *S. C.*, 3 Code R., 213. So, where it appears from a transcript of the docket of the justice that the judgment has been paid, the appellate court, upon a reversal of the judgment, will order restitution. *Hunt* v. *Westervelt*, 4 E. D. Smith, 225.

When no application for restitution is made at the hearing, and no order is then made, it will be necessary to make a subsequent application by way of motion, upon due notice.

The affidavits for such a motion must set out the necessary facts to show that the party is entitled to the relief sought. The justice's return, and the judgment roll, will always be available as a part of the moving papers, and they will usually be indispensable as the best evidence of the proceedings in the court below, and in the county court.

The fact of the payment or collection of the judgment may be made by affidavit, or by a certified copy of the docket of the justice, or of the county court, where that shows the fact of payment or collection.

The principal facts to establish in such a case will be to show: 1. The rendition of a judgment against the appellant in the court below. 2. The payment or collection thereof. 3. That an appeal has been brought, and the judgment reversed, without ordering a new trial in the court below. 4. The amount of the various payments, with the interest thereon.

The affidavits ought to be entitled in the appellate court, and may be drawn in the usual form. So many precedents of affidavits having been given already, it is not deemed necessary to add to the number. See *ante*, 826, for general outlines of a form. Copies of all affidavits intended to be used must be served at least as early as the notice of motion, and at least six days before making the application. But when any of the moving papers are records, as in the case of the return or judgment roll, and the like, no copies need be served.

In making such a motion, notice to the opposite party is necessary, and therefore the motion must be made at a regular term of the county court, and not at chambers, as in the case of applications when no notice is necessary. *Ante*, 821. The notice need not be in any particular form if it states facts sufficient to inform

the opposite party of the application, and of the papers upon which the motion will be made.

Notice of application for restitution.

FULTON COUNTY COURT.

John Doe, Respondent,
agst.
Richard Roe, Appellant.

Sir: Take notice that upon affidavits, with copies of which you are herewith served, and upon the justice's return, and the judgment roll in said action, a motion will be made, at the next term of this court, to be held at the court house in Johnstown, on the day of , 1865, for a rule or order requiring the said John Doe to make restitution of the money paid or collected upon said judgment, and of all costs or fees paid to such justice on taking said appeal, with the costs of the appeal, or for such other or further rule, order or relief, as the said court may deem proper to grant, with the costs of this motion. Dated Johnstown, August 25, 1865.

Yours, &c., HORACE E. SMITH,
Att'y for Appellant.

To A. McFarlan, Esq.,
Att'y for Respondent.

Before makiug a motion for restitution, it will always be proper to demand the amount which is due to the appellant. If he refuses to make the proper restitution, the appellate court will grant the costs of a motion for restitution, as a matter of course. But if no such demand is made, the court might decline to impose costs, though the matter would be entirely discretionary with the court, and the discretion exercised according to the circumstances of the case. At the proper time the motion is to be brought to argument, and, if the appellant is successful, he will then enter a proper order with the clerk of the appellate court.

Order for restitution.

[Title as in notice of motion.]

At, &c., on, &c., as in the form, *ante*, 814.

Upon reading and filing the affidavits of the respective parties, and upon an examination of the justice's return, and of the judgment roll in this action, and after hearing Horace E. Smith, Esq., for the appellant, and Archibald McFarlan, Esq., for the respondent, it is ordered that the respondent, John Doe, restore to the appellant, Richard Roe, the sum of $150, which includes the amount of the judgment collected or received by the said John Doe, of the said Richard Roe, with interest thereon from the day of , 1865, as well as the sum of $5 for costs and fees paid to the said justice on taking said appeal, and also the sum of $10 costs of this motion, making in all the sum of $165, and that an execution issue to collect the same.

Upon presenting the respondent or his attorney with a certified copy of this order, the money will usually be promptly paid But if it is not, the appellant may at once issue an execution for the collection of the amount. Such an execution may be in the usual form of a county court execution, with the necessary changes to adapt it to the particular case.

After the argument and decision of a cause upon the merits, upon an appeal, the successful party usually enters up a proper judgment thereon. Various forms are in use, but it is not essential that any particular form be followed if the judgment is sufficient in substance. For the convenience of practitioners a few forms will be given:

Judgment of affirmance.

FULTON COUNTY COURT.

John Doe, Respondent,
agst.
Richard Roe, Appellant.

At a term of the Fulton county court, held at the court house in the village of Johnstown, on the last Tuesday of November, 1865. Present, Hon. JOHN STEWART, County Judge, presiding.

The above entitled action having been duly brought into this court on an appeal taken by the appellant Richard Roe, from a judgment rendered on the day of , 1865, by Richardson P. Clark, Esq., a justice of the peace of the town of Johnstown, in Fulton county, for the sum of $ damages and costs, in favor of the said John Doe and against the said Richard Roe; † and the said cause having been duly brought to a hearing, and after hearing Horace E. Smith, Esq., of counsel for the appellant, and Archibald McFarlan, Esq., of counsel for the respondent, and due deliberation having been had thereon, it is now, on motion of Archibald McFarlan, ordered and adjudged, that the judgment rendered by the said justice, as aforesaid,* be and the same is hereby in all things affirmed, that the said John Doe recover of the said Richard Roe, the amount of the judgment in the court below, to wit, the sum of $, with the interest thereon from the rendition of said judgment, amounting to the sum of $; that he also recover the amount of his costs and charges adjusted at $, which amount in the whole to the sum of $, and that he have an execution thereon, &c.

Judgment of reversal.

(As in the preceding form down to the *, and then proceed thus:) be and the same is hereby in all things reversed, with costs, and it is further ordered and adjudged, that an execution issue, &c.

Reversal in part, absolutely.

(As in the form of affirmance above, down to the *, and then proceed thus:) be and the same is hereby reversed as to the sum of $50, and for the residue of the said judgment, to wit, for the sum of $100, the said judgment is affirmed with $10 costs to the appellant (or to the respondent), and it is further ordered and adjudged, that an execution issue, &c.

Reversal in part, conditionally.

(As in the form of affirmance above, down to the words, "duly brought to a hearing," and then proceed thus:) and the annexed decision of this court thereon having been made and filed, whereby said judgment is affirmed in case the plaintiff consents to reduce the recovery for damages to the sum of $, as by the day of , 1865, and the plaintiff having consented to such reduction, now, on motion of

John M. Carroll, Esq., of counsel for the appellant, it is ordered and adjudged, that the judgment so rendered by the said justice be and the same is hereby reversed for the sum of $, and the residue of said judgment, to wit, for the sum of $, is hereby affirmed, with $ costs; and it is further ordered, that an execution issue, &c.

In making up the judgment roll in this last case, it will be proper, if not necessary, to incorporate a copy of the order of modification, *ante*, 881, and of the consent of the plaintiff, *ante*, 882.

Judgment of reversal, with restitution, &c.

(As in the form of affirmance, *ante*, 911, down to the *, and then proceed thus:) be and the same is hereby in all things reversed. And it appearing to the court that, notwithstanding the appeal herein, the respondent executed and collected the amount of the judgment of the court below, with costs, constable's fees, &c., to wit, the sum of $, it is therefore further ordered and adjudged, that the respondent make restitution, by paying to the said appellant or his attorney, within days after the service of this judgment upon him or his attorney, the said sum of $, with interest from the day of , 1865, the date of said collection by the said respondent. And it is further ordered and adjudged, that the appellant recover $ costs on this appeal, amounting in the whole to $, and that an execution issue, &c.

In the form of judgment just given, the order for restitution forms a part of the judgment itself, as it properly may where the order for restitution is made on the hearing of the appeal. But if the application for restitution is not made until after bringing on the appeal, a motion will be necessary; and upon proper proofs an order of restitution will be made, as in the form, *ante*, 910.

Judgment on dismissal of appeal.

(As in the judgment of affirmance, *ante*, 911, down to the words "now on motion of Archibald McFarlan," and then proceed thus:) it is ordered and adjudged that said appeal be dismissed, with $ costs to the respondent, and that an execution issue, &c.

Judgments where a new trial is had in the county court.] The forms of judgments already given relate to cases in which the appeal was heard and decided upon the facts appearing upon the face of the justice's return. But, since there must be judgments in cases which are retried in the county court by a jury, it is necessary to give the proper forms of judgments in such cases.

Judgment for plaintiff on verdict.

(As in affirmance, *ante*, 911, down to †, and then proceed thus:) and the said justice having made and filed his return to said appeal, and having returned the process, proof of service thereof, and the pleadings in the said action, &c., and the said action being duly pending in this court, the issues joined between the parties having been duly brought on for trial therein, before the Hon. John Stewart, county judge of Fulton county, and a jury of said county, at the term of this court held at the court house in the village of Johnstown on the day of , 1865, and the issues having been tried, and a verdict for ‡ the plaintiff for the sum

of $ having been duly rendered on the day of , 1865, and his costs having been adjusted at $, now, on motion of Alva H. Tremain, Esq., attorney for the plaintiff, it is adjudged that the said plaintiff recover of the said defendant $, so found by the jury, with $ costs; and that an execution issue, &c.

Judgment for defendant on verdict.

(As in the last form, down to the ‡, and then proceed thus:) the defendant having been duly rendered, and his costs having been adjusted at $, now, on motion of Richard H. Rosa, Esq., it is adjudged that the defendant have judgment against the plaintiff, upon the issues in this action, for the sum of $, and that an execution issue, &c.

Judgment where respondent did not make offer to correct judgment.

(As in judgment of affirmance, *ante*, 911, down to the †, and then state, as in the judgment for plaintiff on verdict, *ante*, 912, down to the ‡, and then proceed thus:) the plaintiff having been duly rendered on the day of , 1865, for $ damages, and it appearing to the court that the appellant stated in his notice of appeal the particulars in which he claimed that the judgment in the court below should have been more favorable to him; ¶ that the respondent neglected or refused to make any offer to correct said judgment in any of the particulars so specified; and that the judgment in this court was more favorable to the appellant than that rendered in the court below, in this, to wit, (specify in what particulars); †† and it also appearing to this court that the costs of the appellant amount to the sum of $: now, on motion of Alva H. Tremain, attorney for the appellant, it is ordered and adjudged that the recovery of the plaintiff be set off against the sum due the appellant, for his costs, &c., and that the appellant have judgment in his favor for the balance, which balance is found to be $; it is therefore further ordered and adjudged that the appellant recover judgment against the respondent for the sum of $, and that an execution issue, &c.

Judgment where appellant refused to accept respondent's offer to correct judgment.

(As in the last form, down to the ¶, and then proceed thus:) that the respondent duly made and served upon the said justice and the appellant, a written offer to allow the said justice to correct the said judgment in the particulars specified in the notice of appeal; that the appellant neglected or refused to accept the offer so made by the respondent, and that the judgment in this court was more favorable to the appellant than the offer so made by the respondent, in this, to wit, (specify in what particulars. Then proceed as in the last form, from the †† to the end of the judgment.)

The foregoing forms are sufficient to show the young practitioner what the general form of such judgments should be, and in those instances in which the facts differ from those in a case like those already specified, each person can modify these forms to suit the particular case.

Judgment roll.] The statute prescribes what papers are necessary to constitute a judgment roll. Vol. I, 32, § 367.

It will be remembered that there will be two different kinds of judgment roll: one in those cases in which the case is heard and decided upon the return; the other in those cases in which a new

trial is had in the county court. Both of these kinds of judgment roll will differ in form according to the particular circumstances of each case.

Enforcement of the judgment.] Where the judgment of a justice has been affirmed, it may be that the plaintiff may enforce the judgment below by means of an execution issued by the justice; and the costs of the appeal may be collected by an execution issued in the county court. Where an appeal is taken to the New York common pleas from an inferior court of that city, it has been held that this is the only regular practice.* *Onderdonk* v. *Emmons*, 2 Hilt., 505; *S. C.*, 9 Abb., 187. But see *Smith* v. *Allen*, 2 E. D. Smith, 259, 265, which treats either mode as regular.

In those cases in which the appeal is taken to a county court, there will not be any difficulty as to the practice. And it may be well to point out a material difference between the statutes relating to the county courts, and those relating to the New York common pleas. See Vol. I, 28, 29, § 354; Id., §§ 355, 356, 357.

Upon an appeal to the county courts in a case which is heard upon the return, the appellant may give security or not, at his election; but the rule is otherwise in the New York common pleas, where security must be given or a deposit made, or the appeal will be a nullity. *Id.*

In a case like the latter, in which the judgment below is amply secured in all cases of appeal, it may be well enough to adopt the rule pursued in the common pleas. So, too, it is well enough to permit the plaintiff below to collect his judgment by an execution issued out of the court below, while the appeal is pending, if no security has been given. And the law contemplates that such a collection may sometimes be made, since it provides for restitution in such a case. But if no execution is issued, and the judgment has not been paid or in any manner collected, and the judgment below is affirmed, it is entirely proper to enter up a judgment in the county court for the amount of the judgment below with interest thereon, together with the costs of the appeal. Upon the affirmance of a judgment upon the *certiorari* of the Revised Statutes, 2 R. S., 257, §§ 180 to 185, 1st ed., it was the regular practice to enter up a judgment in this manner. See 1 Humph. Prec., 480. Those sections of the Revised Statutes and the provisions of the Code, § 371, Vol. I, 33, are substantially alike, and there is therefore no reason nor any necessity for a change in the practice. There are some cases, too, in which the entire judgment must be entered up in the county court, as where a judgment is reversed in part and affirmed in part. So, again, the county court is authorized to set off a debt or damages due to one party against the costs of the other in certain specified cases. Vol. I, 33, §§ 370, 371; see *Onderdonk* v. *Emmons*, 2 Hilt., 505, 510.

SECTION VIII

COSTS ON APPEAL.

There is usually very little difficulty in relation to the adjustment of costs on appeals to the county courts from inferior courts. The provisions of the statute are few and simple, and for that reason there will be no occasion for any extended remarks upon the subject.

Since the change in the law which provides for new trials in the county courts, there will be two different rates or classes of costs, viz.: one in those cases which are heard and decided upon the return; the other in those cases in which a new trial is had. These classes will be examined separately; and first, then, as to the costs in cases heard upon the return.

Appellant's costs, when case heard on return.] If the appellant succeeds in reversing the judgment below, he is entitled to recover the full rate of costs, which is fifteen dollars, besides the costs and disbursements in the court below, including the costs which might have been taxed in that court had the judgment been in his favor. Vol. I, 33, § 371.

The right to costs, in such a case, is not discretionary, but absolute by the very terms of the statute. Vol. I, 33, § 371. And the courts uniformly enforce this rule by declaring that, upon the reversal of a judgment, they have no power to refuse costs to the appellant. *Hahn* v. *Van Doren*, 1 E. D. Smith, 411; *Main* v. *Eagle*, Id., 619. If, however, the county court should order a reversal of a judgment, without costs to either party, the county clerk has no power to correct the error by entering a judgment with costs of reversal. *Chapin* v. *Churchill*, 12 How., 367, Herkimer county court.

Where an inferior court entertains an action and renders a judgment in favor of the plaintiff, in a case in which such court had no jurisdiction of the subject matter, an appeal will lie to the county court, which may award the costs of the appeal upon a reversal of the judgment. *Gormly* v. *McIntosh*, 22 Barb., 271.

Where the appellant is a public officer, and the judgment against him is reversed upon his appeal, he cannot recover treble costs. *Estus* v. *Baldwin*, 9 How., 80; *ante*, 711.

The right to recover costs in those cases in which is involved the question whether a more favorable judgment has been rendered, has been sufficiently discussed, *ante*, 793 to 798.

Respondent's costs, where case heard on return.] Where the judgment appealed from is affirmed the respondent is entitled to costs, as of right. Vol. I, 33, § 371. And in this case, as in that relating to reversals, the county court has no power to relieve the appellant from the payment of costs upon the affirmance of the judgment appealed from. *Logue* v. *Gillick*, 1 E. D. Smith, 398, 400. The amount of costs to which the respondent is entitled upon an affirmance of the judgment is twelve dollars. Where the respondent is a public officer, and the judgment is affirmed,

he is entitled to recover treble costs. See *ante*, 711. As to costs in those cases in which the appellant's notice of appeal claims that a more favorable judgment should have been rendered in his favor, see *ante*, 793 to 798. The costs of printing the return or of points in the county court cannot be taxed as costs by either party. *Lewis* v. *Fox*, 11 Abb., 281; *S. C.*, 19 How., 561. But see the note, 20 How., 96.

Costs in the discretion of the court.] Where a judgment is reversed in part, and affirmed as to the residue, the county court may award costs against either party, to an amount not exceeding ten dollars. Vol. I, 34, § 371; and see Id., 32, § 368. So, where the judgment is reversed for an error in fact, not affecting the merits of the action, the costs of the appeal are in the discretion of the court. *Ib.*

There are also numerous cases in which motions are made, or proceedings taken, in matters which are entirely within the discretion of the court to grant or refuse; and in all such cases the costs are usually in the discretion of the court, and costs will be awarded or refused according to the justice and propriety of the application or of the relief sought.

Costs on new trials in the county court.] A new trial in the county court, where the cause is tried by a jury, and upon the introduction of the evidence in the same manner as though the county court were the original jurisdiction, necessarily involves a considerable addition to the labor and expense of the litigation. To provide properly for this requires that the costs shall correspond with the time and labor expended during the litigation of the cause. The law has, therefore, given a reasonable fee bill in such cases, which will in some degree compensate the successful party for his expenditures. Vol. I, 34, § 371. The right of either party to make an offer of judgment to the other, and thus terminate the litigation, has been already explained, *ante*, 793. Fees of officers, disbursements, and witnesses' fees, are taxable in favor of the successful party. Vol. I, 34, § 371.

Taxation of costs.] The practice as to the adjustment of costs is the same as in actions in the supreme court, and there is no need of stating it at length in this place, since the usual books of practice will furnish all desired information. But the provisions of the Code, and a reference to a few of the cases may be conveniently given.

"The clerk shall insert in the entry of judgment, on the application of the prevailing party, upon five days' notice to the other, except where the attorneys reside in the same city, village, or town, and then upon two days' notice, the sum of allowances for costs, as provided by this Code, the necessary disbursements, including the fees of officers allowed by law, the fees of witnesses, the reasonable compensation of commissioners in taking depositions, the fees of referees, and the expense of printing the papers for any hearing required by a rule of the court. The disbursements shall be stated in detail and verified by affidavit. A copy

of the items of the costs and disbursements shall be served with the notice of adjustment. Whenever it shall be necessary to adjust costs in any interlocutory proceedings in an action, or in any special proceedings, the same shall be adjusted by the judge before whom the same may be heard, or the court before which the same may be decided or pending, or in such other manner as the judge or court may direct." Code, § 311.

As to the practice on the adjustment of costs by the clerk, see 2 Till. and Shear. Pr., 672 to 681; 2 Tiff. and Smith Pr., 434 to 442; 2 Whit. Pr., 497 to 502; Voorhies' Code, 613 to 618, 8th ed.

Errors committed by a county clerk in the adjustment of costs cannot be corrected by an appeal from the judgment; the remedy is by motion in the county court, which is in the nature of an appeal. *Beattie* v. *Qua*, 15 Barb., 132. The motion is founded upon affidavits showing what was done by way of adjusting the costs, and also upon the record or judgment roll, so far as it is applicable.

As to the allowance of costs in the justice's court, see Vol. I, 33, § 371. As to setting off costs against judgment, &c., see *Ib.* Where a cause is certified into the supreme court by a county judge, by reason of his disqualification for hearing it, and the case is heard and decided by one of the justices of the supreme court, the same rate of costs will be taxable as though the county judge had decided it. *O'Callaghan* v. *Carroll*, 16 How., 327; *Taylor* v. *Seeley*, 4 How., 314.

SECTION VIII.

EXECUTION.

After a final judgment has been rendered in the county court, the practice is so nearly like that of the supreme court that it will not be necessary to do more than to refer to works devoted to an explanation of that practice, and to give the proper forms of executions in ordinary cases.

Before noticing the practice as to executions issued upon judgments rendered in the county court, it may be well to consider the practice in those cases in which the judgment was rendered in a justice's court, and a transcript subsequently docketed in the county clerk's office.

Where an execution is issued upon a judgment rendered by a justice, and after a transcript thereof has been filed and docketed in the county clerk's office, such execution must be issued by the county clerk, and be signed by him. Vol. I, 11, §§ 13, 64. An execution issued by the attorney of the judgment creditor in such a case is a nullity, and a sale of property under it will not transfer any title thereto to the purchaser. *Brush* v. *Lee*, 18 Abb., 398, 404.

The form of an execution to be issued by the county clerk, in such a case, will be found, *ante*, 716. But where the judgment was rendered in the county court, even upon an appeal from a justice's court, the execution is issued by the attorney for the

successful party in the same manner as in actions in the supreme court.

As the law now stands there are two modes of reviewing causes brought up on an appeal from a justice's judgment, one by a review upon the facts appearing in the justice's return, and the other by a new trial in the county court. The judgments rendered will, in each case, conform to the nature of the trial and the facts involved. For the form of some of these judgments, see *ante*, 911 to 913.

The execution being a mere process for the enforcement of the judgment, must conform to the judgment itself.

In those cases in which the case was decided upon the justice's return, the judgment is usually a mere reversal or affirmance of the judgment below. If it is the case of a mere affirmance of the entire judgment, the execution may be in the following form:

Execution on affirmance of justice's judgment.

The People of the State of New York, to the sheriff of the county of Fulton, GREETING: Whereas, a judgment was rendered on the day of , 1865, by Richardson P. Clark, a justice of the peace of the town of Johnstown, in Fulton county, in favor of John Doe, and against Richard Roe, for the sum of dollars damages and costs; and, whereas, said judgment was duly taken to the county court of Fulton county, on an appeal brought by the said Richard Roe; and, whereas, said judgment has been duly affirmed by the said county court, and a judgment rendered by said county court, in favor of the said John Doe, that he recover of the said Richard Roe, the amount of said justice's judgment, with interest thereon, amounting to the sum of dollars; and, also, that the said John Doe recover judgment against the said Richard Roe, for the sum of dollars, for the costs and charges attending the said appeal; and, whereas, the judgment roll in said action was duly filed in Fulton county, on the day of , 1865, that said judgment was docketed in the county of Fulton, on the day of , 1865.

And, whereas, there is now actually due on the said judgment dollars and cents, with interest thereon, from the day of , 1865.

You are therefore required to satisfy the said judgment out of the personal property of the defendant, or either of them, and if sufficient thereof cannot be found, then out of the real property in your county belonging to the defendant, or either of them, on the aforesaid day on which the said judgment was docketed in your county, or at any time thereafter, and that you return this execution, with your proceedings thereon, to the clerk of Fulton county, within sixty days after your receipt of the same.

Dated August 30th, 1865. JOHN M. CARROLL,
Plaintiff's Attorney.

Besides the usual entitling of papers upon their backs, there ought, in this case, to be a direction indorsed upon the back of the execution, which may be as follows:

Indorsement on execution.

Levy $ with interest from the day of , 1865, besides your fees and poundage, and return this execution within sixty days after its receipt by you, to the Fulton county clerk's office.

JOHN M. CARROLL,
Plaintiff's Attorney.

Where the judgment below was reversed, the execution can be readily made to correspond with the judgment of the county court.

In those cases in which a new trial is had in ordinary cases for the recovery of money, the form of the execution may be as follows:

Execution where a new trial has been had.

The People of the State of New York, to the sheriff of the county of . , GREETING: Whereas, a judgment was rendered in the county court of the county of , in the State of New York, in favor of , plaintiff against , defendant, for dollars and cents recovery, and dollars and cents costs, the judgment roll whereof was filed in county on the day of , 1865, which judgment was docketed in the said county of on the day of , 1865. And whereas, there is now actually due on said judgment dollars and cents, with interest thereon from the day of , 1865.

You are therefore required to satisfy the said judgment out of the personal property of the defendant, or either of them, and if sufficient thereof cannot be found, then out of the real property in your county belonging to the defendant, or either of them, on the aforesaid day on which the said judgment was docketed in your county, or at any time thereafter, and that you return this execution, with your proceedings thereon, to the clerk of the county of within sixty days after your receipt of the same.

JOHN M. CARROLL,
Plaintiff's Attorney.

Dated, &c.,

The indorsement of this execution should be similar to that adapted to the execution, *ante*, 918.

The foregoing form may be readily modified so as to meet the case of a judgment rendered in favor of the defendant and against the plaintiff. Where the action is replevin, the execution will be conformed to the facts of the case; and illustrations of the mode of stating such facts in an execution may be seen, *ante*, 715, in the forms adapted to justices' courts. For other forms of execution see the usual works on the practice in actions in the supreme court.

SECTION IX.

APPEALS TO THE SUPREME COURT.

It does not fall within the scope of this work to discuss minutely the practice on appeals to the supreme court. But notwithstanding that a reference will be made to some of the decisions relating to this practice, and the provisions of the Code will be cited. "An appeal may be taken to the supreme court from the judgments rendered by a county court, or by the mayors' courts or the recorders' courts of cities. An appeal also may be taken to the supreme court from any order affecting a substantial right, made by a county court, or a county judge, in any action or proceeding, and such appeal shall be heard on a copy of the papers on which the order appealed from was made." Code, § 344.

"Security must be given upon such appeal, in the same manner and to the same extent as upon an appeal to the court of appeals." Code, § 345. "Appeals in the supreme court shall be heard at a general term, either in the district embracing the county where the judgment or order appealed from was entered, or in a county adjoining that county, except that where the judgment or order was entered in the city and county of New York, the appeal shall be heard in the first district." Code, § 346. "Judgment upon the appeal shall be entered and docketed with the clerk in whose office the judgment roll is filed. When the appeal is heard in a county other than that where the judgment roll is filed, or is not from a judgment of a county court, the judgment upon the appeal shall be certified to the clerk with whom the roll is filed, to be there entered and docketed." Code, § 347.

Appeal, when to be taken.] The appeal to the supreme court "must be taken within two years after the judgment shall be perfected, by filing the judgment roll." Code, § 331. This allows a party two years in which to bring his appeal, which is certainly a liberal time for that purpose.

From what judgments.] Since there are two classes of cases on appeal, it might be supposed that there was a difference of practice in the two cases. And in the proceedings in the county court, before final judgment there, a material difference in the practice exists. When the case is heard and decided upon the justice's return, an appeal will lie immediately upon the completion of the judgment. But when a new trial has been had in the county court, a case or exceptions must be made before the cause can be in a condition to appeal to the supreme court.

The practice as to making a case or exceptions is the same as that of the supreme court. Vol. I, 32, § 366, sub. 6.

Where a party desires to appeal to the supreme court it is important that he should appear and argue it in the county court, for if he suffers a judgment to be taken against him in that court, by default, he will lose all remedy by way of appeal to the supreme court. *Dorr* v. *Birge*, 8 Barb., 351; *S. C.*, 5 How., 323. That court has no authority to review a judgment of the county court in any case except where there has been a decision made after an actual hearing of both parties. *Ib.*

Authority of supreme court.] Upon an appeal to the supreme court, that court has power and authority to review and correct all erroneous decisions upon matters of law which may have been made in any of the courts below. It also has power to render such judgment as the court below ought to have given; and it is the usual practice to render such a judgment as the justice ought to have rendered, if the error has not been corrected by the county court. As illustrations of this principle, see cases cited, *ante*, 876, where the supreme court reversed judgments in part and affirmed them in part, or where they reversed them as to some of the parties and affirmed them as to others.

There is a class of cases, however, in which a discretion is

reposed in the county court, and the judgment rendered in pursuance of that discretion cannot be reviewed by the supreme court, as in the case of opening a default taken in a justice's court. See *ante*, 840; *Wavel* v. *Wiles*, 10 E. P. Smith, 635. So, upon an appeal from the judgment rendered in summary proceedings in landlord and tenant cases, the judgment of the county court is final, and cannot be reviewed by the supreme court. *Deuel* v. *Rust*, 24 Barb., 438.

But aside from these exceptional cases, which are created by statute, the supreme court has full power to redress all wrongs and correct all errors of law which may have occurred, either in the justice's court or the county court.

In cases tried in the county court, upon an appeal, that court has full power to review its own decisions upon a case or exceptions, and to grant new trials, to affirm, modify, or reverse its own judgments, subject to an appeal to the supreme court. Vol. I, 4, § 30, sub. 13.

The authorities are conflicting on the question whether an appeal will lie to the supreme court before the county court has passed upon the questions presented by the case or exceptions by granting or refusing a new trial. In *Monroe* v. *Monroe*, 27 How., 208, and *Broughton* v. *Mitchell*, 19 Abb., 163, *S. C.*, 29 How., 68, in the sixth, and in *Dixon* v. *Buck*, 42 Barb., 70, in the seventh district, it was held that exceptions might be reviewed in the supreme court before the county court had passed upon them. But in *Whitney* v. *Wells*, 28 How., 150, and *Broughton* v. *Mitchell*, above cited, it was held that the supreme court would not review the question whether a verdict was against evidence until after it had been passed upon by the county court. A distinction is thus made between the errors of the court and those of a jury. But other cases deny the existence of such a distinction, and refuse to pass upon exceptions until after they have been decided upon by the county court. *Carter* v. *Werner*, 27 How., 385 (and *Gilbert* v. *Chase*, and *Palmer* v. *Avery*, there referred to); *Simmons* v. *Sherman*, 30 How., ; and in the latter cases the court dismissed the appeals on motion.

The balance of authority, therefore, seems to be in favor of the rule that no appeal will lie to the supreme court until after an actual decision by the county court upon the questions presented by the case or exceptions.

This is a reasonable and a convenient rule. If the county court has erred in its decisions, the statute gives it full power to correct such errors, after a full argument of the questions, without an appeal to the supreme court. Vol. I, 4, § 30, sub. 13.

The object of conferring this power, doubtless, was to enable the county court to correct its own errors, without the expense or the trouble of an appeal to the supreme court.

If the error is properly corrected, no further remedy is needed. But if such error is not corrected, an appeal may be taken to the supreme court. Vol. I, 4, § 30, sub. 13. By adopting such a

practice, the county court is not only permitted, but is required to correct its own errors, and, if it does so, no appeal to the supreme court will be necessary. But in case of a neglect or refusal to make the proper corrections, an appeal is allowed to the supreme court.

Appeals from orders of county courts.] The statute already cited, *ante*, 919, § 344, allows an appeal to the supreme court from orders made by the county courts. The practice upon such appeals is the same as that in an action in courts of record, and is fully explained in the works devoted to that subject.

Notice of appeal to supreme court.

FULTON COUNTY COURT.

John Doe, Respondent,
agst.
Richard Roe, Appellant.

Take notice that the plaintiff (or the defendant) appeals to the general term of the supreme court, from* the judgment rendered in the above entitled action by this court, on the day of , 1865, in favor of the plaintiff, and against the defendant, for the sum of $, damages and costs. Dated August 31, 1865.

ALVA H. TREMAIN,
Defendant's Attorney.

To H. E. Smith, *Plaintiff's Attorney*, and
Mortimer Wade, *Clerk of this court.*

Appeal from judgment of affirmance or reversal by county court.

(As in last form, down to the *, and then proceed thus:) the judgment of this court, entered on the day of , 1865, affirming (or reversing) a judgment rendered by Richardson P. Clark, a justice of the peace of Fulton county. (Signature as in last form.)
(Date.)
(Address to clerk and party as in last form.)

Appeal from order of county court.

(As in the notice of appeal above, down to the *, and then proceed thus:) from a certain order, affecting a substantial right of the defendant, made by the county court of Fulton county (or by John Stewart, county judge of Fulton county), on the day of , 1865, whereby, &c., (stating the substance of the order.) (Signature.)
(Date.)
(Address, &c.)

Undertaking to stay proceedings on appeal to supreme court.

FULTON COUNTY COURT.

John Doe, Respondent,
agst.
Richard Roe, Appellant.

Whereas, on the day of , 1865, the (plaintiff) recovered judgment against the (defendant) in the county court of Fulton county, for $ damages and costs (or for the recovery of possession of certain personal property, or otherwise, as the case may be.)

And, whereas, the above named appellant intends to appeal from the said judgment to the general term of the supreme court,

Now, therefore, we, Eli Pierson, of the village of Johnstown, county of Fulton, and Daniel Edwards, of the same place, do hereby, pursuant to the statute in such case made and provided, undertake that the said appellant will pay all costs and damages that may be awarded against him on such appeal, not exceeding two hundred and fifty dollars; and do also undertake that if the said judgment so appealed from, or any part thereof, be affirmed, or the appeal be dismissed, the said appellant shall pay the amount directed to be paid by the said judgment, or the part of such amount as to which the said judgment shall be affirmed, if it be affirmed only in part, and all damages which may be awarded against the appellant on such appeal.

ELI PIERSON, [L. S.]
DANIEL EDWARDS. [L. S.]

FULTON COUNTY, *ss:* Eli Pierson and Daniel Edwards, above named, being severally duly sworn, each says for himself, that he is a resident of the State of New York, as mentioned in the above undertaking, and a householder (or freeholder) therein, and worth double the sum specified in the said undertaking over and above all his debts and liabilities, and exclusive of property exempt from execution.

Subscribed and sworn before me, this 31st day of August, 1865, } ELI PIERSON.
DANIEL EDWARDS.

JOHN STEWART, *County Judge, &c.*

FULTON COUNTY, *ss:* I certify, that on the 31st day of August, 1865, Eli Pierson and Daniel Edwards, above named, to me known to be the persons described in and who executed the above, personally appeared before me, and severally acknowledged that they executed the above undertaking as their own free act, for the uses and purposes therein mentioned.

JOHN STEWART, *County Judge, &c.*

SECTION X.

APPEAL TO THE COURT OF APPEALS.

Although an appeal from a justice's judgment may be taken to the county court, and from that court to the supreme court, as a matter of course and of right, without any permission from any court or judge, and subject only to the rule requiring security in certain cases, yet an entirely different practice prevails in relation to appeals to the court of appeals in such cases. The statute relating to this subject is as follows:

"But such appeal shall not be allowed in an action originally commenced in a court of a justice of the peace, or in the marine court of the city of New York, or in an assistant justice's court of that city, or in a justice's court of any of the cities of this state, unless any such general term shall, by order duly entered, allow such appeal before the end of the next term after which such judgment was entered. The foregoing prohibition shall not extend to actions discontinued before a justice of the peace, and prosecuted in an other court pursuant to sections sixty and sixty-eight of this Code." Code, § 11, sub. 3.

It will be seen that, from this section, an appeal will not lie to the court of appeals without an order for that purpose by the general term of the supreme court, if the case is one which was

originally commenced before a justice of the peace, and was discontinued on an answer of title pursuant to § 60 of the Code.

An action which is commenced in one of the district courts of the city of New York cannot be removed to the court of appeals without an order of the common pleas at general term, even though the cause may have been tried in that court after having been duly removed there. *Smith* v. *White*, 9 E. P. Smith, 572.

If a party desires to go to the court of appeals with a case, he must be careful to obtain an order in due season, or he will lose the right.

In *Wait* v. *Van Allen*, 8 E. P. Smith, 319, the motion was made and argued in proper time, but the case was overlooked by the presiding justice, and the proper order was not made at that term, although this was done at the next term of the court, and the order entered *nunc pro tunc*, as of the term when the motion was made, but the court of appeals held that the supreme court had no power to extend the time for making the order, and that the order so made was a nullity, and that an appeal brought in pursuance of it must be dismissed. This case overrules *Clapp* v. *Graves*, 2 Hilt., 317.

The application to the general term of the supreme court for this order may be made at the time when the decision is pronounced, if the parties are then present in court.

If they are not, the application will be in the nature of a motion founded upon notice and upon affidavits showing facts which would justify an appeal to the court of appeals.

As a general rule, leave will not be granted to go to the court of appeals unless the case is one involving great interests, or it will settle an important principle of law which will affect numerous other cases. *Jackson* v. *Purchase*, 1 Hilt., 357; *S. C.*, 14 How., 230. If there are conflicting decisions upon a question, that is a good reason for allowing the case to go to the court of appeals. *Clapp* v. *Graves*, 2 Hilt., 243.

But it will not be a sufficient reason to show that for want of preparation on the part of counsel the case was not fully argued, or was not understood by the court. *Drucker* v. *Patterson*, 2 Hilt., 135. So, where the question is merely one which relates to the practice of the lower court, and one case involving the same question has been permitted to be taken up to the court of appeals, leave will not be given to take an other case there for the purpose of presenting the same question.

Having thus presented some of the general rules, as well as some of the details of the practice relating to appeals, and having also given quite an extensive collection of practical forms relating to the subject, this part of the work is conpleted.

The subsequent portion of this volume will be devoted to the practice in special proceedings, to precedents of pleadings, and such other similar matters as may be useful, which will complete the work.

PART IX.

SPECIAL PROCEEDINGS AND PRECEDENTS.

CHAPTER I.

PRECEDENTS OF PLEADINGS.

SECTION I.

COMPLAINTS ON CONTRACTS.

Pleadings of some kind must be used in every court in which actions are tried and judgments rendered upon evidence introduced. In justices' courts these pleadings are frequently oral, and sometimes quite informal and insufficient if duly objected to. The change in the law which authorized a new trial in the county court, upon an appeal, will induce more general care as to the pleadings interposed. To aid the young practitioner in this particular, a selection of precedents will be given, which will include most of the forms of pleading required in actions tried in this court. And where the law relating to the particular precedent has been discussed in this work, a reference will be made to the pages relating to such law.

The formal parts of a complaint may be as follows:

IN JUSTICE'S COURT.

John Doe *agst.* Richard Roe.	Before DAVID KENNEDY, Esq.

The plaintiff complains of the defendant, and alleges (here state the cause of action).

Wherefore the defendant demands judgment in his favor, and against the defendant, for the sum of two hundred dollars, together with the costs of this action.

For the general rules relating to complaints, see *ante*, 312 to 327.

The complaint ought, somewhere, to state the names of all the parties to the action in full. This is usually done by stating the names of all the parties at length in the title to the action. And where the parties have all been once properly named, it will be unnecessary to repeat all the names when it subsequently becomes necessary to mention the parties in the pleadings. In such a case, it will be sufficient to refer to them by naming them as "the said plaintiffs," or as "the said defendants." *Davison* v. *Savage*, 6 Taunt., 121; *Stevenson* v. *Hunter*, Id., 406.

When the plaintiff sues in an official capacity, the title of the

action ought to show that fact, by stating the name of the officer and that of his office. But it will not be sufficient to merely state this in the title of the complaiut, for the body of the complaint ought to state the facts which show that he is such officer, as well as to show that the facts give a right of action. Unless the body of the complaint shows that the plaintiff sues in an official capacity, he will be presumed to have sued in his individual character, even though the title of the action appears to be the complaint of one suing in an official capacity. *Gould* v. *Glass*, 19 Barb., 179; *Paige* v. *Fazackerly*, 36 Id., 392; *Supervisors of Galway* v. *Stimson*, 4 Hill, 136.

Complaint by an infant plaintiff.

IN JUSTICE'S COURT.

James Smith, an infant, by John Smith, his next friend, Plaintiff, *agst.* John Doe, Defendant.	Before DAVID KENNEDY, Esq.

The plaintiff complains of the defendant, and alleges that he is an infant, under the age of twenty-one years, and that on the 13th day of November, 1865, the said John Smith was duly appointed, by the said justice, as a next friend for the plaintiff, for the purpose of prosecuting this action; that (state cause of action). Wherefore, &c. (state demand of judgment as *ante*, 925).

In a subsequent place precedents will be given for complaints brought by persons in official and representative characters.

Formal parts of an answer.

IN JUSTICE'S COURT.

John Doe, Plaintiff, *agst.* Richard Roe, Defendant.	Before DAVID KENNEDY, Esq.

The defendant in the above entitled action answers the complaint therein, &c., (state defense.) Wherefore, the defendant demands judgment in his favor for costs, &c.

If there are several defendants, and there is a defense interposed by one defendant, the commencement may be changed so as to read as follows: "The defendant A. B., in the above entitled action, answers the complaint," &c.

It will not be necessary in this place to say more in relation to the formal parts of the pleadings. And in the subsequent pages precedents will be given for most of the complaints which are useful in a justice's court. So, precedents of answers and demurrers will also be given.

On a justice's judgment.

[Title and commencement as *ante*, 925.]

That on the day of , 1865, at the town of Mayfield, in the county of Fulton, the said John Doe commenced a civil action against the said Richard Roe, then (and still) being a resident of said county, by

summons before Harley Bartlett, then (and still) being a justice of the peace, in and for the said county, and having authority under and by virtue of title six of part one of the Code of Procedure of this state, and of article two, part three, title four, chapter two of the Revised Statutes of this state, entitled "Of the jurisdiction of justices' courts," and the various acts amending said statutes.

That the said summons was issued by and under the hand of the said justice, and directed to any constable of the said county, commanding him to summon the said Richard Roe to be and appear before the said justice, at his office in Mayfield aforesaid, on the day of 1865, at ten o'clock in the forenoon, to answer the complaint of the said John Doe, in a civil action for the recovery of money due for services rendered (or other ground of action, whatever it may have been), and was by the said justice delivered to John W. Brown, then (and still) being a constable of the said county, who afterwards, and before the time of appearance therein mentioned, returned the same to the said justice, with a return thereupon in writing, with his name signed thereto, that he had on the day of , 1865, served the same upon the said Richard Roe personally. That at the time and place of appearance mentioned in the said summons (if the defendant did not appear) the said John Doe appeared before the said justice, and the said Richard Roe did not appear then, nor within one hour thereafter, but therein made default.

(If the defendant did appear, then allege:) The said John Doe and Richard Roe appeared before the said justice, and the said John Doe complained against the said Richard Roe for work and labor (or as the cause of action may have been), and claimed damages to the amount of two hundred dollars only. That the said Richard Roe answered the said complaint by interposing a general denial of all the allegations contained in the said complaint (with any other defense which may have been interposed); the said justice then and there holding a court by authority of the acts, or statutes aforesaid, for the trial of the said action.

That such proceedings were thereupon had before the said justice; that the said John Doe afterwards, and on the day of , 1865, at the place aforesaid (or if judgment was rendered on the same day), on the day and year last aforesaid, at, &c., by the consideration and judgment of the said justice, recovered a judgment against the said Richard Roe, for the sum of one hundred and fifty dollars damages and costs, adjudged to the said John Doe by the said justice.

That said judgment still remains in full force and effect, wholly unsatisfied, not paid nor reversed, annulled nor set aside, nor has the said John Doe had execution thereof. Wherefore the plaintiff demands judgment for the sum of one hundred and fifty dollars, with interest and costs, amounting to the sum of two hundred dollars.

For the law relating to actions upon judgments, see Vol. I, 598 to 602.

Complaint on a chattel mortgage.

[Title and commencement, as *ante*, 925.]

That on the day of , 18 , at the town of , in the county of , the defendant, for a valuable consideration, made his chattel mortgage in writing, under his hand (and seal, if there is one attached), and delivered it to the plaintiff, of which the following is a copy (set out a copy). That the said mortgage remains wholly unpaid and unsatisfied, and that there is now due thereon to the plaintiff, from the defendant, the sum of $, with interest on the same, from the

day of , 18 . Wherefore the plaintiff demands judgment, &c., as *ante*, 925. (See Vol. I, 130 to 176.)

Complaint on bond for payment of money only.

[Title and commencement, as *ante*, 925.]

That on the day of , 18 , the defendant made his bond in writing, under his hand and seal, and delivered it to the plaintiff, of which the following is a copy (set out a copy). That the said bond remains entirely unpaid, and that there is now due thereon to the plaintiff, from the defendant, the sum of $, with interest from the day of , 18 . Wherefore, &c., as *ante*, 925.

Complaint on bond for limits.

[Title and commencement as *ante* 925.]

That on the day of , 18 , at a court held by and before David Kennedy, Esq., a justice of the peace of the town of Mayfield, in the county of Fulton, the plaintiff duly and legally recovered a judgment against one John Smith, for the sum of $, in an action (state the cause of action, which must be one in which the defendant could be arrested on execution); that on the day of 18 , the said justice duly issued an execution upon the said judgment, which execution was directed to any constable of the county of Fulton, and contained a command requiring said constable to levy the amount of such judgment upon the goods, chattels, and personal property of the said John Smith (except such goods and chattels as are by law exempt from levy and sale upon execution), and to bring the amount so collected before the said justice within sixty days after the receipt of said execution; that if no goods or chattels of the said John Smith could be found, or if there were not enough to satisfy such execution, then the execution further commanded the said constable to take the body of the said John Smith and convey him to the common jail of Fulton county, where he was required to remain until such execution was paid or satisfied; that said execution was on the day of , 18 , delivered to Jacob Lawyer, then a constable of the county of Fulton, to be executed; that said Jacob Lawyer, on the day of , 18 , who was then constable as aforesaid, at the town of Mayfield, in Fulton county, took and arrested the said John Smith, by virtue and in pursuance of the authority contained in such execution; that on the day of 18 , the said constable delivered the said John Smith to Austin Kasson, Esq., who was then sheriff of the county of Fulton, and who kept the said jail of said county, by his under sheriff, Bradford T. Simmons, Esq.; that such sheriff, by his under sheriff aforesaid, on the said day of , 18 , received the said John Smith into his custody as such sheriff, &c., by virtue of such execution; that such John Smith remained in such custody until the time of making the bond hereafter mentioned; that on the day of 18 , at the village of Johnstown, in the said county of Fulton, the said John Smith, together with one George Smith, entered into and executed a bond, in due form of law, for the purpose of entitling the said John Smith to the liberties of the said jail; which bond was delivered to the said sheriff on the day of , 18 ; that such bond was executed to the said Austin Kasson, Esq., as sheriff of the county of Fulton; that said bond contained and was subject to the conditions following, viz., that the said John Smith and George Smith were bound to the said sheriff in the penal sum of $, to be paid to said sheriff, or his assigns; that if the said John Smith remained a true and faithful prisoner, and did not at any

time, nor in any manner, escape, or go beyond the limits or boundaries of such jail, until discharged by due course of law, then the said obligation was to be void, otherwise to remain in full force and virtue; that on the day of , 18 , the said sheriff duly assigned said bond to the plaintiff, and that on the day of , 18 , the said John Smith did escape and go at large from the said jail liberties, without the consent, and against the will of the plaintiff, wherefore the plaintiff demands a judgment against the said George Smith for the sum of $200, besides the costs of this action.

The law in relation to escapes will be found in Vol. I, 742 to 746.

Complaint on an attachment bond.

[Title and commencement as *ante*, 925.]

That on the day of , 18 , an application was duly made by A. B., the present defendant, who was then a creditor of the plaintiff, to David Kennedy, Esq., a justice of the peace of the town of Mayfield, in the county of Fulton, for an attachment against the property of the plaintiff pursuant to the statutes and the laws of the State of New York; that such application was in writing, signed by the said A. B.; that such application was accompanied by an affidavit, duly made on behalf of said A. B., specifying, as near as might be, the sum claimed to be due to said A. B., over and above all discounts; that on the said day of , 18 , at the time mentioned, the said A. B., and the said C. D. and E. F., executed a bond to the plaintiff, under their hands and seals, and then and there delivered the same to the said justice, together with said application and affidavit, which bond is as follows (here set out a copy of the bond); that on the delivery to said justice of said application, affidavit and bond, on the day of , 18 , the said justice did issue a process of attachment in due form of law, in favor of the said A. B., and against the property of this plaintiff, which attachment was as follows (here set out a copy of the attachment); that at the time of issuing such attachment, the said David Kennedy, Esq., was a justice of the peace of the said town of Mayfield, in Fulton county, and as such justice he had full power and authority to issue the process of attachment in civil actions, according to the statute, &c.; that said attachment was, on the day of , 18 , by the direction and at the request of the said A. B., delivered to one Jacob Lawyer, to be executed, the said Lawyer then being a constable of said county of Fulton; that said constable, by virtue of such attachment, did, on the day of , 18 , attach and take into his possession the following property of the plaintiff (here enumerate and describe the articles). And the plaintiff further alleges, that after the making of said bond, and after the issuing and the levying of such attachment, as aforesaid, such proceedings were subsequently had by and before said justice, that a judgment of nonsuit was rendered against the said A. B. (or a judgment in favor of this plaintiff.) And the plaintiff further alleges, that the said A. B. has not recovered judgment in said attachment suit, but has wholly failed therein; that in consequence of the issuing of such attachment, and of the service thereof, the plaintiff has been compelled to pay large sums of money in the defense of said action, and the value of such attached property has been greatly impaired. Wherefore, &c., as *ante*, 925.

The law in relation to attachment bonds has been sufficiently discussed. *Ante*, 157 to 166.

Complaint on bond given on claim of attached property.

[Title and commencement, as *ante*, 925.]

That on the day of , 18 , one A. B. was indebted to this plaintiff on a demand arising upon contract; that on the day of , 18 , this plaintiff made application in writing to David Kennedy, then a justice of the peace of the town of Mayfield, in the county of Fulton, for an attachment against the property of the said A. B.; that said application was accompanied by an affidavit, which showed that (state the grounds of the application); that said plaintiff also furnished said justice with a bond such as is required by law in such cases; that said justice did, on the said day of , 18 , duly issue an attachment, which was as follows (set out a copy); that such attachment was on the same day delivered to Jacob Lawyer, who was then a constable of said county of Fulton, and that by virtue of said attachment, the said Lawyer, as such constable, did, on the day of , 18 , attach and take into his custody and possession the following described property (designate it), which then belonged to the said A. B.; that while said property was thus in the custody and possession of said constable, and before any execution had been issued upon the judgment in the action in which said attachment was issued, one C. D. claimed that he was the owner of said goods and chattels, so attached as aforesaid; that on the day of , 18 , the said C. D., with the sureties, E. F. and G. H., did execute a bond under their hands and seals, to the said plaintiff; that said sureties were duly approved by the said justice (or the constable who held the attachment); that said bond was duly delivered to the said constable, which bond was as follows (set out a copy); that upon the delivery of said bond to the said constable, he delivered up the said attached property to the said C. D.; that said bond was afterwards duly delivered to the plaintiff, who is now the owner and holder thereof; that this action is brought within three months from the date of said bond; and the plaintiff alleges that the said claimant C. D. is not the owner of the said attached goods and chattels, but they are the property of said A. B. Wherefore, the plaintiff demands judgment in his favor, against the defendants, for the value of said goods, &c., with interest thereon from the time when they were so delivered to the said C. D., which amounts to the sum of $, together with costs, &c.

The statutory provisions which authorize the giving of such a bond, will be found in Vol. I, 42, 76. And see *ante*, 175 to 180.

Complaint on bond for costs, &c.

[Title and commencement, as *ante*, 925.]

That on the day of , 18 , at the town of Mayfield, in the county of Fulton, one A. B. made application to David Kennedy, Esq., who was then a justice of the peace, of the town and county aforesaid, for process by short summons (or a civil warrant) against this plaintiff, in a civil action; that before the issuing of any process by said justice, and on the day of , 18 , the said A. B., with C. D. and E. F. as his sureties, executed a bond to this plaintiff, under their hands and seals, which bond was then delivered to said justice. (If an affidavit was necessary, and was given before process could issue, say:) That at the same time and place, the said A. B. made an affidavit showing the grounds of his action, and the cause why said short summons (or warrant) should be issued, which grounds were (here state the grounds specified in the affidavit); that upon such affidavit and bond, the said

justice issued said short summons against this plaintiff; that said summons was duly delivered to Jacob Lawyer, a constable of said county, who duly served the same on this plaintiff; that on the return day of said summons, this plaintiff appeared at the place and time therein mentioned, before the said justice; that afterwards such proceedings were had by and before such justice; that a judgment was rendered against the said A. B., and in favor of this plaintiff, for the sum of $, for his costs incurred in his defense, and by reason of issuing said short summons (or civil warrant); that on the day of , 18 , and before the commencement of this action, the said plaintiff duly demanded of the said A. B., the payment of the said sum of $, which sum the said A. B. neglected and refused to pay; and on the day of , 18 , the said plaintiff duly notified the said sureties of the said default of the said A. B.; and also then demanded of the said C. D. and E. F., the payment of the said sum of , which the said C. D. and E. F. neglected and refused to pay. Wherefore, &c.

The liability of a surety in cases of warrants, and of short summonses, will be found explained, *ante*, 83 to 87, 105 to 107. When a short summons is issued, the condition of the bond is for the payment of any sum that may be adjudged against the plaintiff in the suit. *Ante*, 83. When the recovery of the defendant is for a set-off in his favor, against the plaintiff, the complaint should contain a statement showing a recovery therefor, and should claim judgment for the amount.

Before any action is brought upon such a bond, a demand ought to be made for the payment of the judgment. And this is especially the case in relation to the sureties.

Complaint on an undertaking on an appeal.

[Title and commencement as *ante*, 925.]

That, on the day of , 18 , a judgment was rendered in a justice's court, held by and before David Kennedy, Esq., a justice of the peace of the town of Mayfield, in the county of Fulton, in favor of the plaintiff, and against one A. B., for the sum of $ damages and costs; that, on the day of , 18 , the said A. B. brought an appeal, in due form of law, upon said judgment to the county court of Fulton county; that, upon said appeal, an undertaking was given by the said A. B., which was made and executed by the said A. B., together with C. D. and E. F., as his sureties therein; that said undertaking was delivered to the said justice by the said A. B. for the use and benefit of the plaintiff, which undertaking was as follows (here set out a copy); that said justice made a return on said appeal in due form of law; that said appeal was duly argued in the said county court, and the judgment of the justice was in all things affirmed by said county court, on the day of , 18 ; that a judgment was rendered in favor of the plaintiff, and against the said A. B., on said appeal, on the day of , 18 , for $ damages, and $ costs; that an execution, in due form of law, was issued upon said judgment, on the day of , 18 , to the sheriff of the county of Fulton, in which the said A. B. then resided, and said execution was returned by the said sheriff wholly unsatisfied; that, on the day of , 18 , a demand of the said sum of damages and costs was made of the said A. B., and the said C. D. and E. F., the sureties aforesaid, who neglected and refused to pay the same;

and the plaintiff says that the said sum of $ remains wholly unpaid and unsatisfied. Wherefore, &c. (See Vol. I, 124, 125.)

Complaint on a replevin bond.

[Title and commencement as *ante*, 925.]

That, on the day of , 18 , the plaintiff commenced an action for the recovery of the possession of certain personal property, under the authority and in pursuance of Code, § 53, sub. 10; that said action was commenced before David Kennedy, Esq., a justice of the peace of the town of Mayfield, in the county of Fulton, and this plaintiff was also plaintiff in that action, and the present defendant, A. B., was also defendant in that action; that such proceedings were had in that action that one Jacob Lawyer, a constable of said county, in pursuance of the process issued in said action, and delivered to him as such constable, did, on the day of , 18 , take into his custody and possession the following named articles (describe them); that, on the return day of the summons issued by the said justice, the said A. B. appeared before such justice and made and executed a written undertaking, in writing, which was also executed by C. D. and E. F., as sureties for the said A. B.; that said undertaking was then and there delivered to said justice, and filed by him for the benefit of the plaintiff, and it is as follows (here set out a copy); that the said personal property, so taken by said constable, was, on the day of , 18 , returned to the said A. B., in pursuance of law and the requirements of said undertaking; that such proceedings were subsequently, and on the day of 18 , duly had by and before the said justice; that this plaintiff recovered a judgment in his favor, and against the said A. B., adjudging that this plaintiff was the owner, and entitled to the immediate possession of said personal property; that such judgment also adjudged that the plaintiff was entitled to the sum of $ as damages for the wrongful detention of said personal property, and the value of said property was assessed at the sum of $; that, on the day of , 18 , this plaintiff duly demanded payment of the said damages, and of the value of the property so assessed, &c.; but that no part thereof has been paid, and the said defendants are now justly indebted to this plaintiff in the sum of $ thereon, with interest thereon, from the day of , 18 . Wherefore, &c., as *ante*, 925. (See *ante*, 195 to 198.)

Complaint on bond of indemnity.

[Title and commencement as *ante*, 925.]

That, at the times hereinafter mentioned, the plaintiff was a constable of the county of Fulton; that, on the day of , 18 , and while the plaintiff was such constable, the defendant, A. B., delivered to the plaintiff an execution, in due form of law, to be executed by the plaintiff; that said execution was issued upon a judgment duly rendered on the day of , 18 , by David Kennedy, a justice of the peace of the town of Mayfield, in the county of Fulton; that said execution was duly issued, and was in due form of law, and was as follows (here set out a copy of the execution); that on the day of , 18 , this plaintiff, as such constable, and by virtue of the said execution, levied upon certain personal property then in the possession of C. D., who was named as defendant in said execution; that said property consisted of the following described articles (here set them out); that on the day of , 18 , and after such levy, and before the removal or sale of said

property, one E. F. claimed to be the owner thereof, and on the day of , 18 , the said E. F. notified this plaintiff of his said claim, and then forbade this plaintiff from selling the same on the said execution; that due notice was given to the said defendant A. B., on the day of , 18 , of the said claim and notice of the said E. F.; that the said defendant A. B. insisted that the said property did not belong to the said E. F., and that the plaintiff should sell the same as such constable, &c.; that, on the day of , 18 , the plaintiff requested the said defendant A. B. to indemnify him against the consequences of such sale; that, on the day of , 18 , the defendants A. B., and his sureties, G. H. and I. J., duly made and executed a bond of indemnity, in writing, and under their hands and seals, and delivered the same to this plaintiff, which bond is as follows (set out a copy of the bond); that afterwards, on the day of , 18 , the plaintiff, in pursuance of said execution, and on the faith of the indemnity aforesaid, duly sold said property as such constable; that, on the day of , 18 , the said E. F. brought an action against this plaintiff, before David Kennedy, a justice of the peace of Mayfield, in the county of Fulton, for selling said property; that, before the trial of said action, due notice was given by this plaintiff to the said defendant A. B., of the commencement of said action, and the said defendant A. B. was requested to defend the said action, which he neglected and refused to do; that, on the day of , 18 , such proceedings were had by and before said justice, that the said E. F. recovered a judgment against this plaintiff for the sum of $, for the selling of said property on said execution aforesaid; that, on the day of , 18 , this plaintiff notified said defendant A. B. of the rendition of said judgment for the cause aforesaid, and demanded of said A. B. that he should pay the amount thereof, which the said A. B. neglected and refused to do; that, on the day of , 18 , the plaintiff paid the amount of said judgment to said E. F.; that, in addition to the payment of said judgment the plaintiff was compelled to pay the sum of $, as fees of counsel in said action, and he was also subjected to great loss of time, and was compelled to pay large expenses in the defense of said action, amounting in all to the sum of $. Wherefore, &c., as *ante*, 925. (See Vol. I, 121 to 124.)

Complaint on bond to indemnify in case of a lost note, &c.

[Title and commencement as *ante*, 925.]

That, on the day of , 18 , at , the plaintiff made his negotiable promissory note (or bill of exchange), in writing, and delivered the same to the defendant A. B., as the owner and holder thereof; that, on the day of , 18 , and, after the maturity of said note, the said A. B. demanded payment on the said note of this plaintiff, and alleged that said note was accidentally lost; that this plaintiff refused to pay the said note because of its non-production; that, on the day of , 18 , the said A. B. commenced an action for the recovery of the amount payable by said note, by summons, before David Kennedy, Esq., a justice of the peace of Mayfield, in Fulton county; that, on the return day of said summons, which was on the day of , 18 , the parties appeared and joined issue before said justice in said action; that on the trial of said action, which was on the day of joining such issue, the said A. B. failed to produce the said note, but alleged that the same was accidentally lost; that the said A. B. then and there made and executed a bond to indemnify this plaintiff as is required by law; that said bond was also executed by C. D. and E. F. as sureties in said bond; that said bond was then and there duly delivered to

the said justice for the benefit of this plaintiff; that such bond is as follows (set out a copy of the bond); that such proceedings were afterwards had by and before said justice that he, on the day of , 18 , rendered a judgment on said note in favor of the said A. B., and against this plaintiff, for the sum of $, which judgment the plaintiff paid before the commencement of this action; that the said note was afterwards presented to the plaintiff by one G. H., who was a *bona fide* purchaser of the same before it became due, for value paid by him; that this plaintiff was sued upon said note by the said G. H., before one David Kennedy, a justice of the peace of Mayfield, in Fulton county, and a judgment recovered against him in favor of the said G. H., on the day of , 18 , for the sum of $ damages, and costs of action, which judgment this plaintiff has since paid; that afterwards due notice thereof was given to the defendant, who refused to repay to this plaintiff the amount of said judgment, &c. Wherefore, &c., as *ante*, 925. (See title Bills and Notes for law as to lost notes, Vol. I, 432 to 436.)

Complaint on fire policy on goods, &c.

[Title and commencement as *ante*, 925.]

That the defendants are a corporation duly created and organized under and by virtue of the laws of this state (or under and by virtue of laws of New York, enacted, &c., giving date, &c.); that on the day of , 18 , at , in consideration of the payment, by the plaintiff to the defendants, of the premium of dollars, the defendants, by their duly authorized agents, made their policy of insurance in writing, a copy of which is hereto annexed, and delivered the same to this plaintiff; and the said defendants thereby insured the plaintiff against loss or damage by fire upon his goods, chattels, &c. (describing them), to the amount of dollars; that at the time of making such insurance, and from that time until the happening of the loss hereinafter mentioned, the plaintiff had an interest in the goods and chattels so insured, as the owner thereof, to the amount of dollars; that on the day of , 18 , the said goods, chattels, &c., were totally destroyed by fire, which loss did not happen by reason of a violation of any of the terms and conditions contained in said policy; that the plaintiff has fulfilled, on his part, all the conditions of the said policy; and that on the day of , 18 , he duly gave notice to the defendants of such loss, and also furnished them due proof of the same according to the terms of the said policy, and duly demanded payment from them of the said sum of dollars; that the said defendants have not paid the said sum, nor any part thereof, but that they are now justly indebted to the plaintiff in the sum of dollars. Wherefore, &c. (See Vol. I, 579 to 598.)

Complaint on subscription for plank road, &c.

[Title and commencement as *ante*, 925.]

That in pursuance of an act of the Legislature of the State of New York, entitled "An act to provide for the incorporation of companies to construct plank roads, and for companies to construct turnpike roads," passed May 4th, 1847, and of the several acts amendatory of the same, the above named company was duly organized and formed into a corporation under the name of the Mayfield and Vail's Mills Plank Road Company; that heretofore, to wit, on the 10th day of May, 1849, at the town of Mayfield, in the county of Fulton, the said defendant and certain other persons, being desirous of associating themselves together for the purpose of constructing a plank road from the village of Vail's Mills, in said

county, to the village of Mayfield Corners, also in said county, and in consideration thereof, and of the mutual promises to each other, and of the benefits to be derived from being members of said association, made and subscribed an agreement in writing called articles of association, which were as follows, to wit (here set out a copy of the articles of association); that the said defendant, Peter Van Denburgh, did, at the time of subscribing said articles of association, set opposite to his name thereto subscribed the number of eight shares, and that the amount of each share is twenty-five dollars; and that the said defendant promised and agreed to take such shares, and to pay for them as specified in said articles of association; that although public notice was given in at least one newspaper printed in said county of Fulton, of the time and places where books for such subscription to the stock of said road would be opened, and although, after such stock to the amount of at least five hundred dollars for every mile of the road so intended to be built had been in good faith subscribed, and five per cent on the amount had been paid in to the persons named in the articles of association as directors, and the subscribers thereto, including said defendant, had, upon due notice, elected directors for said company, and had thereupon severally subscribed articles of association, which had been duly filed in the office of the secretary of state of the State of New York; and although these plaintiffs, relying upon the said subscription of the said defendant and of the other persons so subscribing, did expend large sums of money in the construction of said road, and entered into contracts and personal liabilities to a large amount, to wit, the sum of four thousand dollars; and although the directors of the said company did, on the 15th day of June, 1849, make a call for said stock, and require the said defendant and the other stock subscribers to pay upon the capital stock subscribed by him and by them, to the treasurer of said company, at their office, at Vail's Mills aforesaid, ten dollars per hundred upon each share of stock so subscribed on the 20th day of July, 1849; yet the said defendant wholly neglected and refused to pay the said sum of ten dollars per hundred upon each share of stock subscribed by him as aforesaid; that although the directors of said company afterwards, to wit, on the 1st day of August, 1849, made another call for stock, requiring the defendant and the other subscribers to pay to the treasurer of said company, at their office aforesaid, the whole amount of stock by him and them severally subscribed, and not already paid in, on the 15th day of September, 1849; yet the defendant wholly neglected and refused to pay the whole or any part of the amount of said stock by him subscribed as aforesaid, according to the form and effect of said agreement, and of his said promises and undertakings; that the said defendant had due notice of the said two several calls for stock made by the directors of said company as aforesaid, and the same were duly published in at least one newspaper printed and published in said county of Fulton, at least thirty days previous to the time specified for said payments; and although the whole eight shares of stock subscribed by said defendant became due and payable to these plaintiffs in the sums and at the times specified in said calls, yet the said defendant has not performed his said agreement, and has wholly neglected and refused to pay for the stock so subscribed by him, or any part thereof, and the defendant is now justly indebted to these plaintiffs thereon in the sum of two hundred dollars, with interest, &c.; wherefore, the plaintiffs demand judgment against the defendant, for the sum of two hundred dollars, with interest thereon as follows, to wit: on twenty dollars from the 20th day of July, 1849, and on one hundred and twenty dollars from the 15th day of September, 1849, together with costs, &c. (See Vol. I, 99 to 104, 261 to 264.)

Complaint in action; swearing to justness of debt.

[Title and commencement as *ante*, 925.]

That on the 1st day of May, 1865, at the city of Albany, N. Y., the plaintiff claimed of the defendant the sum of two hundred dollars, and that the same was due for money before then lent and advanced by the plaintiff to the defendant, at his request (or other cause of action, as the facts may be); that the said defendant then and there denied that there was due to this plaintiff the sum so claimed, or any part therof; that the said defendant then and there offered and promised this plaintiff that he would pay to him the said sum of two hundred dollars, in consideration that he, the said plaintiff, would make oath before some justice, officer or magistrate, having due and legal power to administer oaths, that the said sum of two hundred dollars was honestly and justly due to the said plaintiff from the said defendant; that afterwards, and on the said 1st day of May, 1865, at Albany aforesaid, he, the said plaintiff, did make oath before George Wolford, county judge of the county of Albany, who then and there had due and legal authority to administer oaths, that the said sum of two hundred dollars was honestly and justly due to him from the said defendant, of all of which facts the said defendant then and there had due notice from the plaintiff; that the said defendant has not paid the said sum of two hundred dollars nor any part thereof, but utterly refuses and neglects to pay the same or any part thereof. Wherefore, &c. (See Vol. I, 88, 89.)

Complaint for rent due on lease; lessor against lessee.

[Title and commencement as *ante*, 925.]

That on the 1st day of May, 1864, at Johnstown, in the county of Fulton, N. Y., by a certain instrument in writing, the plaintiff did demise, lease, and to farm let, unto the defendant and his assigns, and the defendant did hire of the plaintiff, a certain messuage or dwelling house, tenements and premises, with the appurtenances particularly described in said lease, and situated in the village of Johnstown, Fulton Co., N. Y., known as (briefly describe premises), to have and to hold the said messuage or dwelling house, tenements and premises, with the appurtenances, unto the said defendant and his assigns, for the term of one year from the said first day of May, 1864, for the yearly rent of one hundred dollars, payable to the plaintiff on the (state days of payment), which rent the defendant did thereby for himself and his assigns, promise, covenant and agree to pay to the plaintiff as aforesaid; that the said defendant, afterwards, to wit, on the first day of May, 1864, and during the said term, entered into the possession and was possessed of the said premises; that the plaintiff has fully and faithfully performed the said agreement and its covenants on his part; that the said defendant has not kept or performed the said agreement or covenant on his part, and that before the commencement of this action there was due and in arrear from the said defendant to this plaintiff, the sum of one hundred dollars, for the rent aforesaid. Wherefore, &c.

For the law relating to landlord and tenant, see Vol. I, 187 to 215.

Use and occupation.

That on the day of , 1864, the defendant hired from this plaintiff, and thereupon took possession, and thereafter, from the day of , 1864, until the day of , 1865, had, with the permission of this plaintiff, the use and occupation of a certain

house and premises, known as (describe premises briefly), the property of this plaintiff; for which the defendant promised to pay this plaintiff a reasonable sum (or the sum of dollars, on, &c.)

That the sum of dollars is a reasonable sum therefor, but that no part thereof has been paid, and the defendant is now justly indebted therefor to this plaintiff in the sum of dollars, with interest from, &c. Wherefore, &c.

For the law as to use and occupation, see Vol. I, 717 to 719.

Complaint against tenant for not keeping in repair, &c.

[Title and commencement as *ante*, 925.]

That on the 1st day of May, 1864, by a lease in writing, made between the plaintiff and the defendant, under their hands and seals, the plaintiff leased to the defendant, and the defendant hired of the plaintiff, for the term of one year from that date, at the yearly rent of one hundred and fifty dollars, a certain dwelling house, with the land and appurtenances, situated in the village of Gloversville, Fulton county, N. Y., the property of the plaintiff, bounded and described as follows (describe premises by boundaries or otherwise); that the said lease was as follows (set out a copy); that the defendant entered into the possession of the said premises under and by virtue of said lease, and occupied and possessed them during the term specified; that he has failed to keep his covenants, or to perform the agreement so made by him in said lease, but that on the contrary he has broken the same; that he has not kept the premises in good repair; that he has left them in an untenantlike condition; that the fences are injured and broken down; that the roofs of the dwelling house are leaky and admit the water, so that the walls have, in consequence, been greatly injured and destroyed; that the window glass have been broken, and the doors and other woodwork of the house greatly marred and defaced; and that the premises are otherwise injured and out of repair in consequence of the refusal or neglect of the defendant to keep them in good repair, as he agreed to do, to the damage of the plaintiff of two hundred dollars. Wherefore, &c.

For the law relating to the rights and duties of a tenant as to repairs, see Vol. I, 211 to 213.

Complaint against landlord for neglect to repair, &c.

[Title and commencement as *ante*, 925.]

That on the 1st day of May, 1864, the plaintiff and the defendant made a lease in writing, under their hands and seals, by virtue of which the defendant leased and rented, and the plaintiff hired the following described premises, situated in the village of Johnstown, Fulton county, N. Y., bounded as follows (describe premises), at the yearly rent of two hundred dollars; that said lease was as follows (set out a copy); that the plaintiff entered into the possession and occupation of said premises under and by virtue of said lease, and used them for the purposes for which they were leased and hired; that the defendant has failed, neglected and refused to perform the covenants and agreements on his part, in said lease contained; that he has failed, neglected and refused to make the following repairs (specify them as provided for in the lease); and that the premises are greatly out of repair (describe how, and the injuries resulting therefrom), to the great damage of the plaintiff of two hundred dollars. Wherefore, &c. (See Vol. I, 211 to 213.)

Complaint by schoolmaster against trustees, &c., on contract with predecessors.

[Title and commencement as *ante*, 925.]

That on the 1st day of May, 1860, at the town of Mayfield, in the county of Fulton, N. Y., the plaintiff, at the request of A. B., C. D. and E. F., three trustees of school district number two in said town, commenced teaching the district school in said district, and that for the space of six consecutive months thereafter he continued to teach and educate as a schoolmaster or teacher the scholars or pupils sent to the school so taught by him; that before and during the time the plaintiff so taught, he was duly qualified and licensed to teach, in the manner required by law; that the said trustees promised and agreed to pay the plaintiff the sum of thirty dollars a month, for each month during which the plaintiff should so teach said school; that the plaintiff has fully performed the said agreement on his part, by teaching for the time and in the manner so agreed; that the defendants have not performed their said agreement, or any part thereof, but they have wholly neglected and refused to perform the same; that there is now due to the plaintiff, from the said defendants, the sum of one hundred and eighty dollars. Wherefore, &c. (See Vol. I, 689, 692 to 694.)

If there has been a change of trustees during the time the plaintiff is teaching, or before he sues to recover his wages, the complaint ought to state that fact, which may be alleged as follows: "That afterwards, and on the day of , 186 , the said A. B., C. D. and E. F. went out of their office of trustees (state whether by death, expiration of term or otherwise), and the defendants succeeded them in the office of trustees, which office they held at the commencement of this action, and still hold; and that the defendants are therefore liable to pay to the plaintiff the said sum of one hundred and eighty dollars, &c."

By an employee, discharged or prevented from fulfilling his contract.

[Title and commencement as *ante*, 925.]

That on the day of , 1865, at , the plaintiff and the defendant made an agreement in writing, of which the following is a copy (set out a copy) (or made an agreement, whereby the plaintiff undertook to render his services to the defendant as bookkeeper, *or* as salesman *or* as teacher, *or* otherwise as the case may be, from said date to the day of , 1865; in consideration whereof the defendant agreed so to employ the plaintiff during said period, and to pay him for his services at the rate of dollars each month); that the plaintiff (entered upon his employment under said agreement, and duly discharged all the duties thereof until the day of , 1865, and he) has ever since been and still is ready and willing (and on the day of , 1865, duly offered) to perform all the conditions of said agreement on his part; that the defendant then refused and still refuses to allow him to do so, or to pay him therefor, to his damage of two hundred dollars. Wherefore, &c. (See Vol. I, 180, 181, 182.)

Where the plaintiff has entered into such service under the contract, and is afterwards wrongfully discharged before the expiration of the term of service, it is not necessary to allege or prove an offer to serve. *Wallis* v. *Warren*, 4 Exch., 361, and see *Wilkinson* v. *Gaston*, 9 Q. B., 137.

By an employer on refusal to serve.

[Title and commencement as *ante*, 925.]

That on the day of , 1865, at , the plaintiff and the defendant made an agreement in writing, of which the following is a copy (set out a copy) (or made an agreement whereby the defendant agreed to render his services to the plaintiff as bookkeeper, *or* as a salesman, *or* as a teacher, or otherwise as the case may be), from said date to the day of , 1865; in consideration whereof the plaintiff agreed so to employ the defendant during said period, and to pay him for his services at the rate of dollars each month; that the plaintiff (has ever been ready and willing to employ the defendant, and on the day of , 1865, offered to do so, and has otherwise) duly performed all the conditions on his part; that the defendant entered upon the service of the plaintiff on the above mentioned day, but afterwards on the day of , 1865, and ever since he has refused to serve the plaintiff as aforesaid, to his damage of two hundred dollars. Wherefore, &c.

Against overseers of poor for support of a bastard child on contract by predecessors.

[Title and commencement as *ante*, 925.]

That A. B. and C. D., the defendants, are now, and were at the time of commencing this action, overseers of the poor of the town of Broadalbin, in the county of Fulton, N. Y.; that heretofore E. F. and G. H. were the overseers of the poor of said town, and were the predecessors in office of the said defendants; that on the first day of January, 1865, the then overseers of the poor of the said town made an agreement with the plaintiff for the support of I. J., a bastard child, chargeable to the said town of Broadalbin, and for the support and maintenance of which said bastard child two of the justices of the peace of the said town had duly made an order of filiation and support; that said E. F. and G. H. requested the plaintiff to support and maintain such bastard child for the term of six months from the said first day of January, 1865 (or other time, as the fact may be), for which support and maintenance the said E. F. and G. H. promised and agreed to pay the plaintiff the sum of two dollars for each week of such time; that the plaintiff, in consideration of such request and promise, and of the premises, did then and there promise to and agree with the said E. F. and G. H. to support and maintain said bastard child, for the price and during the time mentioned; that the plaintiff, in pursuance of such request, promise and agreement, did well, truly and properly support and maintain the said bastard child for and during the time aforesaid; that the said E. F. and G. H. afterwards, on the day of , 1865, went out of their office as overseers, as aforesaid (state whether by expiration of term, or how otherwise), leaving the said sum of money due and unpaid to the plaintiff; and thereupon, the said defendants succeeded them in the said office, and they still hold the same; that neither the said E. F. and G. H., nor the said defendants, have either of them paid the said sum or any part thereof, but the same remains due and unpaid to the plaintiff. Wherefore, &c. (See Vol. I, 125 to 130.)

Against seller for not delivering.

[Title and commencement as *ante*, 925.]

That on the day of , 1865, the plaintiff and defendant entered into an agreement whereby it was mutually agreed between them as fol-

lows: that the defendant should sell and deliver to the plaintiff at Albany, and on or before the day of , 1865 (*or* on demand, *or* within a reasonable time, *or* otherwise as the case may be), fifty barrels of flour, and that the plaintiff should pay the defendant therefor, upon the delivery of said flour, at the rate of ten dollars for each barrel; that the plaintiff was ready at the time and place appointed to receive said flour, and to pay for the same according to the agreement; and otherwise has duly performed all the conditions on his part; that the defendant neglected and refused to deliver said flour, to the damage of the plaintiff of two hundred dollars; wherefore, &c. (Vol. I, 676 to 678, 464 to 548. As to measure of damages, *ante*, 659.)

Complaint against purchaser for not accepting goods.

[Title and commencement as *ante*, 925.]

That on the first day of May, 1865, at the town of Kinderhook, Columbia county, N. Y., the plaintiff and the defendant made an agreement by which the plaintiff sold to the defendant, and the defendant purchased of the plaintiff, one hundred bushels of corn, at the price of one dollar and fifty cents per bushel, on the terms hereinafter stated; that by the terms of said contract of sale the said corn was to be delivered, by the plaintiff to the defendant, on the tenth day of June, 1865, at the dwelling house of said defendant, in said town, which said corn was to be paid for by the defendant, on the delivery thereof as aforesaid; that afterwards, and on the said tenth day of June, 1865, the said plaintiff, at the dwelling house of the said defendant, offered and tendered the said one hundred bushels of corn to the defendant, and was then and there ready and willing to deliver the same to him, as by said agreement he was required; that the said plaintiff then and there requested the said defendant to accept the said corn, and to pay for the same as he had agreed; but that the said defendant then and there refused to accept or receive the same or to pay for it, and that he has always refused, and still refuses to do so; that the plaintiff has, by such refusal, been put to great expense in carrying and tendering the same to the defendant, and in returning it to the premises of the plaintiff, and also in rehousing the same, to the plaintiff's damage of two hundred dollars; wherefore, &c. (As to the law in such a case, see Vol. I, 675, 676. As to the general law of sales, see Vol. I, 464 to 548; Id., 415 to 417.)

Complaint to recover balance on exchange of horses.

[Title and commencement as *ante*, 925.]

That on the first day of January, 1864, at the city of Albany, N. Y., the plaintiff and the defendant made an agreement for an exchange of horses; that by the terms of said agreement it was agreed that the plaintiff should deliver his horse to the defendant, and the said defendant, in consideration thereof, was to deliver his horse and fifty dollars in exchange therefor; that the plaintiff then and there delivered his horse to the defendant in pursuance of the said agreement, and the said defendant also then and there delivered his said horse to the plaintiff, and he also then and there, in consideration of the premises and of such exchange, promised and agreed to and with the plaintiff, to pay him the said fifty dollars on or before the first day of February, 1864 (or on demand; or generally, in which case it is due immediately); that the said defendant has been frequently requested to perform his said agreement by paying said fifty dollars, but that he has hitherto neglected and refused to do so, or to pay

any part thereof, to the plaintiff's damage of two hundred dollars, &c. Wherefore, &c.

In an action like the above, it is not necessary to allege or to prove a special demand of the money, because it is the duty of the defendant to pay it without a demand. The averment, however, can do no harm, because it will not be necessary to prove it merely because it has been alleged. A special complaint like this does not seem to be necessary, for the reason that there may be a recovery of such balance upon the common counts where the contract has been fully performed, except so far as it relates to the payment of the purchase price. *Clark* v. *Fairchild*, 22 Wend., 576; and the rule is the same under the Code. *Farren* v. *Sherwood*, 3 E. P. Smith, 227; *ante*, 319, 320. The same rule applies to actions for the recovery of the compensation due for services rendered under a special contract, if the plaintiff has fully performed the services on his part, and nothing remains to be done but to pay the stipulated price. *Ib.*, Vol. I, 695.

Complaint for breach of warranty of title to goods sold.

[Title and commencement as *ante*, 925.]

That on the first day of January, 1865, at the city of Albany, the plaintiff, on the offer and at the request of the defendant, purchased of said defendant a one-horse sleigh; that the purchase price thereof was one hundred dollars; at the time of such sale and before the said purchase was completed, the defendant represented and warranted that the said sleigh was the property of the defendant; that the plaintiff believed and relied upon such representation and warranty, and in consideration thereof purchased said sleigh of the defendant, and then and there paid him the said sum of one hundred dollars therefor; that at the time of such sale the said defendant was not the owner of said sleigh, but the same was then the property of one William R. Davidson, which the defendant at the time of such sale and warranty well knew. That afterwards, the said Davidson commenced an action in the supreme court of this state for the recovery of the possession of said sleigh; that the plaintiff gave the defendant due and legal notice of the commencement of said action, and he also duly requested the defendant to answer and defend the said action so commenced by said Davidson; that the defendant neglected and refused to answer or defend said action, and such proceedings were afterwards had therein, that the said Davidson recovered a judgment against this plaintiff for the possession of the said sleigh, together with one hundred dollars costs and damages of said action; that on the first day of May, 1865, and before this action was brought, the plaintiff demanded a repayment of the said defendant of the purchase price of the said sleigh, with interest thereon from the time of such payment, as well as the costs and damages so recovered by the said Davidson against this plaintiff; that by reason of the premises, the plaintiff thus sustained damages to the amount of two hundred dollars. Wherefore, &c.

As to the law in relation to the warranty of title to personal property, see Vol. I, 530 to 532. If the warranty of title was express, the allegations in the complaint ought to agree with the warranty made. And, if the warranty is an *implied* one, or such as the law will create from the nature of the sale, the complaint

must still allege such a warranty as the law implies; and it must be stated in a material and traversable allegation of facts. *Prentice* v. *Dike*, 6 Duer, 220. It has been held that the purchaser of personal property cannot defend against an action by the vendor for the purchase price, on the ground that such vendor had no title to the property sold, unless there has been a previous recovery in an action by the true owner against such purchaser. *Case* v. *Hall*, 24 Wend., 102; *Vibbard* v. *Johnson*, 19 Johns., 77; *Tibbets* v. *Ayer*, Hill & Denio, 174; *Delaware Bank* v. *Jarvis*, 6 E. P. Smith [20 N. Y.], 230; *Livingston* v. *Bain*, 10 Wend., 385, per NELSON, J., but see Vol. I, 532. In an action by a purchaser against a vendor for the breach of an *implied* warranty of title, the measure of damages is the price paid, and interest thereon from the time of the payment thereof, and the costs recovered by the true owner in his action against the purchaser, provided such purchaser gave the vendor due notice of the action commenced by the true owner. *Armstrong* v. *Percy*, 5 Wend., 535; *Burt* v. *Dewey*, 31 Barb., 540, and see *ante*, 664 to 666. The costs paid by the purchaser for his defense, such as his witnesses' fees, the fees paid to his counsel, &c., cannot be recovered by the purchaser. *Ib.*

In this action by the purchaser against the vendor for the breach of warranty of title, it is not necessary for him to show that he has paid the judgment recovered against him by the true owner. *Burt* v. *Dewey*, 31 Barb., 540. Nor is it necessary, for the purpose of maintaining the action, to show that the purchaser gave the vendor notice of the action brought by the true owner against such purchaser. *Ib.* The consequences of an omission to do so will merely be to prevent the purchaser from recovering the costs paid to the true owner of the property, and it will also impose upon him the burden of proving, by other evidence than the record of such other action, that the vendor had no title at the time of his sale of the property. *Ib.*

Complaint for breach of warranty as to quality of goods sold.

[Title and commencement as *ante*, 925.]

That on the 1st day of January, 1865, at the city of Albany, N. Y., the defendant offered to sell and deliver one hundred barrels of ale to the plaintiff; that the defendant was then and there a brewer, and at that time carried on the business of brewing ale at the place aforesaid; that the defendant then and there represented and warranted to the plaintiff, that the said ale was of good and merchantable quality; that it was of the first quality to ship to a distant seaport; that the said barrels of ale were well and properly filled with ale, and that such ale would not sour nor burst the barrels containing the same, on a distant voyage by sea; that the plaintiff then and there believed and relied upon such representation and warranty so made by the defendant, and in consequence and consideration thereof, the plaintiff then and there purchased the said one hundred barrels of ale of the defendant, and paid him therefor the sum of five hundred dollars; that the said ale, at the time of such sale and warranty, was not good and of merchantable quality, nor of the first

quality to ship to a distant seaport, nor were the said barrels well and properly filled with ale, nor was the said ale of such a quality that it would not sour or burst the barrels on a distant voyage by sea; but that on the contrary to such warranty as aforesaid, the said ale was then and there of a bad and unmerchantable quality; that it was unfit to ship to a distant seaport; that the barrels were but partially filled with ale; that the said plaintiff shipped the said ale to a distant seaport, to wit, to the city of San Francisco, in the State of California, and that the said ale did sour during such voyage, and became unfit for use; and that twenty-five of the said barrels of ale did, during said voyage, burst the barrels containing the same; that said ale was of very little value to the plaintiff, and that by reason of the premises the plaintiff has sustained damages to the amount of two hundred dollars. Wherefore, &c.

This precedent will serve as a general guide in drawing complaints for the breach of a warranty in relation to the *quality* of goods sold. In drawing a complaint, the allegations as to warranty must conform to the circumstances of the case. If the warranty was *express*, it must be stated according to the actual facts; but if an *implied* warranty is relied upon, then the warranty stated must be such as the law will imply from the circumstances of the case. The law in relation to implied warranties of quality, is stated Vol. I, 519 to 530; and see Id., 678. As to the measure of damages, see *ante*, 663.

Complaint against receiptor for not delivering goods.

[Title and commencement as *ante*, 925.]

That on the 12th day of January, 1865, at the city of Albany, N. Y., the defendant, in consideration that the plaintiff would then and there deliver to him one sofa, six chairs (state the articles), the said defendant then and there promised and agreed with the plaintiff to redeliver such goods and chattels to the plaintiff on his demand therefor; that on the same day, and at the same place, the plaintiff, in consideration of such promise and agreement, delivered the said goods and chattels to the plaintiff; that afterwards, and on the 20th day of January, at the city of Albany aforesaid, the plaintiff duly demanded a redelivery of said goods and chattels of the defendant, who then and there refused to redeliver the same, or any part thereof, to the plaintiff; and that the defendant has ever since refused to redeliver such goods or chattels to the plaintiff, although frequently requested so to do, to the damage of the plaintiff of two hundred dollars. Wherefore, &c. (See Vol. I, 312, 367, 368.)

Complaint against an agent for not accounting, &c.

[Title and commencement as *ante*, 925.]

That on the 12th day of January, 1865, at the city of Albany, N. Y., the plaintiff delivered certain goods and chattels of great value to the defendant, at his request; that such goods and chattels consisted of (describe them generally), and were of the value of two hundred dollars; that such goods and chattels were delivered to the defendant, to sell and dispose of as an agent of the plaintiff, and for a reasonable consideration to be paid to him therefor by the plaintiff; that it was the legal duty of the defendant, and at the time of such delivery of the goods, &c., to the defendant, for sale, &c., he agreed and promised to the plaintiff that he would render a just, full and reasonable account of such sales, and that

he would also pay over the proceeds thereof in a reasonable time, whenever he should be requested by the plaintiff to do so; that the defendant received the said goods, &c., and afterwards sold and disposed of them for the sum of two hundred dollars; that since such sale, &c., a reasonable time has elapsed for the accounting and paying over of such proceeds, &c., to the plaintiff; that the plaintiff, on the 1st day of February, 1865, at the city of Albany, N. Y., duly demanded of the defendant an accounting for the proceeds of such sale, and the payment of the money so received from such sale by the defendant; and that the defendant did then and there refuse and neglect to account for or pay over said sum of money, or any part thereof, and still refuses so to do, to the damage of the plaintiff of two hundred dollars. Wherefore, &c.

As to the general principles relating to the rights and duties of agents, see Vol. I, 240 to 242.

If the plaintiff cannot prove that the goods have been sold, the complaint should omit the allegation of sale, and allege instead thereof, "*that the defendant agreed and promised to account for the goods delivered to him, whenever requested by the plaintiff;*" and the complaint should then allege, "*that on the day of , 186 , at the town of , the plaintiff duly demanded of the defendant that he should account for the said goods to the plaintiff, or deliver the same to him; and that the defendant then and there neglected and refused to account for said goods, or deliver them to the plaintiff.*"

Such a form of action is proper in those cases in which the agent may have disposed of the property by way of exchange for other property, or in any other manner which did not produce money as the result of the disposition of the property. And it is also proper in those cases in which the agent refuses either to account for the property, or to return it on demand; though in the latter case an action for the conversion of the goods would be preferable.

Complaint against agent for selling goods on credit, and not for cash, or a good bill, contrary to orders.

[Title and commencement as *antè*, 925.]

That from the first day of May, 1865, and until after the time of the making the sales of goods hereinafter mentioned, the defendant was the servant and agent of the plaintiff; that such defendant was to be paid a valuable and legal consideration for the services so rendered and to be rendered by him for the plaintiff; that on the 29th day of May, 1865, the plaintiff employed and instructed the defendant to sell and dispose of a large quantity of lumber for cash, or for an approved bill for a short date; that the defendant promised and agreed, and it was also his legal duty, as such agent, to sell the said lumber for cash, or for an approved bill at short date; that afterwards, and on the 20th day of May, 1865, at the city of Albany, N. Y., the defendant sold and disposed of said lumber for the sum of two hundred dollars, otherwise than for cash or an approved bill at short date, and for a bad and insufficient bill of exchange, which has become of no use or value to the plaintiff, and which sum of money is wholly unpaid to the plaintiff, to his damage of two hundred dollars. Wherefore, &c. (See Vol. I, 228 to 232.)

Complaint against a clerk for selling goods on credit, contrary to express orders.

[Title and commencement as *ante*, 925.]

That before and at the time of the making of the sales of goods hereinafter mentioned, the plaintiff was a dry goods merchant, carrying on the business as such in the city of Albany, N. Y.; that at the time of the sales hereinafter mentioned, the defendant was a servant, shopman or clerk of the plaintiff, and retained to act as such in said store for a valuable consideration paid and to be paid therefor to him by the plaintiff; that the plaintiff directed and instructed the defendant, as such clerk, &c., not to sell any goods, &c., on credit, or in any other manner than for cash on the delivery of the goods to the purchaser; that afterwards, on the first day of May, 1865, while acting as such clerk, in violation of such orders and instructions, and in violation of his duty as such clerk, the defendant sold and delivered a large quantity of dry goods, &c., the property of the plaintiff, to one John Smith, which goods were of the value of two hundred dollars; that the defendant sold and delivered the said goods, &c., to the said Smith on credit, and not for cash; that the said John Smith has not paid plaintiff for the said goods, but that the whole amount of the purchase price remains unpaid, to the plaintiff's damage of two hundred dollars. Wherefore, &c. (See Vol. I, 228 to 232.)

Complaint to recover a reward offered by defendant.

[Title and commencement as *ante*, 925.]

That on the 12th day of January, 1865, at the city of Albany, N. Y., the defendant published, or caused to be published, a placard, handbill or advertisement, which, after reciting that one Peter Paywell had been robbed, and that it was feared that he had also been murdered, contained a promise and agreement on the part of said defendant, that he would pay the sum of two hundred dollars to any person who should give such information as should lead to the discovery and conviction of the person who had committed said crime, except that the person who actually committed the crime should not be entitled to such reward; that the plaintiff in compliance with such request and promise, afterwards and on the day of , 1865, did give to the defendant such information as led to the discovery of the said criminal, who was not this plaintiff; that afterwards on, &c., at, &c., at a court of oyer and terminer, held at the city of Albany, in and for the county of Albany, one A. B., who was guilty of the said offense of robbery, &c., was in due course of law tried and convicted of the said robbery, in consequence of such information so given by the plaintiff, and that the said sum of two hundred dollars has not been paid to the said plaintiff by the said defendant. Wherefore, &c. (See Vol. I, 104, 105.)

Breach of marriage promise.

[Title and commencement as *ante*, 925.]

That on the day of , 1865, at the city of Albany, N. Y., in consideration that the plaintiff, who was then unmarried, would, at the request of the defendant, marry him on request, the defendant promised to marry the plaintiff within a reasonable time (or on the day of , 1865, or on request.)

That the plaintiff, confiding in said promise, has always since remained, and now is ready and willing to marry the defendant.

That the defendant refuses to marry the plaintiff, although a reasonable time elapsed before the commencement of this action (or although she, on the day of , 1865, requested him to do so), to her damage of two hundred dollars. Wherefore, &c. (See Vol. I, 656, 657, 942.)

Payee against maker of note.

[Title and commencement as *ante*, 925.]

That heretofore the defendant made his promissory note in writing, dated on the day of , 1865, at the city of Albany, N. Y., and thereby promised to pay to the plaintiff (or his order) the sum of one hundred dollars in three months after said date (or on the day of , 1865; that no part of said note has been paid (except the sum of, &c.) Wherefore, &c. (See Bills and Notes, Vol. I.)

Payee against maker and indorser.

[Title and commencement as *ante*, 925.]

That on the day of , 1865, at the city of Albany, N. Y., the defendant A. B. made his promissory note in writing, dated on that day, and thereby promised to pay to the order of the plaintiff, at Albany aforesaid, the sum of one hundred dollars, in three months after said date (or on the day of , 1865); that the defendant C. D. indorsed said note, when said A. B. delivered the same to the plaintiff; that said note at maturity was duly presented for payment, but was not paid; of all which due notice was given to the defendant C. D.; that said note was made by the defendant A. B., and indorsed by the defendant C. D., for the purpose of paying for (coal sold and delivered to the defendant A. B.), on the credit of such indorsement; that the defendant C. D., indorsed the same for the purpose of procuring for the said maker a credit with the plaintiff, knowing that it would be so applied, and that said note was so passed and so indorsed by the defendant C. D., with his privity to the plaintiff, in payment for (coal then sold and delivered); that no part of said note has been paid. Wherefore, &c. (See Bills and Notes, Vol. I.)

Indorsee against maker and indorser.

[Title and commencement as *ante*, 925.]

That heretofore the defendant A. B., made his promissory note in writing, dated on the day of , 1865, at the city of Albany, N. Y., and thereby promised to pay to the order of the defendant C. D., one hundred dollars in sixty days after said date (or on the day of , 1865); that the defendant C. D. then and there indorsed the same to the plaintiff (for value); that (at maturity) the said note was duly presented for payment, but was not paid; of all which due notice was given to the defendant C. D.; that the cost of protest was dollars; and that no part thereof has been paid. Wherefore, &c. (See Bills and Notes Vol. I.)

Complaint on a note made by partners.

[Title and commencement as *ante*, 929.]

That at the time of making the note hereinafter mentioned and set forth, the defendants were partners, and doing business under the firm name of Vail & McFarlan; that on the 13th day of January, 1865, at the city of Albany, N. Y., the defendants made, under their firm name of Vail & McFarlan, and delivered to the plaintiff, their promissory note

in writing, of which the following is a copy (set out a full copy of the note); and that there is now due to the plaintiff thereon, from the defendants, the sum of two hundred dollars, with interest from the 13th day of January, 186. Wherefore, &c. (See Vol. I, 294 to 296.)

Complaint on a note wrongly dated.

[Title and commencement as *ante*, 925.]

That on the 13th day of January, 1864, at the city of Albany, N. Y., the defendant made his promissory note in writing, which, by mistake, bears date on the 13th day of January, 1863, when in truth and fact it was intended that it should bear date on the first day of January, 1864, and the defendant thereby, for value received, promised to pay to the plaintiff or his order (or bearer) the sum of one hundred and fifty dollars, one month after the first day of January, 1864, and delivered the same to the plaintiff; and that said note has not been paid, nor any part thereof; but the defendant is now indebted to the plaintiff thereon in the sum of one hundred and fifty dollars, with interest from the said first day of January, 1864. Wherefore, &c.

Complaint on a note made by an agent.

[Title and commencement as *ante*, 925.]

That on the 13th day of January, 1864, at the city of Albany, N. Y., the defendant, by one A. B., his duly authorized agent, made and delivered his promissory note in writing to the plaintiff; that the following is a copy of said note (set out a full copy of the note); that there is now due, to the plaintiff, from the defendants on said note, the sum of one hundred dollars, with interest from the 13th day of January, 1864. Wherefore, &c. (See Vol. I, 215 to 259.)

Complaint on a note by a surviving partner.

[Title and commencement as *ante*, 925.]

That at the time of making the note hereinafter mentioned and set forth, the plaintiff and one A. B. were partners, doing business at the city of Albany, N. Y., under the firm name of Smith & Mead; that on the 13th day of January, 1864, at Albany aforesaid, the defendant made and delivered to the said firm, under their firm name of Smith & Mead, his promissory note in writing, of which the following is a copy (set out a full copy of the note); that on the 25th day of January, 1864, at Albany aforesaid, the said Mead died, leaving the plaintiff the sole surviving partner of said firm; and that there is now due to the plaintiff, on said note, from the defendant, the sum of one hundred dollars, with interest from the 13th day of January, 1864. Wherefore, &c. (See Vol. I, 304, 305.)

Complaint on note by payee against surviving maker.

[Title and commencement as *ante*, 925.]

That at the time of making the note hereinafter mentioned and set forth, the defendant and one A. B. were partners, doing business at Albany, N. Y., under the firm name of Wright & Simmons; that on the 13th day of January, 1864, at Albany aforesaid, they made, in their firm name, and delivered to the plaintiff their promissory note in writing, of which the following is a copy (set out a full copy of the note); that on

the tenth day of March, 1864, at Albany aforesaid, the said defendant Wright died, leaving the defendant Simmons the sole surviving partner of said firm; and that there is now due on said note, from the defendant to the plaintiff, the sum of one hundred and fifty dollars, with interest from the 13th day of January, 1864. Wherefore, &c. (See *ante*, 277, 278, 279.)

Complaint by first indorsee against maker of note.

[Title and commencement as *ante*, 925.]

That on the 13th day of January, 1864, at Albany, N. Y., the defendant A. B. made his promissory note in writing, of which the following is a copy (set out a full copy of the note), and delivered the same to the defendant C. D., therein named as payee, who, then and there, for value received, indorsed it to the plaintiff; and that there is now due to the plaintiff thereon, from the defendant, the sum of one hundred dollars, with interest from the 13th day of January, 1864. Wherefore, &c. (See Vol. I, Bills and Notes.)

Complaint on note by second indorsee against maker.

[Title and commencement as *ante*, 925.]

That on the 13th day of January, 1864, at Albany, N. Y., the defendant A. B. made his promissory note in writing, of which the following is a copy (set out a full copy of the note), and delivered the same to C. D., the payee therein named, who then and there indorsed it, and delivered it so indorsed, and thereafter, and before its maturity, the same came lawfully into the possession of the plaintiff for value; that the plaintiff is now the lawful owner and holder of the same, and that there is now due to him thereon, from the defendant, the sum of one hundred and seventy-five dollars, with interest from the 13th day of January, 1864. Wherefore, &c. (See Vol. I, Bills and Notes.)

Complaint on note; first indorsee against payee and indorser.

[Title and commencement as *ante*, 925.]

That, on the 10th day of January, 1864, at Albany, N. Y., one A. B. made his promissory note in writing, of which the following is a copy (set out a full copy of the note), and delivered it to the defendant C. D., who was named as payee therein; that the said defendant then and there indorsed the said note to the plaintiff for value; that at maturity the said note was duly presented for payment but was not paid, of which the defendant had due notice; and that the defendant is now justly indebted on said note, to the plaintiff, in the sum of one hundred dollars, with interest from the 13th day of January, 1864. Wherefore, &c. (See Vol. I, Bills and Notes.)

Complaint on a bill of exchange; payee against acceptor.

[Title and commencement as *ante*, 925.]

That, on the 13th day of January, 1864, at Albany, N. Y., the defendant accepted and delivered to the plaintiff a bill of exchange, of which the following is a copy (set out a full copy of the bill); that there is now due to the plaintiff thereon, from the defendant, the sum of one hundred dollars, with damages and interest from the 13th day of January, 1864. Wherefore, &c. (See Vol. I, Bills and Notes.)

Complaint on bill of exchange; payee against drawer for non-acceptance.

[Title and commencement as *ante*, 925.]

That, on the 13th day of January, 1864, at Albany, N. Y., the defendant A. B. made his bill of exchange in writing, of which the following is a copy (set out a full copy of the bill), and delivered the same to the plaintiff; that the same was duly presented to C. D., therein named as drawee for acceptance, but was not accepted, of which the defendant A. B. had due notice; that the said bill of exchange has not been paid, nor any part thereof, and that there is now due thereon, to the plaintiff from the defendant, the sum of one hundred and seventy dollars, with interest from the 13th day of January, 1864. Wherefore, &c. (See Vol. I, Bills and Notes.)

Complaint on a bill of exchange; payee against drawer and acceptor.

[Title and commencement as *ante*, 925.]

That, on the 13th day of January, 1864, at Albany, N. Y., the defendant A. B. made his bill of exchange in writing, dated on that day, and directed the same to C. D., and thereby required the said C. D. to pay to the order of the plaintiff one hundred dollars, three months after the date thereof, for value received, and delivered it to the plaintiff; that then and there (or on the   day of   , 186 , at   ) the defendant C. D., upon sight, accepted the said bill; that at maturity the same was duly presented to the defendant C. D. for payment, but was not paid, of which the defendant A. B. had due notice; and that the defendants are now justly indebted upon said bill to the plaintiff in the sum of one hundred dollars, with interest from the 15th day of January, 1864. Wherefore, &c. (See Vol. I, Bills and Notes.)

Complaint on a bill of exchange; indorsee against drawer and acceptor for non-acceptance.

[Title and commencement as *ante*, 925.]

That, on the 13th day of January, 1864, at Albany, N. Y., the defendant A. B. made his bill of exchange in writing, dated on that day, and directed it to one C. D., and thereby required the said C. D. to pay to the order of the defendant E. F. one hundred dollars, sixty days after the date thereof, for value received, and delivered it to the defendant E. F.; that the said E. F. then and there indorsed the same to the plaintiff; that the same was duly presented to the said C. D. for acceptance, but was not accepted, of which the defendants had due notice; that the plaintiff is now the lawful owner and holder of said bill, and that the same has not been paid, nor any part thereof; and that the defendants are now justly indebted to the plaintiff thereon in the sum of one hundred dollars, with interest from the 15th day of January, 1864. Wherefore, &c. (See Vol. I, Bills and Notes.)

Complaint on a bill of exchange, against drawer, acceptor and indorser, for non-payment.

[Title and commencement as *ante*, 925.]

That, on the 13th day of January, 1864, at Albany, N. Y., the defendant A. B. made his bill of exchange, in writing, dated on that day, and directed it to the defendant C. D. and thereby required said defendant

C. D. to pay to the order of the defendant E. F. one hundred dollars, ten days after the date thereof, for value, and delivered it to the defendant E. F.; that on the 13th day of January, 1864, at Albany, N. Y., the defendant C. D., upon sight thereof, accepted said bill; that on the 14th day of January, 1864, at Albany, aforesaid, the defendant E. F. indorsed the same, and delivered it so indorsed, and thereafter, and before maturity, the same came lawfully into the possession of the plaintiff, for value; that at maturity the same was duly presented to the defendant C. D. for payment, but was not paid, of which the defendants A. B. and E. F. had due notice; that the plaintiff is the lawful owner and holder of the said bill, and that the same has not been paid, nor any part thereof, and the defendants are now justly indebted to him therefor in the sum of one hundred dollars, with interest from the 14th day of January, 1864. Wherefore, &c. (See Vol. I, Bills and Notes.)

Complaint on a bill of exchange, drawer against acceptor, on a bill returned to drawer and taken up by him.

[Title and commencement as *ante*, 925.]

That, on the 13th day of January, 1864, at Albany, N. Y., the plaintiff made his bill of exchange in writing, dated on that day, and directed it to the defendant, and thereby required the defendant to pay to the order of one A. B., ninety dollars, ten days after the date thereof, and delivered the same to the said A. B.; that on the 14th day of January, 1864, at Albany, aforesaid, the defendant, upon sight thereof, accepted said bill for value received; that on the 26th day of January, 1864, at Albany, aforesaid, the same was returned to the plaintiff for non-payment, and the plaintiff, as drawer thereof, was then and there compelled to pay to said A. B. (or to the holder thereof) the sum of one hundred dollars, being the amount of said bill, with costs of protest and interest; that the plaintiff is now the lawful owner and holder of said bill, and that the same has not been paid, nor any part thereof; and that the defendant is now justly indebted to him thereon in the sum of one hundred dollars. Wherefore, &c. (See Vol. I, Bills and Notes.)

Complaint upon check; payee against drawer.

[Title and commencement as *ante*, 925.]

That on the 14th day of January, 1864, at Albany, N. Y., the defendant made his check in writing, dated on that day, and directed the same to the Commercial Bank of Albany, N. Y., and thereby required said bank to pay to this plaintiff or order (or bearer), one hundred dollars for value received, and delivered said check to the plaintiff; that the same was duly presented to the said Commercial Bank for payment, but was not paid, of which the defendant had due notice, and he is now justly indebted to this plaintiff thereon in the sum of one hundred dollars, with interest from the 14th day of January, 1864. Wherefore, &c. (See Vol. I., Bills and Notes.)

Complaint upon check; indorsee or bearer against drawer.

[Title and commencement as *ante*, 925.]

That on the 14th day of January, 1864, at Albany, N. Y., the defendant made his check in writing, dated on that day, and directed to the Commercial Bank of Albany, N. Y., and thereby required the said Commercial Bank to pay to one A. B. or order (or bearer), one hundred and fifty dollars, for value received, and delivered it to said A. B. (*if payable to*

order, add who indorsed the same and delivered it so indorsed); and the same thereafter came lawfully to the possession of the plaintiff; that thereafter the same was duly presented to said Commercial Bank for payment, but was not paid, of which the defendant had due notice; that this plaintiff is now the lawful owner and holder of the same, and that the defendant is now justly indebted to him thereon in the sum of one hundred and fifty dollars, with interest from the 15th day of January, 1864. Wherefore, &c. (See Vol. I, Bills and Notes.)

Complaint on a check; indorsee against drawee; drawer insolvent; non-presentment therefor excused.

[Title and commencement as *ante*, 925.]

That on the 14th day of January, 1864, at Albany, N. Y., the defendant made his check in writing, dated on that day, and directed the same to the Commercial Bank of Albany, N. Y., and thereby required the said Commercial Bank to pay to the order of one A. B. seventy-five dollars, for value received, and delivered the same to the said A. B., who thereupon indorsed it to the plaintiff; that on the said 14th day of January, 1864, said Commercial Bank had stopped payment (or the said drawer was insolvent), and said check has not been paid, nor any part thereof; and the defendant is now justly indebted to this plaintiff thereon in the sum of seventy-five dollars, with interest from the 14th day of January, 1864. Wherefore, &c. (See Vol. I, Bills and Notes.)

Complaint upon check; indorsee or bearer against drawer and indorser.

[Title and commencement as *ante*, 925.]

That on the 14th day of January, 1864, at Albany, N. Y., the defendant A. B. made his check in writing, dated on that day, and directed to the Commercial Bank of Albany, N. Y., and thereby required said Commercial Bank to pay to the defendant C. D., or order (or bearer), one hundred dollars, for value received, and delivered the same to the defendant C. D.; that thereupon the said defendant C. D. indorsed the same to the plaintiff (or indorsed the same and delivered it so indorsed; and thereafter it came lawfully into the possession of the plaintiff, for value); that said check was duly presented for payment, but was not paid, of which the defendants A. B. and C. D. had due notice; that the plaintiff is now the lawful owner and holder of said check, and the defendants are now justly indebted to the plaintiff thereon, in the sum of one hundred dollars, with interest from the 16th day of January, 1864. Wherefore, &c. (See Vol. I, Bills and Notes.)

Complaint upon check, against bank on certified check.

[Title and commencement as *ante*, 925.]

That the defendants are a corporation, created by and under the laws of this state, organized pursuant to an act of the legislature entitled, "an act to authorize the business of banking" (or if acquired under a special charter, state the title, date of act, &c.), and the acts amending the same; that on the 14th day of January, 1864, at Albany, N. Y., one A. B. made his check in writing, bearing date on that day, and directed it to the defendants, and thereby required them to pay to the plaintiff, or order (or bearer), one hundred dollars, for value received, and delivered the same to the plaintiff; that on the 14th day of January, 1864, the defendants, by

their agent duly authorized thereto in writing, accepted and certified the same to be good; that thereafter the same was duly presented for payment, but was not paid; and the defendants are now justly indebted to this plaintiff thereon, in the sum of one hundred dollars, with interest from the 14th day of January, 1864. Wherefore, &c. (See Vol. I, 226, 227, 448.)

Complaint upon a chattel note; holder against maker.

[Title and commencement as *ante*, 925.]

That on the 22d day of April, 1850, at New York city, the defendants, for value received, and expressed in the note hereinafter mentioned and set forth (or when no consideration is expressed in the note, for and in consideration of, &c., stating the real consideration), made their promissory note in writing, of which the following is a copy: "For value received, we jointly and severally promise to pay to C. L. Brown, or order, in merchandise, on demand, after May 1, 1850, one hundred dollars. T. G. Richardson. New York, April 22d, 1850. David Woods," and delivered the same to the said C. L. Brown; that afterwards, and on the 22d day of April, 1850, at New York aforesaid, the said note was duly indorsed by the said C. L. Brown to the plaintiff; that thereafter, and on the 2d day of May, 1850, the plaintiff duly demanded the payment of said note of the defendants, in merchandise, at their store, in the city of New York, at No. 500 Broadway, which merchandise the plaintiff was ready and willing to accept and receive of the defendants, in payment of said note, according to its terms and conditions; that the said defendants then and there refused to pay the said note in merchandise or in money; that the plaintiff is now, and was at the commencement of this action, the lawful owner and holder of said note; that the plaintiff has duly performed all the conditions of the same on his part, but that the same has not been paid nor any part thereof, and that the defendants are now justly indebted to the plaintiff therein, in the sum of one hundred dollars, with interest from the 2d day of May, 1850. Wherefore, &c. (See Vol. I, 411 to 417.)

Where the note is made payable to the plaintiff, allege that fact, and omit the allegation of indorsement contained in the foregoing precedent. Such an allegation, when proper, will be sufficient to authorize proof of the assignment or transfer of the note by the payee to the plaintiff. *Brown* v. *Richardson*, 6 E. P. Smith, 472.

Where no demand of the goods and chattels is requisite by the payee or holder of such a note, the allegation of a demand may be omitted. When a demand is not necessary, see Vol. I, 415 to 417.

Complaint on a guaranty of payment.

[Title and commencement as *ante*, 925.]

That, on the 1st day of May, 1863, at Albany, N. Y., one A. B., by agreement in writing with this plaintiff, hired, and the plaintiff let to him, the building No. 55 State street, in the city of Albany, aforesaid, at the yearly rent of one hundred and fifty dollars, payable quarterly, which rent the said A. B., by said agreement, promised punctually to pay; that the defendant, in consideration of the premises and of one dollar to him

paid, and as a security for the punctual payment of said rent, then and there subscribed and delivered to the plaintiff an agreement in writing, of which the following is a copy (set out a full and literal copy of the guaranty); that the said A. B. occupied the said premises under the said agreement of hiring, from the first day of May, 1863, to the first day of May, 1864; that the said A. B. has made default in the payment of the rent thereof, and is now justly indebted to the plaintiff in the sum of one hundred dollars for the rent of said premises, due on each quarter; that the plaintiff duly demanded the rent of said A. B. on the proper quarter day for the payment thereof; and on the first day of May, 1864, he requested the said A. B. to pay the full amount of said rent, which he neglected and refused to pay, and that the whole rent of said premises remains due and unpaid; that before the commencement of this action and on the 4th day of May, 1854, the plaintiff duly notified said defendant of said demand and non-payment of rent by the said A. B., and the plaintiff then and there duly demanded payment from the defendant of said sum of one hundred dollars, which he neglected and refused to pay; and that the said rent has not been paid nor any part thereof, to the plaintiff's damage of one hundred dollars. Wherefore, &c. (See Vol. I, 623 to 635.)

Complaint on guaranty to pay for goods sold, &c.

[Title and commencement as *ante*, 925.]

That, on the 14th day of January, 1864, at Albany, N. Y., in consideration that the plaintiff, at the request of the defendant, would sell to one A. B., on a credit of three months, such goods, &c., as the said A. B. should desire to purchase of the plaintiff, the defendant promised to be answerable to the plaintiff for the payment by the said A. B. of the price of goods, &c., so sold on credit to the said A. B.; that a memorandum of said agreement was thereupon made in writing expressing the consideration thereof, and was subscribed by the defendant, of which the following is a copy (set out a full copy of the memorandum); that the plaintiff afterwards, and on the faith of said guaranty, sold and delivered to said A. B. (state the goods sold), for the sum of two hundred dollars, on a credit of three months, which sum became due therefor to the plaintiff on the 20th day of April, 1864; that payment of the same was then duly demanded of the said A. B., but the same was not paid, of all of which the defendant had due notice; that on the 21st day of April, 1864, at Albany, aforesaid, payment of the same was duly demanded by the plaintiff from the defendant, but the same has not been paid, nor any part thereof, to the plaintiff's damage of two hundred dollars. Wherefore, &c. (See Vol. I, 623 to 635.)

Complaint on guaranty of a precedent debt.

[Title and commencement as *ante*, 925.]

That on the 14th day of January, 1864, at Albany, N. Y., one A. B. was indebted to the plaintiff in the sum of one hundred dollars, which was then (or on the 16th day of January, 1864, became) due and payable to the plaintiff; that on the 15th day of January, 1864, at Albany aforesaid, the defendant made and subscribed a memorandum in writing, of which the following is a copy (set out a full copy of the memorandum), and thereby promised and agreed, for value received, to answer to the plaintiff for said debt, and to pay the same to him; that on the 17th day of January, 1864, at Albany aforesaid, payment of the said money was duly demanded by the plaintiff from the said A. B., but the same was not

paid, of all which the defendant had due notice; that on the 18th day of January, 1864, at Albany aforesaid, payment of the same was duly demanded by the plaintiff from the defendant, but the same has not been paid, nor any part thereof, to the plaintiff's damage of one hundred dollars, with interest from the 14th day of January, 1864. Wherefore, &c. (Vol. I, 623 to 635.)

On contract of sale or return.

[Title and commencement as *ante*, 925.]

That on the day of , 1865, at the city of Albany, N. Y., the plaintiff, at the request of the defendant, delivered to him (briefly describe the goods) then and before that time, the property of the plaintiff, of the value of two hundred dollars, upon the condition and consideration that the defendant would purchase the same for two hundred dollars (or at a reasonable price), or return the said property to the plaintiff within a reasonable time, which the defendant then and there undertook and promised to do; that the plaintiff has duly performed all the conditions of said agreement on his part; that although a reasonable time for the defendant to purchase or pay for said goods, or to return them to the plaintiff had elapsed before the commencement of this action, he has not done so, to the damage of the plaintiff of two hundred dollars. Wherefore, &c. (See Vol. I, 479, 480.)

For services; general form.

[Title and commencement as *ante*, 925.]

That from the first day of May, 1865, to the first day of October, 1865, the plaintiff rendered services to the defendant, at his request, as a clerk in his store (or as the fact may be); that for said services the defendant promised to pay the plaintiff fifty dollars a month (or that the same were reasonably worth fifty dollars a month, which sum became due on the day of , 1865); that no part of the same has been paid. Wherefore, &c. (See Vol. I, 679 to 694; Id., 96, 97.)

For services; upon an account.

[Title and commencement as *ante*, 925.]

That the defendant is indebted to the plaintiff on an account for the work, labor and services of the plaintiff and his servants in (state briefly the nature of the services rendered), performed at the request of the defendant, between the first day of January, 1864, and the first day of October, 1865, in the sum of one hundred and fifty dollars, with interest thereon from the first day of November, 1865; that no part of the same has been paid (except the sum of, &c.) Wherefore, &c. (See Vol. I, 96, 97, 679 to 694.)

For work and materials furnished.

[Title and commencement as *ante*, 925.]

That, from the first day of January, 1865, to the first day of July, 1865, the plaintiff rendered services to the defendant, at his request, in printing five thousand copies of a work called "Abbott's Forms," and that the plaintiff then and there furnished the paper and other materials necessary in the said work, upon the like request, and that he delivered the same to the defendant; that the said services and materials were reasonably worth the sum of dollars, which sum became due on the day of

November, 1865; that no part of the same has been paid. Wherefore, &c. (See Vol. I, 694 to 696.)

For goods sold; seller against buyer.

[Title and commencement as *ante*, 925.]

That, on the day of , 1865, at the city of Albany, N. Y., the plaintiff sold and delivered to the defendant (here designate the articles, as dry-goods, crockery, groceries, &c.); that the same were reasonably worth the sum of one hundred dollars; that no part of the same has been paid (except, &c.) Wherefore, &c. (See Vol. I, 675.)

Goods sold; price agreed on.

[Title and commencement as *ante*, 925.]

That, on the day of , 1865, at the village of Valatie, N. Y., the plaintiff sold and delivered to the defendant (briefly designate the articles); that the defendant then promised to pay therefor the sum of one hundred dollars (if a credit was given, say, on the day of , 1865); that on the day of , 1865, the plaintiff demanded of the defendant payment of the said sum; that no part thereof has been paid (except, &c.) Wherefore, &c.

Goods sold; upon an account.

[Title and commencement as *ante*, 925.]

That on the day of , 1865 (*or between two days, naming them*), the defendant was indebted to the plaintiff in the sum of one hundred dollars, on an account for goods sold and delivered to the defendant, at Valatie, N. Y.; that the same became payable on the day of , 1865, but no part thereof has been paid (except the sum of). Wherefore, &c. As to the use of the common counts, see *ante*, 319, 320; as to bills of particulars, see *ante*, 320 to 322.

For board and lodging.

[Title and commencement as *ante*, 925.]

That from the day of , 1865, until the day of , 1865, the defendant occupied certain rooms in, and part of the house No. street (or in the plaintiff's dwelling house, in the village of Johnstown), by permission of the plaintiff, and was furnished by the plaintiff, at his request, with food, attendance and other necessaries; that in consideration thereof, the defendant promised to pay to the plaintiff the sum of dollars (or that the same were reasonably worth the sum of dollars); that the defendant has not paid the same. Wherefore, &c.

Hire of personal property.

[Title and commencement as *ante*, 925.]

That between the day of , 1865, and the day of , 1865, the defendant hired from the plaintiff horses, carriages and saddles, for which he owes the plaintiff on an account thereof, the sum of one hundred dollars, which was due and payable on the day of , 1865; that no part of the same has been paid (except the sum of, &c.) Wherefore, &c.

Hire of chattels, with damages for ill use.

[Title and commencement as *ante*, 925.]

First. For a first cause of action, that on the day of , 1865, at the city of Albany, N. Y., the defendant hired from the plaintiff household furniture, plate, pictures and books, the property of the plaintiff, to wit (*describe or enumerate the articles, or refer to a schedule annexed*): for the space of six months then next ensuing, to be returned by him to the plaintiff at the expiration of said time, in good condition, reasonable wear and tear thereof excepted; that he promised to pay the plaintiff for the use thereof one hundred dollars at the expiration of said six months (or otherwise as the case may be); that no part thereof has been paid (except the sum of, &c.) *Second.* For a second cause of action, this plaintiff further states that the value of the property so hired by the defendant, as above alleged, was five hundred dollars; that the defendant, not regarding the said undertaking to return the said property in good condition, took so little care thereof, that through his negligence, carelessness and ill use, the same became broken, defaced and damaged, beyond the reasonable wear thereof, and in that condition were returned to the plaintiff, to his damage of one hundred dollars. Wherefore, &c. (See Vol. I, 327 to 330.)

Money lent; lender against borrower.

[Title and commencement as *ante*, 925.]

That, on the first day of January, 1865, at the city of Albany, N. Y., the plaintiff lent to the defendant, at his request, the sum of one hundred and fifty dollars, on the condition and terms that it should be repaid (with interest) upon demand (or repaid on the first day of May, 1865); that thereafter and before this action was commenced (or on the first day of November, 1865), the plaintiff duly demanded payment of the same from the defendant, but no part thereof has been paid (except the sum of, &c.); and the defendant is now justly indebted to this plaintiff in the sum of one hundred and fifty dollars, from the first day of May, 1865 (*or if it was to be repaid on demand, claim interest from the day of demand*). Wherefore, &c. (See Vol. I, 696 to 698.)

Money lent; assignee of lender against borrower.

[Title and commencement as *ante*, 925.]

That, on the day of , 1865, at the city of Albany, N. Y., the defendant was indebted to one A. B. in the sum of one hundred dollars, on account for money lent by said A. B. to said defendant, and for money paid, laid out and expended by said A. B. to and for the use of said defendant, and at his request; that thereafter and before the commencement of this action, the said A. B. duly assigned said indebtedness to this plaintiff, of which the defendant had due notice, but no part of the same has been paid, and there is now due and payable to this plaintiff thereon, the sum of one hundred dollars (with interest from the day of, &c.) Wherefore, &c. (See Vol. I, 91 to 94, as to actions upon assigned demands; and see *ante*, 268, 269.)

Money had and received.

[Title and commencement as *ante*, 925.]

That, on the day of , 1865, at the city of Albany, N. Y. (*or*, at sundry times between the day of , 1865, and the

day of , 1865, at the city of Troy, N. Y.), the defendant received from one A. B. (or received from the plaintiff, and as his agent, or otherwise as the case may be) the sum of one hundred dollars, to the use of the plaintiff; that thereafter, and before the commencement of this action, the plaintiff demanded payment thereof from the defendant; that he has not paid any part thereof (except the sum of, &c.) Wherefore, &c. (See Vol. I, 706 to 716.)

To recover money lost by betting.

[Title and commencement as *ante*, 925.]

That, on the day of , 1865, at the village of Saratoga Springs, the plaintiff and one A. B. entered into a wager, depending upon the result of the general election in this state, in that year, which was then about to take place (*or*, upon the event of a horse race then about to take place); that while the event upon which said wager was made was still contingent (*or*, unknown, *or both*) the plaintiff deposited in the hands of the defendant, as stakeholder, the sum of two hundred dollars, to abide the event of such wager, whereby an action has accrued to the plaintiff, according to the provisions of the statute of betting and gaming. Wherefore, &c. (See Vol. I, 713, 714.)

Money received on judgment afterwards reversed.

[Title and commencement as *ante*, 925.]

That, on or about the first day of January, 1865, the defendant recovered judgment, duly given against this plaintiff, in a justice's court, held by and before Harley Bartlett, Esq., a justice of the peace of the town of Mayfield, Fulton county, N. Y., in an action for the recovery of money lent, &c., in which action the defendant was plaintiff and this plaintiff was defendant, for the sum of one hundred dollars; that on the day of , 1865, at the said town of Mayfield, the plaintiff was compelled to pay, and did pay to the defendant, the sum of one hundred dollars in satisfaction thereof; that afterwards, on the first day of April, 1865, by the judgment of the county court of Fulton county (*or other appellate court*), said first mentioned judgment was duly reversed, but that no part of the sum paid in satisfaction thereof has been repaid to this plaintiff. Wherefore, &c.

It is not sufficient for the plaintiff to show that the first judgment was erroneous; it must be shown that the prior judgment was actually reversed, before any action will lie to recover the money paid on such prior judgment. *Marriott* v. *Hampton*, 7 Term, 269; *Walker* v. *Ames*, 2 Cow., 428; *White* v. *Ward*, 9 Johns., 232; Vol. I, 957, 958.

Where money has been collected or received upon a judgment which was valid and binding between the parties at the time of the payment, and that judgment is subsequently reversed upon an appeal, the money paid may be recovered back, although the payment was made without the compulsory process of execution. *Lott* v. *Swezey*, 29 Barb., 87, 93.

The remedies which the law gives by way of order of restitution, and otherwise, are merely cumulative, and do not bar an action for the recovery of the money. *Ib.* And where the order or judgment of reversal directs a new trial, that fact does not

prevent the recovery of the money paid on the erroneous judgment. *Sturges* v. *Allis*, 10 Wend., 355.

Money paid.

[Title and commencement as *ante*, 925.]

That, on the day of , 1865, at the city of Albany, N. Y., at the request of the defendant, the plaintiff paid to one A. B. the sum of one hundred dollars; that in consideration thereof, the defendant promised to repay the same to the plaintiff (on demand); that (on the day of , 1865, the plaintiff demanded payment of the same from the defendant, but) he has not repaid the same. Wherefore, &c. (See Vol. I, 698 to 706.)

By surety against principal, for money paid on undertaking on appeal.

[Title and commencement as *ante*, 925.]

That, on the day of , 1865, one A. B. recovered, in a justice's court, held by and before Harley Bartlett, Esq., a justice of the peace of the town of Mayfield, in Fulton county, N. Y., a judgment duly given against the defendant, for the sum of one hundred dollars, for money lent (or as the case may be), from which judgment the defendant appealed to the county court of Fulton county; that, on the day of , 1865, at the request of the defendant, the plaintiff executed an undertaking in writing, of which the following is a copy (set out a copy); that, on the day of , 1865, the said county court duly affirmed the said justice's judgment, and the sum of forty dollars was awarded and adjudged as damages and costs on the said appeal; that, on the day of , 1865, the plaintiff paid one hundred and forty dollars upon the said appeal undertaking, to the said A. B.; that, on the day of , 1865, this plaintiff demanded of the defendant the said sum of one hundred and forty dollars, but that no part of the same has been repaid to him. Wherefore, &c. (See Vol. I, 124, 125; Id., 29.)

Money due on an account.

[Title and commencement as *ante*, 925.]

That the defendant is indebted to the plaintiff in the sum of two hundred dollars, upon an account for (state briefly the consideration, as for goods sold, money lent, services rendered, &c.), at the city of Albany, N. Y., between the day of , 1865, and the day of , 1865; that the said sum of two hundred dollars became payable thereon on the day of , 1865, but no part thereof has been paid. Wherefore, &c. (As to furnishing a bill of particulars, see *ante*, 320 to 322.)

On an account stated.

[Title and commencement as *ante*, 925.]

That, on the day of , 1865, at the city of Albany, N. Y., an account was stated between the plaintiff and the defendant, and upon such statement a balance of two hundred dollars was found to be due from said defendant to the plaintiff; that (the defendant then and there promised to pay said sum, but) no part thereof has been paid. Wherefore, &c. (See Vol. I, 719 to 722 as to an account stated.)

On an award.

[Title and commencement as *ante*, 925.]

That, on the day of , 1865, at the city of Albany, N. Y., disputes and differences were subsisting between the plaintiff and the defendant, touching a demand made by the plaintiff against the defendant, for the sum of two hundred dollars for (services rendered by the plaintiff to the defendant, as a clerk in his store, and at his request, which demand the defendant disputed and refused to pay (*or other claim, as the case may be*); that for the purpose of putting an end to said disputes and differences, they then and there, by an agreement in writing, submitted themselves to the arbitrament, award and final determination of one A. B., indifferently chosen on behalf of the plaintiff and defendant, to arbitrate and determine concerning said disputes and differences, and mutually promised each other to abide by and perform his award; that thereafter the said arbitrator, having undertaken the arbitration, heard the plaintiff and the defendant, and on the day of , 1865, at the city of Albany, duly made and published his award, in writing, of and concerning the matter so referred, which award bears date the day of , 1865, and thereby he awarded and declared, that after due appearance before him on behalf of this plaintiff and said defendant, he found that the said defendant was justly indebted to this plaintiff in the said sum of two hundred dollars for the services aforesaid (*or as the case may be*); that the plaintiff has duly performed all the conditions on his part, and afterwards, and on or about the day of , 1865, he gave notice of said award to the defendant, and demanded of him payment of the said sum of two hundred dollars; that the defendant then and ever since has refused to pay the same, and there is now due from the defendant to the plaintiff thereon, the sum of two hundred dollars, with interest from the day of , 1865. Wherefore, &c. (See Vol. I, 1011 to 1036.)

For revoking submission to arbitrators.

[Title and commencement as *ante*, 925.]

That, on the day of , 1865, at the village of Valatie, N. Y., it was mutually agreed (in writing, of which the following is a copy, set out a copy) by and between the plaintiff and the defendant, that they would submit the matters in controversy then existing between them, respecting certain moneys claimed by the plaintiff to be due from the defendant (*or respecting certain unsettled accounts and matters between them, according to the terms of the agreement*), to the final award and determination of A. B., an arbitrator chosen by the said parties, so as the said arbitrator should make his award (in writing), ready to be delivered to the parties, or such of them as should require the same, on or before the day of , 1865; that afterwards, and on the said day of , 1865, in consideration of the premises, and that the plaintiff, at the defendant's request, had then promised him to perform the said agreement, in all things to be performed by the plaintiff by virtue of such agreement, the defendant then promised the plaintiff to perform the same in all things to be performed by such defendant by virtue thereof; that afterwards, on the day of , 1865, at Valatie, aforesaid, the said arbitrator proceeded upon the said submission so made as aforesaid, and the said parties then appeared before the said arbitrator and proceeded to the trial and investigation of the matters so submitted to such arbitrator; that afterwards, and on the day last mentioned, and after the investigation had been commenced, and before the cause was

finally submitted to said arbitrator, the said defendant revoked the said submission (by a revocation in writing), whereby the powers of the said arbitrator in the premises, ceased, and were annulled, and whereby the said plaintiff sustained great damages, to wit, to the amount of two hundred dollars, for his costs, expenses and damages, in employing and paying counsel, subpœnaing and paying witnesses, and in otherwise preparing for the trial of the said cause before the said arbitrator. Wherefore, &c. (See Vol. I, 1011 to 1036.)

Upon a compromise of an action.

[Title and commencement as *ante*, 925.]

That on the day of , 1865, an action was pending between the parties to this action, brought by the plaintiff to recover from the defendant the sum of two hundred dollars, which the defendant owed to the plaintiff, but which he disputed; that in consideration that the plaintiff would discontinue his said action, and would accept one hundred dollars in satisfaction of said disputed claim, the defendant promised to pay the plaintiff the sum of one hundred dollars (on the day of, &c.); That the plaintiff did, accordingly, discontinue his said action; and that no part of the said sum of one hundred dollars has been paid. Wherefore, &c. (See Vol. I, 89, 90.)

SECTION II.

COMPLAINTS FOR TORTS.

Trespass to land.

[Title and commencement as *ante*, 925.]

That on the day of , 1865, the defendant wrongfully broke and entered certain lands of the plaintiff (*briefly designating them*], and depastured the same with cattle to his damage of one hundred dollars. Wherefore, &c. (See Vol. I, 766 to 790.)

The same; another form.

[Title and commencement as *ante*, 925.]

That on the day of , 1865, at the town of Kinderhook, the defendant forcibly broke and entered (*or* wrongfully entered) upon the plaintiff's lands (*briefly designating them*), * and trod down the grass, cut the timber, and otherwise injured said premises, to the plaintiff's damage of one hundred dollars. Wherefore, &c. (See Vol. I, 766 to 790.)

The same, for cutting and converting timber.

[Title and commencement as *ante*, 925.]

As in the last form down to the *, *and then continue thus*, and then cut down and carried away the trees and timber of this plaintiff, and converted and disposed of the same to his own use, to the plaintiff's damage of one hundred dollars. Wherefore, &c.

For treble damages for injuring trees.

[Title and commencement as *ante*, 925.]

That the defendant, in the month of , 1865, wrongfully and unlawfully entered upon the land of the plaintiff, in the town of Kinder-

hook (briefly describe premises, the same then being in the possession of the plaintiff), and did, without the leave of the plaintiff, the owner thereof, cut down (*or* carry off, *or* cut down and carry off) ten maple trees and five oak trees (*or otherwise describe the wood, underwood, trees or timber*), of the value of one hundred dollars; and girdled (*or otherwise despoiled*) other trees (*designating number and kind*) of the value of twenty-five dollars; whereby the plaintiff lost said trees and timber, and the land belonging to the plaintiff was greatly damaged and lessened in value to the amount of twenty-five dollars; and thereby the defendant, by the force of section 1, of the Statute "Of Trespass on Lands," forfeited and became liable to pay to the plaintiff treble the amount of said damages. Wherefore, &c. (See Vol. I, 762 to 770. See also *Van Deusen* v. *Young*, 2 Tiff., 9; reversing *S. C.*, 29 Barb., 9.)

For diverting water from plaintiff's mill.

[Title and commencement as *ante*, 925.]

That at the times hereinafter mentioned, the plaintiff was lawfully possessed of a water mill, called a grist-mill (*or saw-mill*), situated upon the Kinneatto creek, at Vail's Mills, in the town of Mayfield; that the plaintiff then had a right to use and employ the water of said creek, and to have the same flow to and through his mill in a convenient and customary manner, according to the natural and usual flow of said creek, and without the hindrance of the defendant or any other person; that on the day of , 1865, and on various other days between that time and the day of , 1865, the defendant (knowing the premises, and intending to injure the plaintiff) wrongfully * dug up and removed the banks of said creek above the said mill, and for sixty days diverted the water (*or* a part of the water) thereof from running to and through said mill (or built a dam across said creek above said mill, and for sixty days stopped the water thereof from running to and through said mill); that, by reason of such acts of the defendant, the plaintiff's mill, which was able, and before such obstruction or diversion of water was used to grind five hundred bushels of grain each day, but that thereafter, and during the time of such obstruction or diversion, said mill was in consequence thereof unable to grind more than two hundred and fifty bushels of grain each day, to the plaintiff's damage of two hundred dollars. Wherefore, &c. (See Vol. I, 792 to 796.)

For erecting a dam below, causing backwater.

[Title and commencement as *ante* .]

(*As in the preceding form to the* *, *and then continuing:*) erected a dam and mill upon the same stream, a little below the plaintiff's said mill, and has continued the same ever since, whereby the defendant causes a backwater that hinders a free course of said stream from the plaintiff's mill, to the nuisance of his mill, and to the hindrance of his business, to his damage of two hundred dollars; that, by reason of such acts of the defendant, the plaintiff's mill, which was able, and, before such obstruction of the water of said stream, was used to grind five hundred bushels of grain each day, but that thereafter, and during the time of such obstruction of the water, the said mill was unable, in consequence of such obstruction, to grind more than two hundred and fifty bushels a day, to the plaintiff's damage of two hundred dollars. Wherefore, &c. (See Vol. I, 796 to 798.)

Nuisance arising from slaughter house.

[Title and commencement as *ante*, 925.]

That the plaintiff is, and at the times hereinafter mentioned was (the owner), and possessed of the house and lot No. , in street, in the city of , which he inhabited with his family; that the defendant was also then possessed of certain premises contiguous to (or, in the immediate vicinity of) those of the plaintiff;* that the defendant, in the month of , 1865, erected on his said premises a slaughter house and cattle pens, and thereafter † kept and slaughtered therein large numbers of cattle and hogs, thereby causing noxious and offensive smells, and loud and offensive noises, and tainting and corrupting the atmosphere, so as to render the dwelling house and premises of the plaintiff unfit for habitation, to the nuisance of the said dwelling house and premises of the said plaintiff, and to his damage of two hundred dollars. Wherefore, &c. (See Vol. I, 748 to 754.)

For continuing a nuisance.

(*As in the last form to the * and then continue:*) that ever since the day of , 1865, the defendant has maintained a slaughter house on his premises contiguous thereto (*or*, in the immediate vicinity thereof), and has (as in the last form from the † to the end of the form).

Trespass, for taking goods, &c.

[Title and commencement as *ante*, 925.]

That on the day of , 1865, at the city of Albany, N. Y., the defendant unlawfully took from the possession of the plaintiff, and carried away (*here briefly designate the goods*) the property of the plaintiff of the value of two hundred dollars (and still unlawfully detains the same from the plaintiff), to his damage of two hundred dollars. Wherefore, &c. (See Vol. I, 805 to 813.)

Trover, for converting goods, &c.

[Title and commencement as *ante*, 925.]

That before and until the time hereinafter mentioned, the plaintiff was lawfully possessed of (*very briefly designate the goods, or, where he was not in possession, say*, was entitled to the immediate possession of, *designating the goods*), which was his property, and was of the value of two hundred dollars; that on the day of , 1865, at the village of Valatie, the defendant then being in possession of said goods, unlawfully converted and disposed of the same, to his own use, to the plaintiff's damage of two hundred dollars. Wherefore, &c. (See Vol. I, 813 to 832.)

Trover, by assignee after conversion.

[Title and commencement as *ante*, 925.)

That before and until the time hereinafter mentioned, one A. B. was lawfully possessed of (*briefly designate the goods*), *or* was entitled to the immediate possession of (*designating the goods, &c.*), which was then the property of said A. B., and of the value of two hundred dollars; that on the day of , 1865, at the village of Kinderhook, the defendant, being then in possession of said goods, unlawfully converted and disposed of the same to his own use, to the damage of the said A. B. of two hundred dollars; that afterwards, and on the day of ,

1865, the said A. B. duly assigned to the plaintiff his claim against the defendant for the damages for said conversion. Wherefore, &c. (See Vol. I, 813 to 832. As to assigning causes of action for torts, see Id., 94 to 96.)

Replevin; ordinary form.

[Title and commencement as *ante*, 925.]

That at the time hereinafter mentioned, the plaintiff was lawfully possessed of (*describe the goods particularly*), of the value of one hundred dollars, then and ever since his property; that on the day of , 1865, at (*state the particular place*), the defendant wrongfully took said goods and chattels from the possession of this plaintiff, and still detains the same to the damage of the plaintiff of one hundred dollars. * Wherefore the plaintiff demands judgment against the defendant for the recovery of the possession of said goods and chattels, or for the sum of one hundred dollars, the value thereof, in case a delivery cannot be had; together with one hundred dollars, his damages and for his costs, &c. (See Vol. I, 862 to 878.)

Replevin; owner against wrongdoer for taking goods from plaintiff's bailee.

[Title and commencement as *ante*, 925.]

That at the time hereinafter mentioned the plaintiff was, and still is, the owner of (*describe the chattels particularly*), of the value of one hundred dollars; which goods were then in the possession of one A. B., to whom the plaintiff had leased or let the same for a certain term (*or otherwise as the case may be*); that on the day of , 1865, at Valatie, the defendant wrongfully took said goods and chattels from the possession of the said A. B., and still unjustly detains the same, to the plaintiff's damage of one hundred dollars; that before the commencement of this action the said term expired, and, therefore, the plaintiff became entitled to the immediate and exclusive possession of said goods and chattels. (*Then demand judgment as in the last form after the* *.)

Replevin; assignee against wrongdoer.

[Title and commencement as *ante*, 925.]

That at the time hereinafter mentioned, one A. B. was lawfully possessed of (*briefly designate the goods*) the property of the said A. B., of the value of one hundred dollars; that on the day of , 1865, at the village of Kinderhook, the defendant wrongfully and unlawfully took said goods and chattels from the possession of the said A. B., and ever since has unjustly detained the same, to the damage of the said A. B. of one hundred dollars; that on the day of , 1865, the said A. B. duly assigned to the plaintiff said goods and chattels, and his claim to damages for said taking and detention. *Demand for judgment as in the last two forms.* (See Vol. I, 862 to 878. As to the practice in replevin action, see *ante*, 183 to 216.)

For enticing away servant.

[Title and commencement as *ante*, 925.]

That before and at the time of committing the several wrongs by the said defendant as hereinafter mentioned, one A. B. was, and ever since has been, and still is the servant (or apprentice) of the plaintiff in the trade or

business of a , which the plaintiff then carried on, and still carries on, at the village of Valatie; that the defendant, well knowing the premises, but wrongfully and unlawfully intending to injure the plaintiff in his said trade or business, and to deprive him of the service of the said A. B., and of the profits and advantages which might, and otherwise would have accrued to him from such service while the said A. B. remained such servant, did, on the day of , 1865, at Valatie aforesaid, wrongfully and unlawfully entice, persuade, and procure the said A. B. to depart from, and to leave the service of the plaintiff, and the said A. B. did, at the time and place aforesaid, leave the service of the plaintiff without the plaintiff's leave or license, and against his will; that said A. B. has, from the said day of , 1865, down to the present time, remained and continued absent from the plaintiff's' service, and he has been deprived of the profits and advantages which might and otherwise would have accrued to him from such service, to the plaintiff's damage of two hundred dollars. Wherefore, &c. (See Vol. I, 741, 742.)

For a false warranty of a horse.

[Title and commencement as *ante*, 925.]

That on the day of , 1865, at the village of Kinderhook, the defendant offering to sell to the plaintiff a certain horse, warranted, and falsely and fraudulently represented said horse to be sound, kind and true, and gentle and quiet in harness; that the plaintiff, relying upon said warranty and representations, then and there purchased said horse, and paid to the defendant therefor the sum of two hundred dollars; that at the time of said warranty, representations and sale, the said horse was unsound, unkind, and untrue, and restive and ungovernable in harness, and had an infectious disease, and was actually worthless (*or*, was worth one hundred dollars less than he would have been had he been as represented and warranted), and was well known by the defendant to be so at the time of such sale, &c., and that said horse still so remains (*if special damages are claimed, allege them as follows, or as the case may be*); that the plaintiff relying upon the said representations and warranty of the said defendant, afterwards attempted to use the said horse in harness, and the said horse being unkind, unsteady, restive and ungovernable in harness, without the fault of the plaintiff, ran away, greatly injuring and breaking the plaintiff's wagon, and greatly injuring and bruising the plaintiff, whereby the plaintiff became sick, sore, and lame, and was hindered from attending to his work, as a mason, and was put to great expense in repairing his wagon and harness, and in recovering from his hurts and injuries; that by reason of the premises the plaintiff was misled and injured to his damage of two hundred dollars. Wherefore, &c. (See Vol. I, 853 to 862.)

For a fraudulent concealment on a sale.

[Title and commencement as *ante*, 925.]

That on the day of , 1865, at the village of Kinderhook, the plaintiff bought of the defendant his certain horse for the sum of two hundred dollars, then paid therefor; that the defendant then and there well knew that the said horse had the heaves, which fact was then unknown to the said plaintiff; he, the said defendant, then intentionally, falsely and fraudulently concealed the said fact from the knowledge of the said plaintiff, and thereby sold the said horse to him for the price aforesaid; and that the said horse so purchased from the defendant had the

heaves at the time of the said sale and purchase thereof to the knowledge of the said defendant, and was thereby rendered, and has since continued, utterly unfit for use, to the damage of the plaintiff of two hundred dollars. Wherefore, &c. (See Vol. I, 853 to 862.)

For fraudulently obtaining goods on credit.

[Title and commencement as *ante*, 925.]

That on the day of , 1865, at the village of Gloversville, the defendant, with intent to deceive and defraud the plaintiff by inducing the plaintiff to sell him goods, falsely and fraudulently represented to the plaintiff that he was solvent, and worth twenty thousand dollars over and above all his liabilities (*or otherwise as the representations were*); that the plaintiff relying on said representations, was thereby induced to sell (and deliver) to him (*briefly designate the goods*) of the value of two hundred dollars; that said representations were false in that (*stating in what respect*), and were then known by the defendant to be so; that no part of the price thereof has been paid (*and, if the goods were not delivered*); that the plaintiff, in preparing and shipping the said goods, and in stopping them in transit, expended twenty five dollars), to his damage of two hundred dollars. Wherefore, &c. (See Vol. I, 504 to 509.)

Fraudulently representing credit of an other person.

[Title and commencement as *ante*, 925.]

That on the day of , 1865, at the village of Gloversville, the defendant, with intent to deceive and defraud the plaintiff, falsely and fraudulently represented to him that one A. B. was in good credit and safe to be trusted, and worth the sum of twenty thousand dollars over and above his debts and liabilities (*or otherwise, as the fraudulent representations were*); that the plaintiff, relying on said representations, sold and delivered twenty-five dozens of buckskin gloves (*or other goods*), of the value of two hundred dollars, to said A. B., upon a credit of four months; but, although said time has expired, said A. B. has neglected and refused to pay for said goods; that, in truth, and as the defendant then well knew, said A. B. was, at the time of such representations, insolvent, and not in good credit, nor safe to be trusted, nor worth anything over and above his debts and liabilities; that by means of said premises the plaintiff has wholly lost said goods, and the value thereof, to his damage of two hundred dollars. Wherefore, &c. (See Vol. I, 734 to 737.)

Against owner, for act of driver of carriage.

[Title and commencement as *ante*, 925.]

That on the day of , 1865, the plaintiff was riding along the public highway, in the town of Kinderhook, in a one-horse carriage, drawn by one horse, both the property of the plaintiff, of the value of five hundred dollars; that the defendant was then the proprietor of a stage and four horses, which were then passing along said highway in the possession of the defendant (*or*, of the defendant's servant), who was driving the same; that the defendant (*or*, that the said servant) so carelessly drove and managed said stage and horses, that by reason of his negligence said stage struck the plaintiff's carriage, and overthrew and broke the same, and threw down the plaintiff's horse, breaking his leg, and threw the plaintiff out of his carriage upon the ground (*or otherwise describe the injury according to the fact*), whereby the plaintiff was bruised and wounded, and was for sixty days prevented from attending to his business, and was put to great expense in repairing his chaise, and in endeav-

oring to get healed of his own hurts, and he was obliged to kill his said horse in consequence of his leg being broken as aforesaid, to the damage of the plaintiff of two hundred dollars. Wherefore, &c. (Vol. I, 249, 276, and see *ante*, 36.)

For neglecting to return execution.

[Title and commencement as *ante*, 925.]

That at the time of issuing the execution hereinafter mentioned, the defendant was sheriff of the county of Montgomery, in this State; that on the day of , 1865, in an action in a justice's court before Joseph French, a justice of the peace in and for the town of Amsterdam, in the county of Montgomery, in this state, wherein this plaintiff was plaintiff, and one A. B. defendant, the plaintiff recovered a judgment duly given by said justice against said A. B., for two hundred dollars, which judgment was thereafter duly docketed in the office of the clerk of the county of Montgomery; that on the day of , 1865, an execution against the property of the said A. B., was duly issued by this plaintiff on said judgment, and directed, and then delivered to the defendant, as sheriff of the county of Montgomery, of which execution the following is a copy (*set out a copy, with the indorsements*); * that although (more than) sixty days elapsed after the delivery of the said execution to the defendant, and before the commencement of this action, yet he has, in violation of his duty as such sheriff, failed to return the same, to the damage of the plaintiff of two hundred dollars. Wherefore, &c.

For neglecting to levy.

(*As in the last form to the *, then continue thus:*) That although at the time of the said delivery of said execution to the defendant, there was within said county personal property belonging to the said defendant, to wit (*designate it briefly*), out of which the defendant might have satisfied the execution (of which property he then and there had notice); nevertheless, in violation of his duty as such sheriff, he failed to levy the moneys or any part thereof, as by said execution he was required to do, to the damage of the plaintiff of two hundred dollars. Wherefore, &c. (See Vol. I, 737.)

For false return to an execution.

[Title and commencement as *ante*, 925.]

That at the time of the issuing and return of the execution hereinafter mentioned, the defendant was a constable of the town of Amsterdam, in the county of Montgomery, in this state; that on the day of , 1865, this plaintiff recovered a judgment, duly given in an action in a justice's court, before Joseph French, a justice of the peace of the town of Amsterdam, in the county of Montgomery, against one A. B. for the sum of two hundred dollars; that on the day of , 1865, an execution against the goods and chattels of the said A. B. was duly issued upon said judgment by the said justice, and directed and then delivered to the defendant as such constable, of which execution the following is a copy (*set out a copy*); that the defendant, as such constable, did, within sixty days thereafter, by virtue of said execution, levy on certain goods and chattels of said A. B., within said county, of a value sufficient to satisfy said judgment, together with the defendant's fees and poundage; that notwithstanding the premises, and in violation of his duty as constable, he did not satisfy said judgment or any part thereof; but has returned

upon said execution, to the said justice, that the said A. B. had not any goods or chattels within the said county, whereby he could cause to be levied the amount of the said judgment, or any part thereof, to the damage of the plaintiff of two hundred dollars. Wherefore, &c. (See Vol. I, 746 to 748; and see *ante*, 753.)

For an escape.

[Title and commencement as *ante*, 925.]

That at the time of the issuing of the execution and of the escape, hereinafter mentioned, the defendant was one of the constables of the county of Columbia, in this state; that on the day of , 1865, in an action brought in a justice's court before James Miller, Esq., a justice of the peace of the town of Kinderhook, in the said county of Columbia, by this plaintiff against one A. B. for wrongfully and unlawfully converting certain personal property belonging to the plaintiff, this plaintiff recovered judgment duly given by said court, against said A. B., for two hundred dollars; that on the day of , 1865, an execution, in proper form, against the goods and chattels and against the person of the defendant, was duly issued by said justice upon said judgment, and delivered to the defendant as such constable, which execution was as follows, (*set out a copy*); that thereafter the defendant, as such constable, at the town of Kinderhook, arrested said A. B. pursuant to said execution; but in violation of his duty as such constable, he neglected and refused to commit the said A. B. to jail as he was by said execution demanded; and on the day of , 1865, at Kinderhook aforesaid, the said defendant, without the consent of the plaintiff, unlawfully permitted the said A. B. to escape, to the damage of the plaintiff of two hundred dollars. Wherefore, &c. (See Vol. I, 742 to 746.)

For keeping a mischievous dog, by which plaintiff was bitten.

[Title and commencement as *ante*, 925.]

That at the time hereinafter mentioned, the defendant wrongfully kept a dog, well knowing him to be of a ferocious and mischievous disposition, and accustomed to attack and bite mankind; (that the defendant, while he kept his dog as aforesaid, wrongfully and negligently suffered such dog to go at large, without being properly guarded or confined;) that on the day of , 1865, at the village of Valatie, the said dog, while in the keeping of the defendant, attacked and bit the plaintiff, and wounded him in the leg, whereby this plaintiff became lame, and so remained for six weeks, and was thereby occasioned great pain, and prevented from going on with his business as a day laborer, and was obliged to, and actually did expend twenty-five dollars in endeavoring to heal himself of said wounds, to his damage of one hundred dollars. Wherefore, &c. (See Vol. I, 846 to 853.)

For keeping a dog accustomed to bite sheep and other animals.

[Title and commencement as *ante*, 925.)

That at the time hereinafter mentioned, the defendant wrongfully kept a dog (well knowing him to be accustomed to hunt, chase, bite, worry, and kill sheep, lambs and other domestic animals), which said dog on the day of , 1865, and on other days, between that day and the commencement of this action (wrongfully came upon the plaintiff's land, and there) hunted, chased, bit and worried ten sheep and twenty

lambs of the plaintiff, being of the value of two hundred dollars; that by means thereof five of the said sheep and ten of the said lambs of the plaintiff, being of the value of one hundred dollars, died, and became of no value to the plaintiff, and the residue of the said sheep and lambs of the said plaintiff, being also of great value, were injured, and rendered of no value to the plaintiff, to his damage of two hundred dollars. Wherefore, &c. (See Vol. I, 846 to 853.)

For a penalty given by statute.

[Title and commencement as *ante*, 925.]

That the plaintiff is an inhabitant of the town of Athens, in Greene county; that on the day of , 1865, at the said town of Athens, the defendant set a stationary fish net in the creek commonly called the Murderer's creek, in the town of Athens, in the county of Greene, that is to say, in a portion of said creek running through said town, and contrary to the provisions of an act of the legislature of the State of New York, entitled "An act to prevent the destruction of fish in Murderer's creek, in the town of Athens," passed March 13th, 1838; that by reason thereof, the defendant is indebted to the plaintiff in the penalty and sum of $10, one-half for himself and one-half for the overseers of the poor of said town, for the use of the poor, and an action has accrued to the plaintiff to recover the same. Wherefore, &c. (See Vol. I, 754 to 762, 800 to 805.)

Against a witness for disobeying a subpœna.

[Title and commencement as *ante*, 925.]

That on the day of , 1865, at Broadalbin, in the county of Fulton, in this state, the plaintiff caused the defendant to be duly served with a subpœna, commanding him to attend as a witness in a justice's court held by and before William Kennedy, Esq., a justice of the peace of said town and county, on the day of , 1865, there to give testimony in behalf of the plaintiff in an action (or in proceedings) there pending, wherein this plaintiff was plaintiff, and one A. B., was defendant; that at the same time the plaintiff caused cents, the lawful fees of the said witness, to be paid (or tendered) to him; that the defendant, not regarding his duty, failed (and willfully refused) to attend as commanded, whereby the defendant became indebted to the plaintiff in the amount of fifty dollars, according to the provisions of the (59) forty-fifth section of the sixth article of the third title of the seventh chapter of the third part of the Revised Statutes of this state, entitled "Of witnesses, their privileges, and compelling their attendance;" that the plaintiff, when said action was called for trial, was nonsuited for the want of the testimony of the defendant, and his action was dismissed, with costs, and the plaintiff was compelled to pay the same, and the sum of dollars, his costs, counsel fees, and disbursements in the said action, and that the defendant in said action having become insolvent (or, the demand upon which said action was brought having meanwhile become barred by the statute of limitations), the plaintiff lost his demand, to recover which said action was brought, all of which was caused by the said refusal or neglect of the said defendant to attend as such witness, to the plaintiff's damage of dollars; that by reason of the premises the defendant forfeited to the plaintiff the sum of fifty dollars. Wherefore, &c. (See *ante*, 551 to 554; and see Vol. I, 729.)

Against depositary (or bailee) for not taking care of goods.

[Title and commencement as *ante*, 925.]

That on the tenth day of January, 1865, the plaintiff delivered to the defendant a large quantity of goods, wares and merchandise, to wit, (*designate or describe the articles*), of the value of two hundred dollars, to be by the defendant safely and securely kept for the plaintiff (for a reasonable compensation, to be paid therefor by the plaintiff to the defendant); and the said goods, &c., were to be returned and redelivered to the said plaintiff when the said defendant should be thereafter requested; that, although the said defendant received the said goods, &c., from the plaintiff, as aforesaid, and, although the said defendant was afterwards, on the first day of May, 1865, and before the commencement of this action, requested by the said plaintiff to redeliver the said goods, &c., to him, the said plaintiff; yet the said defendant, not regarding his said promise and undertaking, and his duty, did not, nor would take due and proper care of and safely and securely keep the said goods, &c., or any part thereof, for the said plaintiff, nor did, nor would he at the same time when he was so requested as aforesaid, or at any time afterwards, redeliver the same to the plaintiff; but on the contrary thereof, he, the said defendant, so carelessly and negligently conducted himself with respect to the said goods, &c., and took so little care thereof, that by and through the mere carelessness, negligence and improper conduct of the said defendant, and his servants in that behalf, that the said goods, &c., were wholly lost to the said plaintiff, to his damage of two hundred dollars, &c. Wherefore, &c.

The liabilities of a mere depositary, who receives no compensation for his services, are not so great as those of a mandatary, who is paid, or entitled to pay for his services. As to a depositary see Vol. I, 308 to 313. As to a mandatary, see Id., 314 to 318. As to gratuitous loans, and the liabilities of the borrowers, see Id., 318 to 323. As to the liabilities of a pawnee or a pledgee, see Id., 323 to 327.

Against mechanic (or bailee) for doing work badly.

[Title and commencement as *ante*, 925.]

That on the day of , 1865, at the village of Kinderhook, a written agreement was made by and between the plaintiff and the defendant, by virtue, or by the terms of which, it was agreed that the defendant should take down a certain store in the said village of Kinderhook, and would build another store at the village of Valatie for the said plaintiff, agreeably to certain plans thereof, then in the possession of the defendant; that the said contract was as follows (*set out a copy*); that afterwards, and before the commencement of this action, the defendant erected and built the said store, with the appurtenances, for the plaintiff, yet the said defendant did not build the said store agreeably to the said plans, agreement and particulars, with good and proper materials, and in a sound substantial, and workmanlike manner, but wholly neglected and refused so to do; but on the contrary, the defendant erected and built the last mentioned store, with the appurtenances, different from and contrary to the said plans, agreement and particulars, and with bad and improper materials, and in a slight, inartificial and unworkmanlike manner, contrary to the form, effect and intention of the said plans, specifications and agreement, to the damage of the plaintiff of two hundred dollars. Wherefore, &c. (See Vol. I, 331 to 338.)

Against mechanic for not using due care and skill in repairing.

[Title and commencement as *ante*, 925.]

That the defendant, being a watchmaker (*or, as the case may be*), at the city of Albany, N. Y., the plaintiff, on the day of , 1865, delivered to him a watch (*or other article*) of the plaintiff, of the value of two hundred dollars, to be repaired by the defendant for reward; that in consideration of the premises, the defendant then undertook said employment, and to use due care and skill in repairing said watch (*or other article*), and to take due care thereof while in his possession, and to redeliver the same to the plaintiff on request; that the said defendant did not take due and proper care of the said watch whilst in his possession, whereby the said watch was broken and injured; and he did not use due care or skill in repairing the said watch, but did his work in so careless and unworkmanlike manner, that no benefit was derived therefrom, and the watch was not improved, but, on the contrary, was materially injured, to the plaintiff's damage of one hundred dollars. Wherefore, &c.

This form can be modified so as to apply to the case of a delivery of materials to a mechanic to be worked up, and where the work is improperly and unskillfully done. See Vol. I, 331 to 338.

Against common carrier for loss of goods.

[Title and commencement as *ante*, 925.]

That at the times hereinafter mentioned, the defendant was a common carrier of goods for hire, between the places hereinafter mentioned; * that on the day of , 1865, at Albany, N. Y., in consideration of the sum of dollars then paid (*or*, agreed to be paid) to him by the plaintiff, the defendant agreed safely to carry to the city of Utica, N. Y., and there to deliver to James Paywell, or order (or as the case was), certain goods, the property of the plaintiff, of the value of two hundred dollars, consisting of (*here briefly describe the goods*) which the plaintiff then and there delivered to the defendant, who received the same upon the agreement and for the purposes before mentioned; that the defendant did not safely carry and deliver the said goods pursuant to said agreement, (although on the day of , 1865, at Utica, and before the commencement of this action, the plaintiff, *or*, said James Paywell, demanded the same of him); but, on the contrary, the defendant so negligently conducted and so misbehaved, in regard to the same in his calling as a carrier, that they were wholly lost to the plaintiff, to his damage of two hundred dollars. Wherefore, &c. (See Vol. I, 343 to 357.)

For breach of carrier's duty.

(*As in the last form to the *, and then continue:*) That on the day of , 1865, at Albany, N. Y., one A. B., delivered to the defendants, and they, as such carriers, received certain goods, the property of the plaintiff, to wit: (*describe the goods*) of the value of two hundred dollars, to be by the defendants safely carried to Port Jackson, in Montgomery county, N. Y., and there to be delivered to Adam W. Kline, for a reasonable reward, to be paid by the plaintiff (or as the case may be) therefor; that the defendant did not safely carry and deliver the said goods, but, on the contrary, so negligently conducted, and so misbehaved in regard to the same in their calling as carriers, that the same were wholly lost to the plaintiff, to his damage of two hundred dollars. Wherefore, &c.

This last form is a proper one to be used in those cases in which no special contract was made with the carrier, but it is sought to make him liable for a breach of his duty towards the public. See Vol. I, 346; and see Id., 346 to 357.

Against an innkeeper for loss of a trunk, &c.

[Title and commencement as *ante*, 925.]

That at the times hereinafter mentioned, the defendant was the keeper of a common inn in the city of Albany, N. Y., known as the "Merchants' Hotel;" that on the day of , 1865, this plaintiff was received by the defendant into his said inn as a traveler (or guest) together with his baggage, to wit, a trunk (*or valise, &c.,*) containing (*here designate contents lost*), the property of the plaintiff; that the defendant and his servants so negligently conducted themselves in regard to the same, that while he so remained at said inn, as a traveler (*or guest*), his said trunk (*or valise, &c.,*) was taken away from the room of this plaintiff by some person or persons to the plaintiff unknown; and thereby the same became wholly lost to the plaintiff, to his damage of two hundred dollars. Wherefore, &c. (As to the liabilities of innkeepers, see Vol. I, 338 to 343.)

SECTION III.

ANSWERS.

In selecting subjects of defense, and in framing precedents of answers, it will be intended to give such forms as shall be most useful in practice, and such subjects as have been discussed in this work. To give a form for every particular defense will not be attempted, though it is believed that such a variety will be found as will materially assist the young practitioner.

Most of the defenses interposed in actions in justices' courts, relate exclusively to the merits of the action. There are a few instances, however, in which the defense is interposed by way of abatement. One class of cases which relates to the jurisdiction of the justice is interposed as a defense, where the defendant wishes to avail himself of this defense by proof at the trial. Where an action of trespass is brought for an injury to real estate, and the defendant wishes to justify, because he is the owner of the land, or because he claims under some third person who is such owner, he must set up such defense by way of answer, or it will not be available at the trial. See forms of answer, *ante*, 252, 253. And see the whole subject explained, *ante*, 245 to 254.

Under the former system of practice there was an order of interposing defenses which has been abrogated by the Code. Under the old system all defenses, by way of abatement of the action, must have been interposed before pleading in bar of the action. An answer in *abatement* sets up such matter as defeats the present action in the manner in which it has been brought, but a judgment in favor of such a defense does not prevent a new action when properly brought. As illustrations of defenses by way of abatement, the non-joinder of all the proper plaintiffs in the action, or the non-joinder of proper and necessary defendants, or the case of a defendant who has brought a prior

action in a justice's court, in which the present plaintiff is bound to set off his demand.

An answer in *bar* is one which interposes a defense which will preclude the plaintiff from maintaining his action at any time, and under all circumstances of the case. Under the present system of practice matters in abatement and in bar may be joined in one answer, and both be tried and decided at the same time. *Sweet* v. *Tuttle*, 4 Kern., 465; *Gardner* v. *Clark*, 7 E. P. Smith, 399.

This mode of joining such defenses may lead to considerable inconvenience in practice. Suppose a matter in abatement and a matter in bar to be joined in the same answer, and that on the trial a jury should render a general verdict in favor of the defendant. In such a case it would be impossible to know whether the jury founded their verdict upon the matter in abatement or that set up in bar of the action. In such a case it would be most important to the parties to know upon which defense the jury founded their verdict; for if it was founded solely upon the matter in abatement, then the plaintiff might bring a new action in a proper form; while if the verdict was founded upon the matter set up in bar, then such verdict would be a bar to any new action by the plaintiff. The only mode of obviating this difficulty is by requiring the jury to specify in their verdict the actual ground of their decision, and then entering such finding in the entry of judgment, so that the record will show whether the cause was decided upon the matter in abatement, or upon that set up in bar of the action upon the merits. As a general rule the law requires that all the proper plaintiffs shall be joined in the action as parties. *Ante*, 274 to 277.

If such plaintiffs are not all joined the defendant may interpose an answer, setting up that fact by way of abatement of the action. *Ante*, 274 to 277.

Non-joinder of plaintiffs in actions upon contract.

[Title of action.]

The defendant answers the complaint of the plaintiff in this action, and alleges * that the supposed contract mentioned in the complaint was made by the said defendant, with this present plaintiff, and one A. B., jointly, and not otherwise; that the said A. B. is still living, and now resides in the town of   , in the county of   , in this state. Wherefore † the defendant demands judgment that this action abate, and that judgment be rendered in his favor for the costs of this action.

If the action is one in which a set-off is interposed as a defense, the claim for judgment may be as follows:

Wherefore the defendant demands judgment in his favor for the sum of two hundred dollars, besides the costs of this action.

Non-joinder of plaintiffs in actions of tort.

[Title of action.]

(*As in the last form to the *, then continue:*) that as to the taking (or the converting) of said horse (or other property), the same was, at

the time of the said supposed trespass (or conversion), the property of the plaintiff and one A. B., as tenants in common, and not of the plaintiff alone; that the said A. B. is still living and now resides in the town of, , in the county of , in this state. Wherefore (*as in the last form from the* †). (See *ante*, 274 to 277.)

Non-joinder of defendant in actions upon contract.

[Title of action.]

(*As in the last two forms to the* *, *and then continue:*) that the said work and labor mentioned in the complaint were done, and the said money mentioned was paid by the plaintiff, at the request of the defendant, jointly with one A. B., who is still living, and resides at the town of , in the county of , in this state. Wherefore (*as in two last forms from the* †).

Action brought in wrong town.

(*Title and commencement as ante* 972 *to the* *, *and then continue:*) That the said plaintiff, at the time of the commencement of this action, resided and had a legal residence in the town of Ephratah, in the county of Fulton; and that the said defendant, at the same time, resided and had a legal residence in the town of Northampton, in said county, and had not absconded from his said residence; and that this action was brought in the town of Perth, in said county, and the summons (*or other process*) was made returnable in the said town of Perth, which does not adjoin either the said town of Ephratah or Northampton. Wherefore, the defendant demands judgment that this action abate, and that he recover his costs. (See *ante*, 52 to 54.)

Another action pending.

(*Title and commencement as ante* 972 *to the* *, *and then continue:*) That at the commencement of this action there was, and still is, another action pending in a justice's court, before William Kennedy, Esq., a justice of the peace of the town of Broadalbin, in Fulton county, in this state, between the same parties as in this action, and for the same cause as that set forth in the complaint in this action. Wherefore &c. (*as in last form*). (See Vol. I, 886, 887.)

General denial.

[Title of action.]

The defendant answering the complaint in this action, denies each and every allegation thereof.

As to what matters may be proved under a general denial, see Vol. I, 879 to 884. As to what matters must be specially pleaded by setting them up in the answer, see Vol. I, 884 to 886.

General denial of one of several causes of action.

[Title of action.]

The defendant answering the first cause of action contained in the complaint in this action, denies each and every allegation of the complaint respecting the same. (See Vol. I, 879 to 884.)

Specific denial.

[Title of action.]

The defendant, answering the complaint in this action, denies that he ever indorsed said note mentioned therein.

Infancy of defendant, action on contract.

[Title and commencement as *ante*, 972.]

That at the time of making the supposed contract (and of the delivery of the goods, *or other consideration*) alleged, he was under the age of twenty-one years, to wit, twenty years of age. Wherefore, &c. (See Vol. I, 888 to 896.]

Infancy of defendant, actions of torts.

[Title and commencement as *ante*, 972.]

That at the time of the supposed wrongful acts and grievances alleged in the complaint, said horse was in the possession of the defendant, by virtue of a contract of bailment for hire, and that the alleged beating, and the fatiguing by over driving occurred, and took place through the unskillfulness, and the want of knowledge, discretion, and judgment of the defendant; that on the termination of the contract of bailment, the defendant returned and redelivered said horse to the plaintiff in full life; that at the time of the bailment, and of the committing of the supposed wrongful acts and grievances, the defendant was an infant under the age of twenty-one years, to wit, of twenty years of age. Wherefore, &c. (See Vol. I, 888 to 896.)

Insanity of defendant.

[Title and commencement as *ante*, 972.]

That at the time of making the alleged promise (*or agreement, or, of executing the alleged deed*) the defendant was of unsound mind, and thereby incapable of making (*or executing*) and understanding the same, as the plaintiff then well knew. Wherefore, &c. (See Vol. I, 896, 897, see also the next form.)

Intoxication of defendant.

[Title and commencement as *ante*, 972.]

That before, and at the time when the defendant made the said promissory note (*or indorsed it*), he was so drunken, intoxicated, and under the influence of intoxicating liquor, and thereby so entirely deprived of sense, understanding, and the use of his reason, as to be unable to comprehend the meaning, object, nature, or effect of the said promissory note (*or indorsement*), or to contract or promise thereby, of all which premises the plaintiff, before and at the time when he, the defendant, made the said note (or indorsed it), and always since, had full knowledge and notice. Wherefore, &c. (See Vol. I, 898 to 900.)

Rescission of contract.

[Title and commencement as *ante*, 972.]

That after the making of the contract alleged in the complaint, it was agreed by and between the plaintiff and the defendant, that the said contract should be waived, abandoned, and they then waived, abandoned,

and rescinded the same accordingly. Wherefore, &c. (See Vol. I, 509 to 517.)

Coverture of the defendant.

[Title and commencement as *ante*, 972.]

That at the time of making the supposed (*contract*) alleged in the complaint, the defendant was (and still is) the wife of one John Smith. Wherefore, &c. (See Vol. I, 900, 901. As to the necessity of pleading this defense, see Vol. I, 885.)

Alteration of instrument without consent.

[Title and commencement as *ante*, 972.]

That after the making (or acceptance) and issue of said promissory note (or bill) and before the commencement of this action, the same was materially altered, without the consent of the defendant, by adding the signature of A. B. as a joint maker thereof (*or, by cutting off the signature of one A. B. who was a joint maker thereof, or by adding the words, "payable at or otherwise, as the case may be*). Wherefore, &c. (See Vol. I, 903 to 913.)

Illegal demand; money lost at play.

[Title and commencement as *ante*, 972.]

That heretofore, to wit, on the day of , 1865, at the city of Albany, N. Y., the defendant and the plaintiff played together at a game of chance called , for stakes, upon credit, and not for ready money; and at said gaming the plaintiff won dollars of the defendant, which he did not pay; that thereafter the defendant gave the plaintiff the note mentioned in the complaint for said money so staked and lost at play. Wherefore, &c. (See Vol. I, 914 to 932.)

Note given for liquors sold without license.

[Title and commencement as *ante*, 972.]

That the only consideration for said note was for the sale of strong or spirituous liquors, sold by (*the payee of the note*), in quantities less than five gallons to said defendant, in the town of , and county of , the said (*the seller*), at the time of such sale, having no license for the sale thereof, as required by the laws of 18 , either grocer or tavern license; that the said note was transferred to the plaintiff after it was due, and without consideration, and after he had full knowledge of the foregoing facts. Wherefore, &c. (See Vol. I, 914 to 932.)

Higher security taken.

[Title and commencement as *ante*, 972.]

That after said account (*or note, or other simple contract debt*) became due, and before the commencement of this action, the plaintiff and this defendant agreed that the defendant should give the plaintiff his bond under seal (*or should confess judgment to the plaintiff*), for said sum so due; that in pursuance of said agreement, this defendant, on the day of , 18 , gave to the plaintiff his bond under seal, in the penal sum of dollars, conditioned for the payment by him, to said plaintiff, of said sum of dollars, so due, on the day of ,

18 , at the city of Albany, N. Y., with interest. Wherefore, &c. (See Vol. I, 936 to 939.)

Alteration of instrument.

[Title and commencement as *ante*, 972.]

That after the making (*or* acceptance) and issue of said note (*or bill*), and before the commencement of this action, the same was materially altered, without the consent of the defendant, by adding the signature of A. B., as a joint maker thereof (*or by cutting off the signature of C. D., who was a joint maker thereof, or by adding the words, "payable at ," or otherwise as the case may be*). Wherefore, &c. (See Vol. I, 903 to 913.)

The addition of a name to a joint, or a joint and several note, without the consent of the prior parties, will invalidate the instrument. Vol. I, 908, and cases. But where a negotiable promissory note had been negotiated, and the note itself was several, instead of joint or joint and several, it was held that the note was not invalidated because the holders procured a third person to subscribe it for the purpose of adding to the security of such holders, and for no other purpose. *McCaughey* v. *Smith*, 13 E. P. Smith, 39. In the last case the note was in the following form:

"$200. Ninety days after date, for value received, I promise to pay to the order of Origen Smith two hundred dollars, at the office of W. C. Curry & Co., Erie, Pa. Westfield, June 22, 1859.

Signed. W. H. HUNGERFORD,
ALFRED HALL.

Indorsed: ORIGEN SMITH."

The alteration in this case consisted in signing the name of W. H. Hungerford as already specified. The court held that this alteration did not discharge the indorser. In a very recent case, *Brownell* v. *Winnie*, 2 Tiff., 400, it was held that the addition of an other person to a several note, as maker, without the knowledge or consent of the original signer, is not such a material alteration as will avoid the note. In this last case the facts were as follows: A note was made by S., payable to W., or bearer, and it was delivered to W., who thereupon applied to the plaintiff to advance the money on it, and the plaintiff consented to do so, if he (W.) would sign his name to it, or become responsible to pay the same, whereupon W. signed his name to the note under that of S., and then delivered the same to the plaintiff, who let him have the money thereon; and it was held that the adding of the name of W. to the note did not vitiate it.

Performance.

[Title and commencement as *ante*, 972.]

That he duly performed said contract, upon his part, in all things; that on the day of , 18 , at Albany, N. Y., he delivered to the plaintiff (*or otherwise proceed to state the acts of performance*). Wherefore, &c. (See Vol. I, 939 to 944.)

Former action; and judgment for defendant.

[Title and commencement as *ante*, 972.]

That after the supposed cause of action in the complaint in this action mentioned, had accrued, and before the commencement of this action, and on the day of , 18 , at the town of Kinderhook, Columbia county, in this state, in an action brought before James Miller, a justice of the peace in and for said town and county, by the present defendant against the present plaintiff, * for the same cause of action as that set forth in the complaint in this action; that the said present defendant recovered judgment duly given, upon the merits thereof, against the said present plaintiff, for two hundred dollars (*or state the judgment given*). Wherefore, &c. (See Vol. I, 947, 948; and see Id., 944 to 958.)

Former action by defendant, and plaintiff set off his demand.

(*As in the last form to the *, then continue:*) in an action arising upon contract, and in which a set-off was allowable, the present defendant recovered judgment duly given, upon the merits thereof, against the present plaintiff, for the sum of two hundred dollars, with the costs of action; that in the said action before the said James Miller, † the present plaintiff did set off against the said demand of the present defendant, the same cause of action now set forth in the present plaintiff's complaint, which cause of action so set off as aforesaid, with the other matters in question, were then and there heard, tried and determined by the said court, before the said James Miller. Wherefore, &c. (See Vol. I, 945, 946.)

Former action in which plaintiff ought to have set off, but did not.

(*As in the last two forms to the †, then continue:*) The present plaintiff did neglect to plead or set off his demand, mentioned in his complaint as his cause of action, against the demand of the present defendant in the action aforesaid, before said James Miller; and that the action before the said James Miller was commenced after the cause of action mentioned in this complaint had accrued. Wherefore, &c. (Vol. I, 946, 947.)

Former recovery by plaintiff for same cause of action.

[Title and commencement as *ante*, 972.]

That on the day of , 18 , at the town of Kinderhook, in Columbia county, in this state, in an action brought before James Miller, a justice of the peace in and for said town and county, and at a court then and there held by and before him, the said plaintiff complained for the same cause of action mentioned and set forth in the complaint as the cause of action herein; that such proceedings were thereupon had in said court, that on the day of , 18 , at the said town of Kinderhook, the said plaintiff, by the judgment of the said court, recovered against the said defendant, by a final judgment on the merits, the sum of two hundred dollars for same cause of action mentioned in the complaint therein, with the costs of suit, &c. Wherefore, &c. (See Vol. I, 944, 945.)

Recoupment in action for goods sold, alleging breach of warranty on the sale.

[Title and commencement as *ante*, 972.]

That the said goods were sold and delivered in the piece or package, and without an opportunity for the defendant to examine the same; and

that at the time of the sale of the same it was represented and agreed by the said (*seller, or plaintiff*), that the same should be free from any defect or injury, and would be marketable; whereas, in fact, a portion of said goods, being dry goods and hosiery, were unmarketable, defective, and injured, and the colors of the same were destroyed and changed, which was unknown to the defendant at the time of the sale and delivery, whereby the defendant sustained damage to the extent of one hundred dollars, being the amount of the price of the goods so injured or defective; which said last mentioned amount the defendant claims shall be deducted from the amount that may be proved against him on the trial of this action. Wherefore the defendant demands judgment, that his said damages be deducted from the plaintiff's demand. (See Vol. I, 958 to 966.)

Recoupment in an action upon a note given for property sold, and a breach of warranty on the sale.

[Title and commencement as *ante*, 972.]

That the said note was not, before it became due, transferred and delivered to the plaintiff for value; that the said note was made and delivered by the defendant to one A. B., who was at that time an agent or servant of the plaintiff, and acting as such on behalf of the plaintiff in that transaction, in exchange for a quantity of segars; which was sold by sample at that time by said A. B. as such agent; that when said segars were delivered to this defendant, they did not correspond with the samples, and were not worth more than one hundred dollars; that as soon as the defendant learned the character of said segars, he offered to said A. B. as such agent, to return them, which he is still ready and willing to do. Wherefore the defendant claims judgment that he recoup one hundred dollars, the amount of his damages in this behalf, from the amount of said note.

Set-off.

[Title and commencement as *ante*, 972.]

That before, and at the time of the commencement of this action, the plaintiff was, and still is, indebted to the defendant in the sum of two hundred dollars for the following cause: (*here state the cause of action or matter relied on as a set-off*), out of which said sum of money so due to the defendant, which exceeds the amount of the plaintiff's demand, he hereby offers to set off to the plaintiff so much as will be sufficient to satisfy the plaintiff's damages or demand, if any, in respect to the alleged matters complained of in the complaint. Wherefore the defendant demands judgment against the plaintiff for the balance due from him to the defendant, together with costs, &c. (See Vol. I, 966 to 979.)

Statute of limitations.

[Title and commencement as *ante*, 972.]

That the cause of action stated in the complaint did not accrue within six (or other number, as the case may be) years before the commencement of this action. Wherefore, &c. (See Vol. I, 979 to 1003.)

Release.

[Title and commencement as *ante*, 972.]

That after the making of the contract, (*or other instrument*,) and the alleged breach thereof (*or after committing the supposed wrongs or*

grievances), in the complaint mentioned, and before the commencement of this action, to wit, on the day of , 18 , the plaintiff, in consideration of ten dollars, by deed released this defendant from the claim set up in the complaint (*or, executed to this defendant a release of which the following is a copy, giving copy*). Wherefore, &c. (See Vol. I, 1003 to 1011.)

Arbitrament and award.

[Title and commencement as *ante*, 972.]

That after the maturity of the note (*or after the accruing of the other cause of action*) mentioned in the complaint, to wit, on the day of , 18 , the plaintiff and the defendant (*by their bonds of arbitration*) mutually submitted the demand alleged in the complaint (*among other controversies*) to the arbitration of one A. B., who, thereafter and before the commencement of this action, to wit, on the day of , 18 , by his award duly made and published, awarded that, &c., (*stating the substance of the award*); that the defendant, on the day of , 18 , and before the commencement of this action, duly performed the said award on his part by (*here state payment or tender, &c., as the case may be*). Wherefore, &c. (See Vol. I, 1011 to 1036.)

Accord and satisfaction.

[Title and commencement as *ante*, 972.]

That after making the contract (*or other instrument*) and the alleged breach thereof, (*or, after committing the supposed grievances*), in the complaint mentioned, and before the commencement of this action, to wit, on the day of , 18 , this defendant delivered to the plaintiff, and the plaintiff accepted and received from the defendant two hundred dollars (or one valuable horse), in full satisfaction and discharge of the damages (*or moneys, or liability, or debt, or as the case may be*) in the complaint mentioned, and of all the damages by the plaintiff sustained by reason of the non-performance (*or non-payment, or neglect, or acts*) therein alleged. Wherefore, &c. (See Vol. I, 1036 to 1042).

Tender of payment.

[Title and commencement as *ante*, 972.]

That before the commencement of this action, and on the day of , 18 , at Kinderhook, N. Y., this defendant tendered to the plaintiff two hundred dollars in payment of said note and interest (*or other indebtedness*), but he refused to receive the same; that this defendant has ever since remained, and still is, ready and willing to pay to the plaintiff said sum, but the plaintiff has hitherto refused to receive the same; that this defendant now brings the said sum of two hundred dollars into court (*or, if already put into court*, that this defendant has paid said sum of two hundred dollars into this court in this action) ready to be paid to the plaintiff, if he will accept the same. Wherefore, &c. (See Vol. I, 1042 to 1059.)

Justification of entry into plaintiff's house, and seizing his goods under an execution against him.

[Title and commencement as *ante*, 972.]

First defense. A general denial.

Second defense. And for a further answer in this action the defendant says, that heretofore, to wit, on the day of , 18 , one John Doe duly recovered a judgment in a civil action against this plaintiff,

Richard Roe, before one Harley Bartlett, then (and now) a justice of the peace in and for the town of Mayfield, in the county of Fulton, in this state (*here state the manner of obtaining the judgment as stated in an action upon a justice's judgment, down to and including the rendition of judgment, as in the form, ante*, 926, 927, *and then continue*); that afterwards, to wit, on the day of , 18 , the said justice duly and legally issued an execution upon the said judgment, which execution was as follows (*set out a copy*); that said execution was on the same day delivered to this defendant, who then was (*and now is*) a constable of the county of Fulton; that afterwards, and before the return day of the said execution, this defendant, as such constable, and by virtue of said execution, did peaceably and quietly enter the dwelling house of this plaintiff (*the outer door thereof being then open*), in order to seize upon, levy and take in execution the goods and chattels of this plaintiff; that in so entering upon said premises the defendant did not make any unnecessary noise, nor do any unnecessary damage, nor remain longer than necessary to execute the said process; that afterwards, to wit, on the day of , 18 , and before the return day of said execution, the defendant at the time aforesaid did duly sell the goods and chattels so levied upon, for the sum of two hundred dollars; that afterwards, to wit, on the day of , 18 , and on the return day of said execution, the defendant duly returned said execution to the said justice, Harley Bartlett, and on the same day also paid over the said two hundred dollars to said justice, as by said execution he was commanded; that the said levy and sale are the same acts, and constitute the same cause of action alleged in the plaintiff's complaint. Wherefore, &c.

Justification of trespass by reason of defective fences.

[Title and commencement as *ante*, 972.]

First defense. A general denial.

Second defense. That the plaintiff and the defendant occupy farms which adjoin each other, and which are separated by a line fence which the plaintiff was legally bound to keep in repair; that the plaintiff, and all other tenants or occupants of the plaintiff's farm, which is the same premises mentioned in the complaint, from a time whereof the memory of man is not to the contrary, have repaired and ought to repair said fence; and the plaintiff, at and before the times mentioned in the complaint, ought to have repaired and maintained said fence so as to prevent the cattle of the defendant from escaping on to the land of the plaintiff (*if the obligation to maintain the fence rests in agreement, allege it accordingly*); that the plaintiff neglected to keep the said fence in repair, by means whereof the cattle of the defendant escaped over the said fence, and on to the premises of the plaintiff, and thereby, and without the fault of the defendant, was committed the supposed injury in the complaint alleged; that the defendant, as soon as he had notice of the escape of the said cattle, entered upon the plaintiff's premises for the sole purpose of driving said cattle therefrom, and the defendant did then drive the said cattle off from the plaintiff's premises as soon as possible, and doing no unnecessary damage, which said acts are the supposed wrongs and injuries in the complaint mentioned and alleged. Wherefore, &c. (See Vol. I, 784 to 788.)

Justification for taking property; damage feasant.

[Title and commencement as *ante*, 972.]

That at the times mentioned in the complaint, this defendant (*or one A. B.*) was lawfully possessed of the real property upon which the (*cattle*)

therein mentioned were taken, to wit, a certain meadow called, &c. (*or describe as the fact may be*); that the (*cattle*) alleged in the complaint to have been taken and carried away by the defendant, were at the time therein stated, wrongfully upon the said premises of the said defendant (*or of one A. B.*), and then and there incumbering the same and doing damage thereon; that (*acting by the command of the said A. B.*) this defendant then and there took said property, and removed the same away to a convenient distance, doing no unnecessary damage thereto, and there left the same for the use of the plaintiff; that these acts are the same of which the plaintiff complains in his complaint. Wherefore, &c. (See Vol. I, 788 to 790.

Eviction of tenant.

[Title and commencement as *ante*, 972.]

That after the making of the lease (*or after the letting*) mentioned in the complaint, and before any part of the rent in the complaint demanded became payable, the plaintiff forcibly entered upon the premises, and removed the defendant therefrom (*or from a part thereof, describing the part*), and kept him out of possession from thence until the day of , 18 (*or until after the rent became due*). Wherefore, &c. (See Vol. I, 206 to 211.)

Surrender of premises.

[Title and commencement as *ante*, 972.]

That before the rent claimed in the complaint beeame due (*or before the alleged breaches, or the breaches by this defense answered*) the defendant surrendered to the plaintiff the demised premises, and all the residue of the said term then to come, and unexpired therein, and the plaintiff then accepted such surrender, and took possession of the said premises. Wherefore, &c. (See Vol. I, 202 to 205.)

Want or failure of consideration.

[Title and commencement as *ante*, 972.]

That the bill (*or note*) mentioned in the complaint was accepted (*or given*) by the defendant, for the price of goods to be sold and delivered by the plaintiff to the defendant before the said bill (*or note*) should become due; that the defendant has always been ready and willing to buy and accept said goods from the plaintiff, and has duly performed all the conditions on his part; that the plaintiff has not sold or delivered the same to the defendant (*though the defendant, on the day of* , 18 , *at* , *duly requested him so to do*); that except as aforesaid, there never was any consideration for the acceptance or payment of said bill (*or giving as payment of said note*) by the defendant. Wherefore, &c. (See Vol. I, 106, 107, 1059, 1060.)

Statute of frauds, leasing or sale of lands.

[Title and commencement as *ante*, 972.]

That neither the said lease, though for a longer period than one year (*or said contract for the sale of said lands*), nor any note or memorandum thereof expressing the consideration, was ever in writing, and subscribed by the defendant by whom the lease (*or sale*) is alleged to have been made, or by any lawfully authorized agent of said defendant (*nor was said agreement ever partly performed.*) Wherefore, &c. (See Vol. I, 635 to 642.)

Statute of frauds; agreement not to be performed within one year.

[Title and commencement as *ante*, 972.]

That although the said agreement by its terms was not to be performed within one year from the making thereof, neither said agreement nor any note or memorandum thereof (*expressing the consideration*) was ever in writing, and subscribed by the said defendant, who is sought to be charged therewith, or by his lawful agent. Wherefore, &c. (See Vol. I, 614 to 622.

Statute of frauds; promise to answer for debt or default of another.

[Title and commencement as *ante*, 972.]

That the supposed promise in the complaint alleged is a special promise to answer for the debt (*or default, or miscarriage*) of an other person, to wit, of one A. B. in said complaint mentioned; that no note or memorandum of such contract (expressing any consideration) was made in writing, or subscribed by the party to be charged therewith, to wit, this defendant (*but on the contrary, the same was wholly without consideration*). Wherefore, &c. (See Vol. I, 623 to 635.)

Statute of frauds; sale of personal property.

[Title and commencement as *ante*, 972.)

That although the alleged contract was for the sale of goods (*or chattels, or things in action*) for the price of fifty dollars or upwards, no note or memorandum thereof was ever made in writing, and subscribed by the said defendant sought to be charged thereby, or by his lawful agent; nor did the said defendant accept or receive any part of such goods (*or any of the evidences of such things in action*); nor did the said defendant at the time pay any part of the purchase-money. Wherefore, &c. (See Vol. I, 536 to 548.)

Payment.

[Title and commencement as *ante*, 972.]

That before the commencement of this action the defendant satisfied and discharged the plaintiff's claim by payment. Wherefore, &c. (See Vol. I, 1063 to 1073.)

Payment by bill or note.

[Title and commencement as *ante*, 972.]

That after the accruing of the alleged debt, and before the commencement of this action, the defendant delivered to the plaintiff, and the plaintiff received from him, for and on account of said debt, a bill of exchange drawn by the plaintiff upon, and accepted by the defendant (*or a promissory note made by the defendant*), for the sum of two hundred dollars, payable to the plaintiff, or order, (*or bearer*) at three months after date, which period had not elapsed at the commencement of this action. Wherefore, &c. (See Vol. I, 408 to 410.)

Duress by imprisonment.

[Title and commencement as *ante*, 972.]

That the defendant at the time of the making of the said (*contract*), was impressed by the said plaintiff (*and others in collusion with him*), and

then and there detained until, by the force and duress of imprisonment, the defendant made and delivered the same. Wherefore, &c. (See Vol. I, 1073 to 1077.)

Duress by threats.

[Title and commencement as *ante*, 972.]

That the instrument in the complaint mentioned was obtained from the defendant by the plaintiff (*and others in collusion with him*) by duress of the defendant in threatening (*or beating*) the defendant, in consequence of which, and in fear and apprehension thereof, the defendant executed the instrument. Wherefore, &c. (See Vol. I, 1073 to 1077.)

Contract or instrument obtained by fraud.

[Title and commencement as *ante*, 972.]

That the plaintiff induced the defendant to make the note mentioned in the complaint, by representing that said plaintiff was authorized by one A. B. to whom defendant owed the amount of the note, to take a note to himself in satisfaction of such debt; that the said representation was false, and was made with intent to deceive and defraud this defendant; that the defendant received no consideration whatever for said note. Wherefore, &c.

Usury in making note.

[Title and commencement as *ante*, 972.]

That the note mentioned in the complaint was made and delivered to the plaintiff upon the usurious agreement between the defendant and the plaintiff, that the defendant should pay the plaintiff, and that the plaintiff should receive, reserve and secure to himself, for the loan of the money for which said note was given, a greater sum than at the rate of seven per cent per annum, to wit, at the rate of (*ten*) per cent per annum; that the said sum was deducted and reserved from the amount of said note by the plaintiff, and the balance only paid to this defendant; that is to say, that this defendant agreed to pay, and the plaintiff ageeed to receive the sum of (*twenty-five*) dollars for said loan, the plaintiff reserving and securing to himself for the loan of money on the said note, until the maturity thereof, the sum of (*twenty-five*) dollars. Wherefore, &c. (See Vol. I, 559 to 579.)

Cause of action assigned.

[Title and commencement as *ante*, 972.]

That after the sale and delivery of the goods (*or other cause of action*) in the complaint mentioned, and before the commencement of this action, the plaintiff duly assigned his cause of action against this defendant arising therefrom (*or said judgment, or other thing in action*) to one A. B., who then became, and who still is, the lawful owner and holder thereof. Wherefore, &c. (See Vol. I, 91 to 96. And see *ante*, 264 to 269.)

Mistake in amount of note.

[Title and commencement as *ante*, 972.]

That the said note was given upon a settlement of accounts between the defendant and the plaintiff, and was intended by them to be made and

received for the sum of one hundred dollars, then claimed by the plaintiff to be the amount due him from the defendant; but that when it was made, it was, by mistake of the parties, given for the sum of two hundred dollars mentioned in the complaint, instead of the sum of one hundred dollars, which was all that was due; and as to the excess, to wit, one hundred dollars, there is not, and never was any consideration. Wherefore, &c. (See Vol. I, 721, 910. See also *Seeley* v. *Engell*, 3 Kern., 542.)

License.

[Title and commencement as *ante*, 972.]

That on the day of , 18 (and at various times between that day and the day of , 18), the plaintiff gave to this defendant license to enter (*&c., according to the facts*); that under and in pursuance of said license of the plaintiff, the defendant did enter (*&c., state acts of the defendant according to the facts*), which acts are the same of which the plaintiff complains; and the defendant denies each and every allegation of the complaint inconsistent with the foregoing. Wherefore, &c. (See Vol. I, 772 to 776.)

Lien for services.

[Title and commencement as *ante*, 972.]

That said goods and chattels were manufactured by the defendant, as a carpenter and joiner (*or as the case may be*); and that he detained them by virtue of his lien as a mechanic, and the manufacturer thereof, as security for the payment of one hundred dollars, the money due him from the plaintiff for work and labor in manufacturing them; that the said sum is still due from the plaintiff therefor, and unpaid. Wherefore the defendant detained (*and still detains*) said goods and chattels. Wherefore, &c. (See Vol. I, 357 to 367.)

Replevin; title in defendant or, in a stranger.

[Title and commencement as *ante*, 972.]

That the goods and chattels mentioned in the complaint were the property of the defendant (*or the property of one A. B.*) at the time mentioned in the complaint, and not the property of the plaintiff (*if title is in the defendant, demand judgment as follows*): wherefore, this defendant demands judgment for a return of said goods and chattels, with damages for the taking and detention thereof, and for the costs of this action. (See Vol. I, 862 to 878. As to damages in replevin, see *ante*, 679 to 681; see forms of judgment, *ante*, 700, 701.)

Estoppel.

[Title and commencement as *ante*, 972.]

That the plaintiff ought not to be admitted to allege or say that the defendant is not the owner of the said horse in the complaint mentioned, because the defendant says that on the day of , 18 , at the town of , in the county of , in this state, he purchased said horse of one A. B., and paid the sum of two hundred dollars therefor; that at the time of making said purchase the said plaintiff was present and knew that this defendant was about to purchase said horse; that the said plaintiff did not at the said sale, nor at any time prior thereto, disclose to this defendant that the plaintiff claimed or owned the said horse, or any

interest in him; that this defendant made said purchase in good faith, without any notice or knowledge that the plaintiff had any interest in it, or any ownership thereof. Wherefore, &c. (See Vol. I, 1077 to 1090.)

Answer, puis darrien continuance.

[Title and commencement as *ante*, 972.]

That the plaintiff ought not to have or to maintain his aforesaid action further against this defendant, because since the last continuance of this action on the day of , 18 , to the day of , 18 , the said plaintiff by deed duly released the defendant from all claims or demands, actions, or causes of action, &c. Wherefore, &c. (See Vol. I, 1032, 1033; *Ante*, 583.)

If the matter set up in the answer arose or accrued during the trial, and before its close, the defense should be interposed by amending the answer. *Price* v. *Peters*, 15 Abb., 197.

SECTION IV.

DEMURRER.

Demurrer to complaint.

[Title of action.]

The defendant demurs to the complaint (*or to the first cause of action set forth in the complaint*) in this action, and for grounds of demurrer states, that the complaint (*or the first cause, &c.*) does not state facts sufficient to constitute a cause of action. Wherefore, &c. (See *ante*, 330 to 334.

Demurrer to answer.

[Title of action.]

The plaintiff demurs to the answer of the defendant (*or the first defense*), and states for grounds of demurrer that the facts stated in the answer are not legally sufficient to constitute a defense to this action. Wherefore, &c. (See *ante*, 330 to 334.)

SECTION V.

FORMS FOR ACKNOWLEDGMENTS.

By grantor known to the officer.

City and County of Albany, *ss:* On this 14th day of November, 1865, before me personally came C. D., to me known to be the person described in, and who executed the within (*foregoing or above*) instrument, and acknowledged the execution thereof for the uses and purposes therein mentioned.

ALVA H. TREMAIN,
Commissioner of Deeds, Albany, N. Y.
(*or Justice of Peace.*)

By husband and wife known to the officer.

Albany City and County, *ss:* On this 14th day of November, 1865, before me personally and severally came the within named E. F. and G. H., his wife, to me known to be the person described in, and who executed

the within (*or annexed*) instrument, and severally acknowledged the execution thereof, and the said G. H., on a private examination by me made apart from her husband, acknowledged that she executed such conveyance freely, and without any fear or compulsion of her said husband.

ALVA H. TREMAIN,
Justice of the Peace.

By a subscribing witness known to the officer.

RENSSELAER COUNTY, *ss:* On this 14th day of November, 1865, before me came E. F., to me known, the subscribing witness within, who, being by me sworn, did depose and say, that he resides in the town of Nassau, county aforesaid, that he knows G. H., the grantor within named, knows him to be the grantor who is described in, and who executed the within instrument, that he was present and saw the said G. H. execute the same, and that he thereupon subscribed his name as a witness thereto.

ALVA H. TREMAIN,
Justice of the Peace.

By a grantor identified by a witness.

ORANGE COUNTY, *ss:* On this fourteenth day of November, 1865, before me came the above named G. H., the grantor named in the foregoing instrument, and acknowledged that he had executed the foregoing instrument for the uses and purposes therein mentioned; and at the same time before me came A. B., to me known, who being by me sworn, did say, that he resides in the town of Goshen, county aforesaid, and that he knew the said G. H., the person making said acknowledgment, to be the individual described in, and who executed the said instrument, which to me is satisfactory evidence thereof.

A. H. TREMAIN,
Justice of the Peace.

By a husband and wife identified by a witness.

COUNTY OF DUTCHESS, *ss:* On this fourteenth day of November, 1865, L. M. and N. M., his wife, personally came before me and severally acknowledged that they had executed the within (*or foregoing*) conveyance (*or instrument*) for the uses and purposes therein mentioned; and the said N. M., on a private examination apart from her husband, acknowledged that she executed the same freely and without any fear or compulsion of her said husband, and at the same time came before me R. S., to me known, who being by me sworn, did say, that he resides in the town of Rhinebeck, in said county, and that he knew the said L. M. and N. M. to be the same individuals described in, and who executed the within conveyance, which to me is satisfactory evidence thereof.

A. H. TREMAIN,
Justice of the Peace.

By husband known and wife identified.

CITY AND COUNTY OF SCHENECTADY, *ss:* On this fourteenth day of November, 1865, before me came the within named A. B., and C., his wife, and severally acknowledged that they had executed the within instrument; and I certify that I know the said A. B. to be one of the persons described in and who executed said instrument; and the said C., on a private examination by me apart from her husband, acknowledged

that she executed the same freely and without any fear or compulsion of her husband; and at the same time before me came S. R., to me known, who, being by me sworn, did say that he resided in the city and county aforesaid, and that he knew the said C., who made the acknowledgment as aforesaid, to be the same individual described in and who executed the within conveyance, which is to me satisfactory evidence thereof.

ALVA H. TREMAIN,
Commissioner of Deeds, Schenectady, N. Y.

By two persons, one known and one identified.

COUNTY OF WARREN, *ss:* On this fourteenth day of November, 1865, before me personally came L. M. and N. O., and severally acknowledged that they had executed the foregoing instrument; and I certify that I know the said L. M. to be one of the persons described in and who executed the foregoing instrument; and at the same time appeared before me R. H., to me known, who, being by me sworn, did say that he resides in the city and county of Albany, and that he knew the said N. O. to be one of the persons described in and who executed the foregoing instrument, which is to me satisfactory evidence thereof.

A. H. TREMAIN,
Justice of the Peace.

By a person conveying by a power of attorney.

ONONDAGA COUNTY, *ss:* On the fourteenth day of November, 1865, before me came S. R., to me known, and acknowledged that he executed the within conveyance (*or instrument*) as the act and deed of B. P., therein described, by virtue of a power of attorney duly executed by the said B. P., bearing date the 1st day of July, 1865, and recorded in the office of the clerk of the county of Onondaga on the 14th day of July, 1865.

A. H. TREMAIN,
Justice of the Peace.

By under sheriff in the name of sheriff.

ESSEX COUNTY, *ss:* On this 18th day of July, 1865, J. G., to me known, before me personally came and acknowledged that he, as under sheriff of H. M., Esq., the sheriff of the county of Essex, had executed the foregoing conveyance in the name and as the act and deed of the said sheriff.

A. H. TREMAIN,
Justice of the Peace.

By witness not known, but identified, &c.

CAYUGA COUNTY, *ss:* On this fourteenth day of November, 1865, before me came R. B., who, being by me duly sworn, did depose and say that he resides in the town of Stillwater, in the county of Saratoga; that he knew L. M. within named; knew him to be the person described in and who executed the within instrument; that he saw the said L. M. execute the same, and that thereupon he subscribed his name thereto as a subscribing witness; and at the same time before me came L. S., to me known, who, being by me sworn, did say that he resides in Syracuse, in the county of Onondaga, and that he knows the said R. B. to be the same person who was a subscribing witness to the within conveyance, which is to me satisfactory evidence thereof.

A. H. TREMAIN,
Justice of the Peace.

By a subscribing witness of a deed executed by a husband and wife residing out of the state.

ALBANY CITY AND COUNTY, *ss:* On the fourteenth day of November, 1865, before me came R. P., the within subscribing witness to me known, who, being by me duly sworn, did depose and say that he resides in the city of Schenectady; that he knows the within named K. L., and P., his wife; knows them to be the persons described in and who executed the within conveyance; that he was present and saw the said K. L., and P., his wife, execute the same, and that thereupon he became the subscribing witness thereto; that at the time of such execution the said K. L., and P., his wife, were residents of the city of Boston, in the State of Massachusetts, and the said conveyance was executed in the said city of Boston.

A. H. TREMAIN,
Justice of the Peace.

By witness identified in a case similar to the last.

(Leave out in the second line of the last form the words "to me known," and add at the end of the form the following:) At the same time appeared before me B. C. to me known, who, being by me sworn, did depose and say, that he resided in the said city and county of Albany; that he was well acquainted with R. P., and knows him to be the subscribing witness to the within conveyance, which is to me satisfactory evidence thereof.

A. H. TREMAIN,
Justice of the Peace.

Proof of a deed by an incorporated company.

COLUMBIA COUNTY, *ss:* On the fourteenth day of November, 1865, K. L., to me known, came before me, who, being by me sworn, did say, that he resides in the city of Hudson, and is president of the Firemen's Insurance Company of the city of Hudson; that the seal affixed to the foregoing instrument is the corporate seal of said company, and was hereto affixed by the order of the board of directors of said company, and that he signed the same as president of the board of directors of said company, by virtue of a like order of said board of directors.

A. H. TREMAIN,
Justice of the Peace.

Proof of the execution of a deed when the subscribing witnesses are dead.

COUNTY OF ALBANY, *ss:* I hereby certify that on the fourteenth day of November, 1865, before me came B. B., to me known, and to whom the foregoing deed was by me at that time shown, and the said B. B., being by me duly sworn, did depose and say, that he resided in the town of Watervliet, in said county, and that he was well acquainted with C. C., the within grantor named; that he had frequently seen him write and knew his handwriting; that the name of that said grantor subscribed to the said deed is in the handwriting of the said C. C.; and the said B. B. further deposed and said, that he was also well acquainted with E. D., one of the subscribing witnesses to the said deed, has seen the said E. D. write frequently, and is well acquainted with his handwriting; that at the time of the date of said deed the said E. D. resided in the village of Cohoes, in said county, and has been dead for about three years; that his name subscribed as a witness to said deed is in the proper handwriting of the said E. D., deceased; and the said B. B.

further deposes, that at the time of the date of said deed he was, and for several years previous thereto had been acquainted with one A. P., a farmer residing at that time in the town of Watervliet, and a near neighbor of the said grantor, that the said A. P. died about one year since; that he was not acquainted with the handwriting of the said A. P.; that he has never known or heard of any other person of the name of A. P., and that he cannot say in whose handwriting the last mentioned name is subscribed to the said deed. And I further certify that the fact proved as aforesaid, by the said B. B., is to me satisfactory evidence of the death of all the witnesses to the said deed, and of the handwriting of E. D., one of the said witnesses, and of the handwriting of C. C., the said grantor.

A. H. TREMAIN,
Justice of the Peace.

Conveyances proved and certified, as in the last form, may be recorded in the proper office if the original deed be at the same time deposited in the same office, there to remain for the inspection of all persons desiring to examine the same. 3 R. S., 58, 5th ed.

By two husbands and their wives.

RENSSELAER COUNTY, *ss:* On this fourteenth day of April, 1865, before me personally and severally came A. A., and B., his wife, and C. C., and D., his wife, all to me known to be the persons described in and who executed the within instrument, and severally acknowledged the execution thereof for the uses and purposes therein mentioned; and the said B. and D., severally, on a private examination, by me made separate and apart from their several husbands, severally acknowledged that they severally executed the said instrument without any fear or compulsion of their several husbands.

A. H. TREMAIN,
Com. of Deeds.

By wife in separate certificates.

COUNTY OF ORLEANS, *ss:* I hereby certify that on this fourteenth day of November, 1865, before me came B. B., wife of C. B., to me known to be the person described in and who executed the within conveyance, and acknowledged, on a private examination by me, apart from her husband, that she executed the same freely, and without any fear or compulsion of her husband.

A. H. TREMAIN,
Justice of the Peace.

By a sheriff.

ORLEANS COUNTY, *ss:* On the 14th day of November, 1865, before me came D. D., to me known, sheriff of the county of Orleans, and known to me to be the person described in and also executed the foregoing instrument, and acknowledged the execution thereof, for the uses and purposes therein mentioned.

A. H. TREMAIN,
Justice of the Peace.

By an administrator, executor or trustee.

COUNTY OF WASHINGTON, *ss:* I hereby certify that on this 14th day of November, 1865, before me came E. C., to me known to be the person

described in and who executed the within instrument, and acknowledged the execution thereof, and acknowledged that he executed the same as the administrator of the goods, chattels and credits of C. O., late of the city of Albany, deceased (*or* as the executor of the last will and testament of B. A., late of the town of Watervliet, deceased; *or* as trustee of H. N., of the town of Knox).

A. H. TREMAIN,
Com. of Deeds.

Certificate of county clerk, to be annexed to the certificate of the officer taking the acknowledgment, when it is to be used in another state.

STATE OF NEW YORK,
CITY AND COUNTY OF ALBANY, CLERK'S OFFICE, *ss:* }

I, R. B., clerk of said city and county, and also clerk of the supreme, county and mayor's courts, being courts of record held therein, do hereby certify that H. H., whose name is subscribed to the certificate of proof or acknowledgment of the annexed instrument in writing, and indorsed thereon, was, at the time of taking such proof or acknowledgement, a commissioner of deeds in and for the city aforesaid, dwelling in the said city, and duly authorized to take the same, and that I am well acquainted with the handwriting of the said commissioner, and verily believe that the signature to the said certificate of proof or acknowledgment is genuine, and that the said instrument is executed and acknowledged according to the laws of the State of New York.

In testimony whereof I have hereunto set my hand and affixed [L. S.] my official seal as county clerk and clerk of said courts, this 14th day of November, 1865.

R. B., *Clerk.*

Satisfaction of a mortgage.

A mortgage bearing date the 14th day of November, 1865, executed by H. M., and B., his wife, and recorded in the clerk's office of the county of Monroe, in book No. 35 of mortgages, on pages 205, &c., on the 1st day of November, 1865, and the bonds accompanying said mortgage are redeemed and satisfied, and I hereby authorize the same to be discharged.

Dated May 10, 1859. R. O.

COUNTY OF MONROE, *ss.:* On this 10th day of May, 1859, before me came R. O., above named, to me known to be the person described in and who executed the above instrument, and acknowledged the execution thereof.

A. H. TREMAIN,
Commissioner of Deeds, Albany, N. Y.

Certificate of satisfaction written on the mortgage.

The within mortgage, and the bond accompanying the same, have been fully paid.

May 10, 1859. L. K.

(Add acknowledgment as above.)

Satisfaction of a judgment entered in a court of record acknowledged by the attorney.

SUPREME COURT—ALBANY COUNTY.

Richard Roe *agst.* John Doe.	Judgment entered May 10, 1865.

Recovery,	$524 38
Costs,	14 22
	$538 60

A. H. TREMAIN,
Plaintiff's Attorney.

The above described judgment has been fully paid and satisfied.
November 14, 1865.

A. H. TREMAIN,
Plaintiff's Attorney.

CITY AND COUNTY OF ALBANY, *ss.:* On this 14th day of November, 1865, before me came the above A. H. Tremain, attorney for the above named plaintiff, to me known to be the person who executed the above instrument of satisfaction and acknowledged the execution thereof.

JOHN JONES,
Justice of the Peace.

Satisfaction by plaintiff of a judgment of a court of record.

SUPREME COURT—ALBANY COUNTY.

John Doe *agst.* Richard Roe.	Satisfaction of judgment.

Satisfaction is acknowledged of judgment between John Doe, plaintiff, and Richard Roe, defendant, for the sum of $516.10.

Judgment entered in the judgment book of the county of Albany, on the 3d day of November, 1865.

Dated November 14, 1865. JOHN DOE.

CITY AND COUNTY OF ALBANY, *ss.:* On this 14th day of November, 1865, before me came the above named John Doe, to me known to be the person described in, and who executed the above instrument of satisfaction, and acknowledged the execution thereof.

JOHN JONES,
Justice of the Peace.

Satisfaction of a judgment of a justices' court, after the same has been docketed in the office of the county clerk.

ALBANY COUNTY COURT.

John Doe *agst.* Richard Roe.	

Judgment rendered before R. S., a justice of the peace in and for said county, on the 13th day of November, 1865, for $205.60 damages and costs.

Transcript filed and judgment docketed the 22d day of November, 1865.
I hereby acknowledge satisfaction of the above mentioned judgment.
November 25th, 1865. A. H. TREMAIN.

(Add acknowledgment as in last form.)

Certificate of county clerk that judgment has been satisfied.

SUPREME (OR COUNTY) COURT—ALBANY COUNTY.

John Doe
agst.
Richard Roe.

Recovery, ...	$153 42
Costs, ...	12 29
	$165 71

Roll filed May 13th, 1864, 3 h. P. M. A. H. TREMAIN,
Plaintiff's Attorney.

SUPREME (OR COUNTY) COURT CLERK'S OFFICE,
City and County of Albany, May 13th, 1865.

I certify that the above judgment was discharged of record the 13th day of May, 1865. R. B., *Clerk.*

Petition for a subpœna to compel a subscribing witness to prove the execution of a conveyance.

To Hon. B. B., county judge of Orleans county:

The petition of C. C. respectfully shows that one E. F. executed and delivered to your petitioner a deed of a certain piece of property, and that G. H., living in said county, is a witness to the execution of the said deed; that said E. F. has died since the execution and delivery of said deed; that the execution of the said deed has not been acknowledged or proved, and cannot be so proved without the evidence of the said G. H.; that your petitioner has applied to the said G. H., and requested him to testify touching the execution of the said deed, and that the said G. H. has refused to testify touching the execution thereof, notwithstanding your petitioner has called on the said G. H. in company with an officer empowered to take the proof of the execution thereof. Wherefore, your petitioner asks your honor to issue a subpœna requiring the said G. H. to appear before you and testify touching the execution of said instrument.

C. C.

ORLEANS COUNTY, *ss:* C. C., being duly sworn, says he has read the foregoing petition by him subscribed, and that the contents thereof are true.

C. C.

Subscribed and sworn before me,
this 15th day of Nov., 1865,
B. B., *County Judge of Orleans county.*

Subpœna for a subscribing witness to appear and testify.

To S. H., of the town of Albion, county of Orleans:

In the name of the people of the State of New York, you are hereby summoned to be and appear before me at my office, in the village of Orleans, in said county, on the 15th day of November, 1865, at 2 o'clock

in the afternoon, to testify and give evidence in regard to the execution of a certain paper in writing, purporting to be a deed of conveyance from one E. F. to C. C., to which you are a subscribing witness, as appears by the application of the said C. C. Whereof fail not. Sworn under my hand this November 10th, 1865.

B. B., *Orleans County Judge.*

Proof of service of subpœna.

County of Orleans, *ss:* H. K., being duly sworn, says, that on the 10th day of November, 1865, at Albion, in said county, he served the within (or foregoing) subpœna on the within (or foregoing) original subpœna, and at the same time giving to and leaving with him a copy of the same, and at the same time paying him fifty cents, his fees.

Sworn before me this May 10th, 1865. } H. K.

B. B., *Orleans County Judge.*

Warrant to arrest.

To the Sheriff of the County of Adams, Greeting: In the name of the people of the State of New York, you are hereby commanded forthwith to apprehend and take into custody G. H., of your county, and bring him before me, B. B., county judge of said county, at my office, in the village of Albion, in the county of Orleans, to testify and give evidence touching the execution of a certain conveyance of real estate, made by E. T. to C. C., to which deed of conveyance the said G. H. is a subscribing witness, as it appears to me of record, the said G. H. having been duly subpœnaed to be and appear before me, and to testify and give evidence in regard to the execution of the said conveyance, and having neglected and refused to attend in pursuance of said subpœna.

Given under my hand and seal this 15th day of November, 1865.

B. B., [L. S.]
Orleans County Judge.

Commitment of witness refusing to testify.

The People of the State of New York, to any constable of the county of Orleans, Greeting: Whereas G. H., who resides in the town of Albion, county aforesaid, having been brought before me on a warrant to testify and give evidence in regard to the execution of a certain deed or conveyance made by E. F. to C. C., has, without cause or reasonable excuse, refused to answer upon oath touching the matters aforesaid, you are commanded forthwith to commit and imprison him in the jail of the said county, there to remain without bail and without the liberties of the jail until he shall submit to answer upon oath as aforesaid.

Given under my hand and seal this 15th day of November, 1865.

B. B., [L. S.]
Judge of the County of Orleans.

Oath to be administered to the subscribing witness.

You do swear, in the presence of the ever living God, that you will true answers make to such questions as shall be put to you touching the execution of the deed of conveyance here shown to you.

(*Or,*) You do solemnly swear that you will make true answers to such questions as shall be put to you in regard to the execution of the deed of conveyance here shown to you. So help you God.

Oath to be administered to a person identifying the parties, or the subscribing witness, to a conveyance.

You do swear, in the presence of the ever living God, that you will true answers make to such questions as shall be put to you touching the identity of the subscribing witness (*or* of the parties) to this conveyance.

(*Or,*) You do solemnly swear that you will true answers make to such questions as shall be put to you in regard to the identity of the subscribing witness (*or* of the parties) to this conveyance. So help you God.

Affirmation to be administered to an affiant.

You do solemnly, sincerely and truly declare and affirm that the contents of this affirmation, by you subscribed, are true.

Affidavit to a deponent sworn with the uplifted hand.

You do swear in the presence of the ever living God that the contents of this affidavit, by you subscribed, are true.

Affidavit to a deponent sworn on the gospels.

You do solemnly swear that the contents of this affidavit, by you subscribed, are true. So help you God.

SECTION VI.

FORMS IN ARBITRATIONS.

General submission to arbitration.

Whereas, divers disputes and controversies have existed and arisen, and are now existing and pending between A. B., of the town of , in the county of , and C. D. of the same place: Now, therefore, we the undersigned, A. B. and C. D. aforesaid, do hereby mutually covenant and agree to and with each other that E. F., G. H. and K. L., of, &c., or any two of them, shall arbitrate, award, order and adjudge and determine of and concerning all and all manner of actions, cause and causes of action, suits, bills, bonds, judgments, quarrels, controversies, trespasses, damages, claims and demands whatsoever, now pending, existing or held by and between us, the said parties; and we do further mutually covenant and agree, to and with each other, that the award to be made by the said arbitrators, or any two of them, shall in all things by us, and each of us, be well and faithfully kept and observed; provided that the said award be made in writing, and signed by the said E. F., G. H. and K. L., or any two of them, and ready to be delivered to the said parties in difference, or such of them as shall desire the same, on or before the day of , next ensuing the date hereof.

(*If a judgment is intended to be entered on the award in pursuance of the statute, add the following clause:*) And it is hereby further mutually agreed by and between the said parties, that judgment in the supreme court of the State of New York (*or* county court of county, *or other court of law and of record*) shall be rendered upon the award to be made pursuant to this submission.

Witness our hands this 15th day of November, 1865.

A. B.
In presence of A. H. TREMAIN. C. D.

Bond of arbitration.

Know all men by these presents, that I, A. B., of the town of , in the county of , am held and firmly bound unto C. D., of the same place (*or as the case may be*), in the sum of five hundred dollars, lawful money of the United States, to be paid to the said C. D. or his certain attorney, executors, administrators or assigns, for which payment to be well and faithfully made, I bind myself, my heirs, executors, administrators, firmly by these presents, sealed with my seal, and dated the 15th day of November, 1865. *

The condition of this obligation is such that if the above bounden A. B. shall well and truly submit to the decision and award of E. F., G. H. and K. L., arbitrators named, selected and chosen, as well by and on the part and behalf of the said A. B. as of the said C. D., to arbitrate, award, order, adjudge and determine of and concerning all and all manner of actions, cause and causes of action, suits, controversies, claims and demands whatsoever, now depending, existing or held by and between the said A. B. and the said C. D., so as the said award be made in writing and signed by the said E. F., G. H. and K. L, or any two of them, and ready to be delivered to the said parties, or such of them as shall desire the same, on or before the day of , 18 , then this obligation to be void, or else to remain in full force and virtue.

(*If there is no submission in writing separate from the bond, and it is intended to have a judgment on the award in pursuance of the statute, insert the following clause:*) And the above bounden A. B. hereby agrees that judgment in the supreme court of the State of New York (*or* county court of county, *or other court*) shall be rendered upon the award to be made pursuant to this submission.

A. B. [L. S.]

Signed, sealed and delivered
in presence of
A. H. TREMAIN.

The parties should execute bonds to each other. The obligor in one will be the obligee in the other.

Bond for an award by an umpire.

(*Proceed as in last form to the *, and then continue:*) The condition of the above obligation is such that if the above bounden A. B. shall well and truly submit to the decision and award of E. F. and G. H., arbitrators indifferently named, selected and chosen as well by and on the part and behalf of the said A. B. as of the said C. D., to arbitrate, award, order, adjudge and determine of and concerning all and all manner of actions, cause and causes of action, suits, controversies, claims and demands whatsoever now depending, existing or held by and between the said A. B. and the said C. D., so as the said award be made in writing, signed by the said E. F. and G. H., and ready to be delivered to the said parties, or such of them as shall desire the same on or before the day of , 18 ,* but if the said arbitrators do not make such their award of and concerning the premises by the time aforesaid, then if the said A. B. shall, in all things, well and truly stand to, obey, perform, fulfill and keep the award, order, arbitrament, umpirage and final determination of such person as the said arbitrators shall appoint as an umpire between the said parties, of and concerning the premises aforesaid, so as the said umpire do make his award or umpirage of and concerning the said premises in writing, signed by the said umpire and ready to be

delivered to the said parties, or such of them as shall desire the same on or before the day of , 18 , then the above obligation to be void, or else to remain in full force and virtue.

(*If a judgment is intended to be entered on the award in pursuance of the statute, then add the following clause:*) and the above bounden A. B. hereby agrees that judgment in the supreme court of the State of New York (*or other court*) shall be rendered upon the award to be made pursuant to this submission.

A. B. [L. S.]

Signed and sealed in presence of
A. H. TREMAIN.

Condition providing for a third arbitrator.

The condition of this obligation is such, &c. (*as in the last form to the *, then proceed:*) But if the said arbitrators do not make such their award by the time aforesaid, then if the said A. B. shall, in all things, well and truly stand to obey, perform, fulfill and keep the award, order, arbitrament and final determination of and concerning the premises aforesaid, which either of said arbitrators shall make with such person as they shall appoint as an arbitrator to act with them, or one of them, in hearing and determining the said matters in controversy, so as the said award be made in writing and signed by the said arbitrators, or any two of them, and ready to be delivered to the said parties, or such of them as shall desire the same on or before the day of , 18 , then the above obligation to be void, or else to remain in full force and virtue, &c. (*as in last form*).

Arbitrator's oath.

You and each of you do swear that you will faithfully and fairly hear and examine the matters in controversy submitted to you as arbitrators, by and between A. B. of the one part, and C. D. of the other part, and a just award thereof make, according to the best of your understanding.

Notice of hearing before arbitrators.

In the matter of an arbitration of, and concerning certain matters in difference between A. B. of the one part, and C. D. of the other part.

Sir: Take notice that the above matter will be brought to a hearing before the arbitrators appointed therein, at the office of Alva H. Tremain, at No. 55 State street, in the city of Albany, on the 10th day of November, 1865, at ten o'clock in the forenoon of that day.

Yours, &c., A. B.

To C. D.

Oath on application for a subpœna.

You do swear that you will true answers make to such questions as I shall put to you, touching the necessity and propriety of my issuing a subpœna upon your present application for the same.

Subpœna to appear before arbitrators.

The People of the State of New York, to O. P., Q. R. and S. T.: You and each of you are commanded personally to appear and attend at the

office of Alva H. Tremain, at No. 55 State street, in the city of Albany, in the county of Albany, on the 16th day of November, 1865, at ten o'clock in the forenoon of that day, before E. F., G. H. and K. L., arbitrators, chosen to determine a controversy between A. B. on the one part, and C. D. on the other, then and there to testify as a witness in relation thereto, before the said arbitrators, on the part of the said A. B. Hereof fail not at your peril. Given under my hand this 10th day of November, 1865.

WILLIAM C. SCHUYLER,
Justice of the Peace.

Oath of witness.

You do swear that the evidence you shall give to these arbitrators (*or* this arbitrator *or* this umpire), touching and concerning the matters in difference submitted for their (*or* his) determination and award by and between A. B. of the one part, and C. D. of the other part, shall be the truth, the whole truth, and nothing but the truth. (*Or the oath may be varied as follows:*) You do solemnly, sincerely and truly affirm and declare that, &c. (*as above*).

Revocation.

To E. F., G. H. and K. L.: Take notice that I do hereby revoke your powers as arbitrators, under the submission made to you by C. D. and myself by our mutual bonds (*or* agreement in writing) dated, &c. Witness my hand and seal (*the revocation need not be under seal unless the submission was under seal*) this 16th day of November, 1865.

A. B.

Notice of revocation.

To C. D.: Take notice that I have this day revoked the powers of E. F., G. H. and K. L., arbitrators chosen to settle the matters in controversy between us, by an instrument of revocation, of which see a copy below.

Yours, &c., A. B.

(Here insert copy of revocation.)

Award.

To all to whom these presents shall come or may concern, E. F., G. H. and K. L. send Greeting: Whereas divers suits, disputes, controversies and differences have happened and arisen and are now depending between A. B., of , and C. D., of , for pacifying, composing and ending whereof the said A. B. and C. D. have entered into a written agreement, dated the day of , last past, to submit the said matters to the award and final determination of the said E. F., G. H. and K. L., arbitrators, selected by the said parties, as by reference to which agreement will more fully appear (*or* the said A. B. and C. D. have bound themselves, each to the other, in the penal sum of $, by bonds bearing date the day of , last past, with condition thereunder written, to stand to, obey, abide, perform and keep the award, order, arbitrament, final end and determination of the said E. F., G. H. and K. L., arbitrators, selected by the said parties, as by reference to the said bonds of submission will more fully and at large appear).

Now, therefore, know ye that the said E. F., G. H. and K. L., having taken upon themselves the charge and burden of the said award, and having deliberately heard the allegations and proofs of the said parties,

do by these presents arbitrate, award, order and adjudge of and concerning the premises in manner and form following, that is to say:

First. They do award, order and adjudge that the said C. D., or his representatives, shall and do, on or before the day of , next ensuing the date hereof, make and execute a good and sufficient conveyance of his interest as lessee for years of a certain farm in the possession of the said C. D., situate (*describe the premises*), pursuant and according to the true intent and meaning of certain articles of agreement bearing date on or about day of , and made between the said C. D., of the one part, and the said A. B., of the other part.

Second. The said arbitrators do further award, order and adjudge that the said C. D., his executors or administrators, shall and do, on or before the day of , next ensuing the date hereof, pay, or cause to be paid, unto the said A. B., his executors, administrators or assigns, the sum of dollars in full payment, discharge and satisfaction of and for all moneys, debts and duties due or owing unto the said A. B. by the said C. D., upon any account whatsoever, at any time before their entering into the said agreement of submission (*or* bonds of arbitration), as aforesaid.

Third. The said arbitrators do hereby further award, order and adjudge that all actions and suits commenced, brought or depending between the said A. B. and C. D. for any matter, cause or thing whatsoever, arising or existing at the time of or before their entering into the said agreement of submission (*or* bonds of arbitration), shall from henceforth cease and determine, and be no further prosecuted or proceeded in by them, or either of them, or by their, or either of their, means, consent or procurement.

And *lastly.* The said arbitrators do hereby further award, order and adjudge, that the said A. B. and C. D. shall and do, within the space of days next ensuing, the date of this present award, seal and execute unto each other mutual and general releases of all actions and causes of actions, suits, controversies, trespasses, debts, duties, damages, accounts and demands whatever, for or by reason of any matter, cause or thing whatsoever, from the beginning of the world to the date of the said agreement of submission (*or* bonds of arbitration), as aforesaid.

In witness whereof, the said arbitrators have hereunto set their hands and seals, this day of , 18 .

(*Signatures and seals.*)

Signed and sealed in presence of
ALVA H. TREMAIN.

Affidavit proving the award.

CITY AND COUNTY OF ALBANY, *ss:* Alva H. Tremain, of said city and county, being duly sworn, deposes and says: That he was present and saw E. F. and G. H. and K. L. sign, publish and declare their final award and determination in writing, between A. B., of, &c., and C. D., of, &c., bearing date the day of , 18 , and hereunto annexed; that the names E. F. and G. H. and K. L. subscribed to the said award, are the proper and genuine signatures of the said E. F., G. H. and K. L., and that they severally acknowledged the execution thereof, and that the said deponent set his name as a subscribing witness to the said award at the time of its execution and publication as aforesaid, and further he says not.

Sworn to, &c. ALVA H. TREMAIN.

Affidavit proving the bond of arbitration.

CITY AND COUNTY OF ALBANY, *ss:* Alva H. Tremain, of said city and county, being duly sworn, says: That he was present and saw A. B. sign, seal, acknowledge and deliver, as and for his act and deed, the within bond of arbitration; that the name, A. B., subscribed to the said bond is the proper and genuine signature of the said A. B., and that the said deponent set his name as a subscribing witness to the same at the time of its execution and delivery by the said A. B. as aforesaid, and further he says not.

Sworn to, &c. ALVA H. TREMAIN.

Affidavit proving the agreement of submission.

CITY AND COUNTY OF ALBANY, *ss:* Alva H. Tremain, being duly sworn, deposes and says: That he knew A. B. and C. D., the individuals described in and who executed the within agreement of submission; that he was present and saw them sign, acknowledge and deliver the same, as and for their act and deed, and that he set his name as a subscribing witness to the same, at the time of the execution and delivery of the said agreement as aforesaid.

Sworn to, &c. ALVA H. TREMAIN.

Notice of motion to confirm the award.

SUPREME COURT (*or other court*).

In the matter of an arbitration of and concerning matters in difference between A. B., of the one part, and C. D., of the other.

SIR: Take notice, that I shall move the supreme court at the next special term thereof, at the court house, in , in and for the county of , on the day of next, at the opening of the court on that day, or as soon thereafter as counsel can be heard for an order;* that the award made by the arbitrators in the above matter be confirmed, and that judgment be rendered thereon in favor of the said A. B., and for such further or other order as the court may think proper to grant; which motions will be founded upon the agreement of submission (*or* bond of arbitration) and proof thereof, and the award of said arbitrators and the proof thereof, dated the day of , 18 .

ALVA H. TREMAIN,
Attorney for A. B.

To C. D., above mentioned.

Notice of motion to vacate the award.

(*As in the last form to the *, then as follows:*) That the award made by the arbitrators in the above matter be set aside and vacated, with costs, and for such further or other order as the court may think proper to grant, which motions will be founded upon the affidavits, with copies of which you are herewith served, and also upon the agreement (*or* bond) of submission, and the award of said arbitrators.

The following are the grounds upon which it is sought to vacate said award: (*Here set forth the irregularities complained of.*)

Dated the 17th day of November, 1865.

ALVA H. TREMAIN,
Att'y for C. D.

To A. B., above mentioned.

Notice of motion to modify or correct the award.

(*As in the second before this to the *, then as follows:*) That the award made by the arbitrators in the above matter be modified and corrected in

the following particulars. (*Here set forth the particulars as to which the party desires the award to be modified or corrected, and then continue:*) And for such further and other order as the court may think proper to grant, which motions will be founded upon the said award and the agreement (*or* bond) of submission between the said parties, and also upon an affidavit, with a copy whereof you are herewith served, dated the 17th day of November, 1865.

To C. D. above mentioned.

Yours, &c.,
ALVA H. TREMAIN,
Att'y for A. B.

Order confirming award and for judgment.

At a special term of the Supreme Court (*or other court*) held at the court house in , in and for the county of on the day of , 18

Present—A. B. J., *Justice.*

[Title as in third before this.]

On reading and filing the award, &c. (*recite the papers on which the motion is founded*), and on motion of Alva H. Tremain, of counsel for A. B., one of the parties to said arbitration, no one appearing to oppose (*or*, on hearing J. S. C., of counsel for C. D., the other party to said arbitration, in opposition thereto), it is ordered that the award of the arbitrators in this matter be and the same hereby is confirmed. It is further ordered and adjudged that the said A. B. do recover against the said C. D., the sum of dollars, awarded to the said A. B. in the said award, and also dollars and cents for his costs and charges by the court now here adjudged to the said A. B., which said sum so awarded as aforesaid, and said costs and charges in the whole amount to dollars.

And it is further ordered that the said C. D. execute and deliver to the said A. B. a good and sufficient conveyance of this interest as lessee for years, of a certain farm in the possession of the said C. D., situated in the town, &c. (*describe the premises*), in the manner required in and by the said award.

Order vacating award.

[Title as in one preceding, then as follows:]

On reading and filing affidavits, and on notice of motion and the award and the agreement (*or* bond) of submission in the above matter, and on motion of Alva H. Tremain, of counsel for C. D., one of the parties to said arbitration, no one appearing to oppose (*or*, on hearing L. P. C., of counsel for A. B., the other party to said arbitration, in opposition thereto), it is ordered that the award of the arbitrators in this matter be and the same hereby is vacated, with dollars costs, to be paid by the said A. B. to the said C. D.

Judgment record.

Pleas before the Supreme Court of the State of New York, the 17th day of November, in the year of our Lord, one thousand eight hundred and sixty-five.

Witness C. L. A., *Justice of the Supreme Court.*

County , *ss:* Be it remembered that at a special term of this court, held at the court house in the village of , on the day

of February, in the year of our Lord, one thousand eight hundred and fifty-eight, A. B., by A. H. Tremain, his attorney, being in the supreme court of the State of New York, brings, according to the statute in such case made and provided, a certain submission of matters in difference between the said A. B. of the one part and C. D. of the other part, to E. F., G. H. and K. L., which submission was made by an agreement in writing, executed by the said parties, and is in the words and figures following, that is to say: (*copy agreement*); (or which submission was made by bonds of arbitration, executed by the said A. B. of the one part, one of which said bonds executed by the said C. D., in the words and figures following, that is to say: (*copy the bond*). The said agreement (*or* bond) of submission was duly proved by the affidavit of A. H. Tremain, a subscribing witness thereto, in the words and figures following, that is to say: (*copy affidavit*); and the said A. B. says, that after the making of the said submission, to wit, on the , day of last past, the said arbitrators met at the house kept by , in the village of , and as well the said C. D. as the said A. B., appeared before the said arbitrators, and the said arbitrators did then and there proceed to the hearing and examination of the matters in controversy, and of the proofs and allegations of the respective parties, and continued such hearing by adjournment from time to time, until the day of February instant, on which day last aforesaid, the said arbitrators made and signed their award in writing, under their hands and seals, in the words and figures following, that is to say: (*copy award*); which award is duly proved by the affidavit of Alva H. Tremain, a subscribing witness thereto.

And hereupon the said A. B. prays that the said award may be in all things confirmed, together with his costs and charges in and about the confirmation of said award, and the said C. D., by J. S. C., his attorney, comes and says nothing in bar or preclusion thereof; whereupon the matters aforesaid having been seen, and by the court now fully understood, and mature deliberation thereupon had:

It is hereby ordered, adjudged and determined that the said award be in all things confirmed, and that the said C. D. do execute and deliver to said A. B. a good and sufficient conveyance of his interest as lessee for years of a certain farm in the possession of the said C. D., situate in the town of (*describe the premises and the order the same as it is in the award*).

And it is hereby further ordered, adjudged and determined that the said A. B. do recover against the said C. D. the sum of dollars, so awarded, to be paid by the said C. D., and also dollars and cents for his costs by him, about his proceedings in his behalf, expended by the court aforesaid, now here adjudged to the said A. B., which damages and costs amount to dollars and cents.

Judgment signed this day of , A. D., 18 .

N. B. M., *Clerk.*

SECTION VII.

CHATTEL MORTGAGES.

Form of chattel mortgage.

To all to whom these presents shall come, Greeting: Know ye, that indebted unto in the sum of dollars and cents, being for ; now, for securing the payment of the said debt and the interest from the date hereof, to the said do hereby sell, assign and transfer to the said all the goods, chattels and property described in the following schedule, viz.: ; said property now being and remaining in the possession of ; provided always, and

this mortgage is on the express condition, that if the said shall pay to the said the sum of , with interest as follows, viz., , which said sum and interest the said hereby covenant to pay, then this transfer to be void and of no effect; but in case of non-payment of the said sum at the time or times above mentioned, together with interest, then the said shall have full power and authority to enter upon the premises of the said party of the first part, or any other place or places where the goods and chattels aforesaid may be, to take possession of said property, to sell the same, and the avails (*after deducting all expenses of the sale and keeping of the said property*) to apply in payment of the above debt, and in case the said shall at any time deem unsafe, it shall be lawful for to take possession of such property, and to sell the same at public or private sale, previous to the time above mentioned, for the payment of said debt, applying the proceeds as aforesaid, after deducting all expenses of the sale and keeping of the said property. If from any cause said property shall fail to satisfy said debt, interest, costs and charges, the said covenant and agree to pay the deficiency.

In witness whereof, have hereunto set hand and seal the day of , in the year of our Lord one thousand eight hundred and .

Sealed and delivered in presence of } A. B. [L. S.]

ALVA H. TREMAIN.

Chattel mortgage; an other form.

To all to whom these presents shall come, GREETING: Know ye, that of the first part, for securing the payment of the hereinafter mentioned and in consideration of the sum of one dollar to in hand paid, at or before the ensealing and delivery of these presents, by of the second part, the receipt whereof is hereby acknowledged, ha granted, bargained and sold, and by these presents do grant, bargain and sell unto the said part of the second part, all and all other goods and chattels whatsoever, mentioned and expressed in the schedule hereunto annexed, now remaining and being , to have and to hold, all and singular, the goods and chattels above bargained and sold, or intended so to be, unto the said part of the second part, executors, administrators and assigns for ever; and the said part of the first part, for , heirs, executors and administrators, all and singular the said goods and chattels above bargained and sold unto the said part of the second part, executors, administrators and assigns, against the said part of the first part; and against all and every person or persons whomsoever, shall and will warrant, and by these presents for ever defend upon condition, that if the said part of the first part shall and do well and truly pay or cause to be paid unto the said part of the second part, executors, administrators or assigns, the sum of , then these presents and everything herein contained, shall cease and be void. And the said part of the first part for , executors, administrators and assigns, do covenant and agree with the said part of the second part, executors, administrators and assigns, to make punctual payment of the money hereby secured; and in case default shall be made in payment of the said sum above mentioned, it shall and may be lawful for, and the said part of the first part do hereby authorize and empower the said part of the second part, executors, administrators and assigns, with the aid and assistance of any

person or persons, to enter and come into and upon the dwelling house and premises of the said part of the first part and in such other place or places, as the said goods and chattels are or may be held or placed, and take and carry away the said goods and chattels, and to sell and dispose of the same for the best price they can obtain; and out of the money to retain and pay the said sum above mentioned, with the interest and all expenses thereon, rendering the overplus (*if any*) unto the said part of the first part, executors, administrators and assigns. And until default be made in the payment of the aforesaid sum of money, the said part of the first part, to remain and continue in quiet and peaceable possession of the said goods and chattels, and the full and free enjoyment of the same, unless the said part of the second part, executors, administrators or assigns, shall sooner choose to demand the same, and until such demand be made, the possession of the said part of the first part, shall be deemed the possession of an agent or servant, for the sole benefit and advantage of principal, the said part of the second part.

In witness whereof, the said part of the first part ha hereunto set hand and seal this day of , one thousand eight hundred and .

Sealed and delivered in the presence of } A. B. [L. S.]

Chattel mortgage sale.

By virtue of a chattel mortgage executed by to dated the day of , 186 , and filed in the office of the clerk of the of on the day of , 186 , and upon which default has been made, I shall sell the property therein described and mentioned, viz.: , at public auction, at the in the of on the day of , 186 , at o'clock in the noon of that day.

Dated at the day of , 186 .

Mortgagee's Agent.

SECTION VIII.

CONTRACTS.

Bill of sale.

Know all men by these presents: That of the first part, for and in consideration of the sum of lawful money of the United States, to in hand paid, at or before the ensealing and delivery of these presents, by of the second part, the receipt whereof is hereby acknowledged, have bargained and sold, and by these presents do grant and convey unto the said part of the second part, executors, administrators and assigns, , to have and to hold the same unto the said part of the second part, executors, administrators and assigns, forever. And do for heirs, executors and administrators, covenant and agree, to and with the said part of the second part, to warrant and defend the sale of the said hereby sold unto the said part of the second part, executors, administrators and assigns, against all and every person and persons whatsoever.

In witness whereof, have hereunto set hand and seal the day of in the year one thousand eight hundred and sixty- .

Signed, sealed and delivered in the presence of }

Will.

In the name of God, amen: I, , being of sound mind and memory, and considering the uncertainty of this frail and transitory life, do therefore make, ordain, publish, and declare this to be my last will and testament: That is to say, first, after all my lawful debts are paid and discharged, I give and bequeath . Likewise, I make, constitute and appoint to be execut of this my last will and testament, hereby revoking all former wills by me made.

In witness whereof, I have hereunto subscribed my name and affixed my seal, the day of , in the year of our Lord one thousand eight hundred and . JAMES JONES. [L. S.]

The above written instrument was subscribed by the said James Jones, in our presence, and acknowledged by him to each of us; and he at the same time declared the above instrument so subscribed to be his last will and testament; and we, at his request, have signed our names as witnesses hereto, and written opposite our names, our respective places of residence.

ALVA H. TREMAIN, residing in the city of Albany, N. Y.
AMASA J. PARKER, Jr., residing in the city of Albany, N. Y.

Statute relating to the execution of wills.

Every last will and testament of real or personal property, or both, shall be executed and attested in the following manner:

1. It shall be subscribed by the testator at the end of the will.
2. Such subscription shall be made by the testator in the presence of each of the attesting witnesses, or shall be acknowledged by him to have been so made to each of the attesting witnesses.
3. The testator, at the time of making such subscription, or at the time of acknowledging the same, shall declare the instrument so subscribed to be his last will and testament.
4. There shall be at least two attesting witnesses, each of whom shall sign his name as a witness at the end of the will at the request of the testator. 3 R. S., 144, § 35, 5th ed.

The witnesses to any will shall write opposite their names their respective places of residence, and every person who shall sign the testator's name to any will by his direction, shall write his own name as a witness to the will. Whoever shall neglect to comply with either of these provisions shall forfeit fifty dollars, to be recovered by any person interested in the property devised or bequeathed, who will sue for the same. Such omission shall not affect the validity of any will, nor shall any person liable to the penalty aforesaid, be excused or incapacitated on that account from testifying respecting the execution of such will. 3 R. S., 144, § 36, 5th ed.

Agreement for the purchase and sale of land.

Articles of agreement made and concluded this 20th day of November, A. D. 1865, by and between A. B. and C. D. of Buffalo, in the State of New York.

First. The said A. B., in consideration of the sum of $500 to him paid by the said C. D., the receipt whereof is hereby acknowledged, and in further consideration of the promise of the said C. D. hereinafter contained, doth hereby promise and agree to and with the said C. D., that he will, on or before the 1st day of July next, make and deliver to the said C. D. a good and sufficient deed, with the usual covenants of warranty,

release of dower &c., of all that tract of land situate, lying and being in the town of in the county of , and State of New York, known as the &c. (*or bounded and decided as follows*).

Second. In consideration whereof, the said C. D. doth hereby promise and agree to, and with the said A. B., that he will, on such deed being tendered to him by the said A. B., on or before the 1st day of July next, pay to the said A. B. the further sum of dollars in addition to the payment already made, being the balance of the purchase-money hereby agreed upon for the said tract of land. And to the true and faithful performance of all the agreements herein contained on the part of the said A. B. and C. D., each of them binds himself, his heirs, executors and administrators to the other, and his heirs, executors and administrators.

In testimony whereof, we have hereunto set our hands on the day and year first above written.

A. B.
C. D.

Executed and delivered in presence of
ALVA H. TREMAIN.

An agreement to build a house according to a plan and specifications annexed.

Be it remembered, that on this 20th day of November, A. D. 1865, it is agreed by and between A. B. of Albany, and C. D. of Bern, in manner and form following, viz.: The said C. D. for the considerations hereinafter mentioned, doth for himself, his executors and administrators, promise and agree to and with the said A. B., his executors, administrators and assigns, that he, the said C. D. or his assigns, shall and will, within the space of four months next after the date hereof, in good and workmanlike manner, and according to the best of his art and skill, at Bern, well and substantially erect, build, set up, and finish one house or messuage, according to the draught or scheme and specifications hereunto annexed, of the dimensions following, viz., &c., and to compose the same with such stone, brick, timber and other materials, as the said A. B. or his assigns shall find and provide for the same. In consideration whereof, the said A. B. doth for himself, his executors and administrators, promise and agree to and with the said C. D., his executors, administrators and assigns, well and truly to pay, or cause to be paid unto the said C. D., or his assigns, the sum of $2,000, in manner following, that is to say, the sum of $1,000, part thereof, at the beginning of said work; the sum of $1,000 more, another part thereof, when the same shall be completely finished; and also, that he, the said A. B., his executors, administrators or assigns, shall, and will at his and their own proper expense, find and provide all the stone, brick, tile, timber and other materials, necessary for making and building the said house, and for the performance of all and every the articles and agreements above mentioned, the said A. B. and C. D. do hereby bind themselves, their executors, &c., each to the other, in the penal sum of $500, firmly by these presents.

In witness whereof, &c.

A. B.
C. D.

Contract for making flour barrels.

Memorandum of agreement made this 20th day of November, 1865, by and between A. A. of the first part, and B. B. of the second part, witnesseth: That the said A. A., for the sum of 35 cents for each and every bar-

rel hereafter made and delivered, hereby agrees to make and deliver to the said B. B. 2,000 flour barrels, the staves and heading to be of good sound seasoned white oak timber, and the hoops of black ash, round or square. The said barrels are to be manufactured in a good and workmanlike manner, and all to be delivered to the said B. B., at his flouring mill, in the city of Utica, within four months from the date of this instrument. And the said B. B. on his part, agrees to pay the said A. A. in cash, the sum of 35 cents for each and every barrel so delivered, upon the delivery of the same at his mill as aforesaid, such payment to be made as often as the said A. A. shall deliver fifty barrels, in the proper proportion for the same.

In witness whereof, the parties have hereunto set their hands the day and year first above written.

A. A.
B. B.

Agreement to sell and deliver wood.

Memorandum of agreement made this 20th day of November, 1859, by and between A. A., of the town of Half Moon, and B. B., of the village of Cohoes, witnesseth: That the said A. A., for the sum of $5 per cord, hereby agrees to sell and deliver to the said B. B., 1,000 cords of good, sound white oak wood, and to securely and properly pile the same on the east bank of the canal, just east of said village of Cohoes, on the lot of the said B. B.; said wood is to be cut during the present month of December and the months of January and February next; to be cut four feet long and properly piled on said lot, on or before the 1st day of May next; said wood, when piled as aforesaid, is to be measured by D. D., and the said B. B. agrees to pay the said A. A. the sum of five dollars for each and every cord so delivered, payment to be made by installments on each fifty cords as they are delivered, whenever, and as soon as the said A. A. shall furnish to the said B. B. the certificate of the said D. D. that such fifty cords, or additional, of wood have been delivered or properly piled in the said lot.

Witness our hands the day and year first above written.

A. A.
B. B.

Agreement with a workman or clerk.

This agreement, made this 14th day of December, 1859, between A. A., of the first part, and B. B., of the second part, witnesseth: That the said A. A. agrees faithfully and diligently to work for the said B. B., on his farm (*or* as clerk or salesman in the store of the said B. B.), at Bethlehem, in Albany county, for the period of six months, from and after the 1st day of January next, for the sum of $25 per month; in consideration of which service so to be performed, the said B. B. agrees to pay the said A. A. the sum of $25 per month, payable as follows: $10 on the 1st day of February, and $10 on the 1st day of each month following, until the whole labor shall be performed, and when the whole labor shall have been performed, then the balance of such sum as has not been theretofore paid the said A. A.

In witness whereof, the said parties have hereunto set their hands the day and year first above mentioned.

A. A.
B. B.

Agreement on a sale of wheat.

In consideration of $1 per bushel, A. A., of the town of Coeymans, hereby sells and agrees to deliver to B. B., at his store, at Coeymans

Landing, all the wheat raised and harvested by the said A. A. on his farm the present year. The said wheat is to be delivered at the said store in good, clean and merchantable order, on or before the 15th day of February, 1860, and in consideration thereof the said B. B. agrees to pay the said sum of $1 for each and every bushel so delivered upon the delivery of the same.

Witness the hands of the said A. A. and B. B., this 14th day of December, 1859.

A. A.
B. B.

SECTION IX.

HIGHWAYS.

Notice to justice or commissioner regarding animals.

To John Jones, justice of the peace of the town of (*or*, to James Jones, commissioner of highways for the town of): Take notice that I have seized and taken into my possession (*here describe the animals seized*), found trespassing on premises owned or occupied by me (*or* found running at large in the public highway, opposite to land owned or occupied by me), in the town of , county of , and State of New York, by virtue of the provisions of the act entitled "An act to prevent animals from running at large in the public highways, passed April 23, 1862."

Yours, &c., ALVA H. TREMAIN.

Notice to owners of animals — trespassing.

To all whom it may concern: Whereas, certain animal , to wit: lately seized and taken by , found trespassing on premises owned or occupied by him in the town of , county of , and State of New York, contrary to the provisions of the act entitled "An act to prevent animals from running at large in the public highways," passed April, 1862, and due notice of such seizure and taking having been given by him to me, the subscriber, a of said town, according to said act: Notice is therefore hereby given that said animal will be sold at public auction, to the highest bidder, at , in said town, on the day of , 186 , at o'clock in the noon, pursuant to the provisions of the act aforesaid.

Dated the day of , 186 .

ALVA H. TREMAIN.

Notice to owners of animals — at large.

To all whom it may concern: Whereas, certain animal , to wit: lately seized and taken by , found by him running at large in the public highway, opposite to land owned or occupied by him in the town of , county of , and State of New York, contrary to the provisions of the act entitled "An act to prevent animals from running at large in the public highways," passed April, 1862; and due notice of such seizure and taking having been given by him, to me, the subscriber, a of said town, according to said act: Notice is therefore given that said animal will be sold at public auction, to the highest bidder, at , in said town, on the day of , 186 , at o'clock in the noon, pursuant to the provisions of the act aforesaid.

Dated the day of , 186

ALVA H. TREMAIN.

GENERAL INDEX.

[N. B. In long titles, the headings of chapters, sections and other subdivisions will be printed in italics.]

ABATEMENT: Non-joinder of plaintiff, 276, 284. Non-joinder of defendant, 286, 282. Change of parties does not abate action, 282. Misjoinder of defendants on contracts, 282. Misjoinder of plaintiff in torts, 284.

ACCOUNT BOOKS: Nature of the evidence, 436, 437. Facts to be proved to render the books evidence, 438. Who is, and who is not a clerk, 438. Common law proof of sales does not render books useless, 439. Charge must be a matter of book account, 439. Books are evidence of goods, &c., sold, 439. What items not matter provable by account books, 439, 440. Entries in bank books evidence in favor of depositor, 440. Such books not evidence against depositor, 440. Not evidence of a single charge, 440. Some of the items charged must be proved, 440, 441. Proof of part of articles sufficient, 441. Two items proof enough, 441. Fairness of books, how proved, 441. Manner of keeping books, 441. Regularity of charges, 441. Kept on separate pieces of paper, 441. Informal books, how regarded, 442. Presumption in favor of books, 442. Books common to all classes, 442. Right to make changes on implied contract, 443. Items for services rendered, 443. Entries, by whom made, 444. Showing want of clerk, 444. Number of witnesses to prove dealings, 444. Credit of books for jury or justice, 444. Credit, how impeached, 445. Existence of common law proof does not invalidate books, 446. Books are evidence of value of articles, charged, 446. Entries, when to be made, 446, 447. Must be made in book in daily use, 447. Entries on separate slips not evidence, 447. Must be book of original entries, 448. Keeping ledger and day book, 448. Entries of an entire account on a separate page, 448. Entire set of books must be introduced, if any of them are, 449. Charges in gross not allowed, 449. Witness testifying from the books, 449. Copy of books not evidence, 450. Books introduced cannot be

ACCOUNT BOOKS—*continued.*
withdrawn without consent, 450. Must be received generally if at all, 450. Whole contents made evidence, 450. Books may be waived, and items proved by other evidence, 451. But books should be produced if called for, 451. License by person rendering service, 452.

ACKNOWLEDGMENTS: Of deeds, &c. See *Forms, post.* See *Admissions.*

ACTION: Definition of term, 40. Abolition of forms of, 40. Preliminaries to be considered before bringing action, 1 to 4. Action, where to be commenced, 52 to 54, Issue in, without process, 54. When deemed commenced, 55 to 59. See *Summons, Warrant, Attachment, Replevin.* See also *Jurisdiction, Process.* See also *Parties to action, Joinder of actions, Election of actions.*

ADJOURNMENTS: General principles relating to, 334. Not given for mere delay, 335. Intended to promote justice, 335. When a right even a hard action or an unconscionable defense, 335. When allowed on motion of the justice, 335. When not allowed on his motion, 335. When justice has a discretion, 336. Must not abuse his discretionary powers, 336. Adjournment on motion of plaintiff, 336. One adjournment a matter of right, 337. May be required to make oath, 337. Plaintiff cannot have more than one adjournment, 337. Adjournment on motion of defendant, 338. For how long a time granted, 338. Justice to guard rights of both parties, 338, 339. *Second for further adjournment,* 339. Defendant may have, 339, 340. Not granted as of course, 340. Plaintiff not entitled to it at all, 340. Defendant must show due diligence, 340. Excuses for want of diligence, 340, 341. Practice in cases of doubt, 341. Justice may sometimes impose terms, 341. Stipulation to allow plaintiff an adjournment, 341, 342. *Adjournment when applied for,* 343. By plaintiff at joining issue, 343. By defendant at any time within ninety days of

ADJOURNMENTS — *continued.* issue, 343. Not allowed after jury sworn, 343. Nor after trial began before justice, 343. Delaying trial for absent witness, 343. How long may hold open court, 344. Disagreement of jury does not give a right to insist on adjournment, 344. May hold open to attach a material witness, 345. *Where to apply for adjournment*, 345. *How to apply therefor*, 345. Must appear in person or by attorney, 346. Cannot adjourn in absence of both parties, 346, 347. Must show absence of material witness or testimony, 347. Stating what witness will prove, 347. Cannot be required of defendant unless bad faith is evident, 348. If defendant refuses to be sworn, adjournment may be denied, 348. *Oath on application for*, 349. *Affidavit for form* of, 349. Proofs usually made orally, 350. *Statutory requirements for adjournment*, 350. Must be issue if both parties appear, 350. Must be oath, if required, 350. Defendant must give bond if required, 350. Plaintiff may waive bond, 351. So he may insist upon having it, 351. Need not give new bond on such adjournment, 351. Forms of bonds, 351, 352. No liability on bond unless adjournment granted, 352. Conditions of bond, 353. What is a breach of condition, 353. Objecting to surety, 353. Justification of surety, 353. Due diligence of defendant, 354. Excuses for want of, 354, 355. What is due diligence, 354, 355. *What is ground for adjournment*, 355. Absence of material witness, 355. Sickness of defendant or family, 355, 356. Absence of counsel, 356. When a matter of right, 356. *How long granted*, 356. *In warrant cases*, 357. Defendant must show absence of witness, 357. Must give security, or remain in custody, 357. How long adjourned first time, 358. *When adjournment may be refused*, 358. *When it is a discontinuance of action*, 358 to 360.

ADMINISTRATOR: May sue but cannot be sued in a justice's court, 28. Parties plaintiff, 270, 313.

ADMISSIONS: Made for purposes of cause, 371. Made by pleadings, how far conclusive, 371. Admissions made on trial in open court, 372. Are evidence against party making them, 372. Statement of party as a witness is evidence against him, 372. So of answers as a witness, 372. Otherwise if answer compulsory, 372. Statements of third persons, when evidence, 372. Wife's statements do not bind husband, 373. May do so if she is agent, 373. Admissions of attorney during trial, 374. Of agent, within scope of authority, 373. Not within scope of authority or business, 374. Of deputy sheriff, 374. Of master of vessel, 374 Of one party does not bind another, 375. Of one of several parties to renew debt barred by statute of limitations, 375. By one of several partners, when evidence, 375. Not after dissolution, 375. By principal as against surety, 376. By a deceased person as against strangers, 376. By former owner of personal property, 376. By former owner of negotiable paper, 377. By former owner of chose in action, 377. Of intestate as against his administrator, 377. Of assignor as against assignee, 377. Offers of compromise not evidence, 378. Otherwise of admission of particular fact, 378. By letter written "without prejudice," 378. Arising from acts of party, 379. By putting refusal upon false grounds, 379. By silence when party bound to speak, 379. By acquiescence, 380. By not denying assertions of other party, 380. When not evidence, 380. Declarations not evidence in party's own favor, 381. Value of admissions, 381. Never conclusive, unless by estoppel, 381. Must be taken together, 381, 382. Qualification of this rule, 382, 383. When made in several interviews, 383. Not evidence in party's own favor, 383. Admission must be clearly proved, 384. Must be clear and full as to identity, 384. Not binding if mistaken as to the law, 384. Effect of judicial admissions by acts, 384. Of one defendant does not bind another in actions of tort, 385. Exceptions in case of conspiracy, 385. Are evidence againt party making them, 385. As a part of the *res gestæ*, 385. Declarations of agent while acting, 385. In cases of breach of marriage promise, 385. To prove fraud, 386. When evidence in favor of party making them, 386.

AFFIDAVITS: *In attachment cases*, 126, 127. *Must always be affidavit to authorize issuing any attachment*, 128. Must be in writing, and sworn to, 128. Should be filed with justice, 128. Whose duty it is to draw them, 128. Fees for drawing them, 128. *Should not be entitled*, 129. *When to be made*, 129. *How often same affidavit may be used*, 129. Cannot be used more than once, 129. *Where to be made*, 130. Must be made in the county in which the justice resides, 130. Need not be before justice issuing the attachment, 130. *Must state the nature of the plaintiff's demand*, 130. Should state facts plainly and positively, 131. Where attachment is founded upon a judgment, 131, 132. *Must show demand is due from the defendant personally*, 132. *When liabilities of defendants are joint*, 133. *Demands against corporations*, 134. *Fictitious name of defendant*, 134. *Must show amount of plaintiff's demand*, 134. *By whom made*, 135. May be by plaintiff or his agent, 135. May be by other witnesses, 135. Compelling attendance of witnesses, 135. Should show a cause of action on contract, 136. Should show a case affirmatively, 136. *Hearsay evidence not competent*, 136. *Should show amount of debt or balance*, 136. *Must not state facts on mere belief*, 137. *Facts not to*

AFFIDAVITS — *continued.*
be stated by way of recital, 138. *Satisfactory to the justice*, 138. Must be legal and sufficient evidence, 138, 139. Constable's return not proof of concealment of defendant, 139. Justice's right to weigh the proofs, 139. *Facts and circumstances must be stated*, 139. Must state grounds for affidavit, 140. Must state facts to prove those grounds, 140. General assertions not sufficient, 140. Cases held defective, 141, 142. Cases held sufficient, 143, 144. *Affidavits when sufficient collaterally*, 144. *Proofs in case of attachment under the Revised Statutes*, 145, 146. *Departed from county, &c.*, 145. *Keeps concealed, &c.*, 145. *Proofs in case under non-imprisonment act*, 146. *About to remove property*, 146. *Has disposed of property*, 146. *Has assigned his property*, 147. *About to assign*, 147. *Venue in affidavits*. 147. Venue an essential part of affidavit, 148. Jurat, and what it is, 148. *Oath to affidavit*, 148. *Signing affidavit*, 148. Signature not indispensable, 148. But ought to be required by justice, 148. *Joinder of classes of cases*, 149. Election as to judgment taken, 150. *Original affidavits defective*, 150. Cannot be amended, 150. Defects cannot be supplied by new proofs, 150. *Quashing attachments for defective papers*, 151. Duty of justice as to quashing, 151. *Controverting affidavits for attachments*, 151. GENERAL POINTS AS TO AFFIDAVITS, 153. *Manner of drawing affidavits*, 153, 154. AFFIDAVIT FOR SHORT SUMMONS, 80. *What facts should be stated in it*, 80, 81. Need not be made by plaintiff in person, 82. *By non-resident plaintiff against resident defendant*, 82. *When all parties non-residents*, 84. AFFIDAVIT FOR WARRANT, 96. Must be affidavit in all cases, 96, 97. What affidavit should contain, 97, 98. Belief no proof, 98. Proof to satisfaction of justice, 99. Stating amount of plaintiff's demand, 100. *By whom affidavit is to be made*, 100. By any one knowing the facts, 100. *Original affidavits defective*, 101. *What the affidavits should show*, 102, 103. Forms of affidavits, 104. Affidavit for warrant to detain canal boats, 109. AFFIDAVITS FOR REPLEVIN PROCESS, 186. *Must be affidavit in all cases*, 186. *Who should draw it*, 186, 187. Fees to justice for drawing it, 187. *Who to draw copies for service*, 187. Fees to constable for drawing, 188. *Who to make affidavits*, 188. By plaintiff, or some one in his behalf, 188. *Not to be entitled*, 189. *Belief as to facts stated*, 189. *Description of property claimed*, 189. Must be particularly described, 189, 190. *Ownership, how stated*, 190. *Right to immediate possession, how stated*, 190. *Wrongfully withheld, &c.*, 191. *Stating cause of detention, &c.*, 191. *That it is not taken for any tax fine, &c.*, 191. When property is exempt, 192. *Actual value of property*, 192. *General rules as to affidavits*, 192. *Indorsing direction upon affidavit*, 192. *Controverting affidavits*, 192. *Defective affidavits*, 193. *Form of affidavits*, 193, 194. *Not necessary on appeals*, 771. AFFIDAVIT THAT JUSTICE IS A MATERIAL WITNESS, 239. Facts to be stated in affidavit, 239, 240. Must state facts fully, 240, 241. Must show materiality of justice as a witness, 242. Form of affidavit, 243. In what actions, 242. Justice bound to swear party to affidavit, 244. AFFIDAVIT FOR ADJOURNMENT, 349. See title *Appeal*.

AFFINITY: Disqualifies justice, 24 to 27. Judgment rendered will be erroneous, 25, 26. It will also be void, 27. *May be assigned as error in fact on an appeal*, 27. Disqualifies a juror, 599, 601.

ALTERATION OF INSTRUMENTS: Material alteration avoids instrument, 434. Time of making them, 434. Explanation of apparent alteration, 434, 435. Burden of proof, 435. Different colored inks, 435. Filed paper presumption as to alteration, 435.

ALIEN: Cannot serve as a juror unless by consent of parties, 600.

AMENDMENTS: Statutes relating to, 757 to 759. *Amendment of process*, 759. Justice possesses all necessary powers, 759. Affidavits for process when not amendable, 759. Summons amendable. 759. Striking out and inserting names, 759. Dates of process amendable, 760. So of amounts, 760. May change demand in process, 760. Constable's return amendable, 760. *Amendment of pleadings*, 760. Variances avoided by, 760. Cannot change entire nature of action, 760. Not from contract to tort, 760, 761. Adding cause of action after plaintiff rests, 761. After decision on demurrer, 761. To interpose unconscionable defenses, 761. Allowance a matter of discretion, 761. *Amendment of verdict and judgment*, 761. When allowed on appeals, 762. When error to refuse, 762. Notice of appeal is amendable, 782, 783.

ANIMALS: What exempt from execution, 746 to 748. Cattle running in highways, forms relating to, 1007.

AN OTHER ACTION PENDING: Form of answer of, 973. See Vol. I, 886.

ANSWER: Practice as to answering, 327. Preliminary steps, 328. Makes an issue of fact. 328. Need not be replied to, 328. Qualities of, 328, 329. Facts alone to be alleged, 329. Facts not denied, admitted, 329. Recitals, 329. Matters in aggravation, 329. Special damages, 329. Must be adapted to the nature of the action, 329.

APPEAL: *Historical sketch of*, 763. *What an appeal is*, 765. Removes cause to appellate court, 765. Relief from default in court below, 765. *Kinds of appeal*, 766. Review on face of return, 766. Error in fact, 766. Relief from default below, 766. Review of order, 766. New trial desired, 766. Summary or special proceedings, 766.

APPEAL — *continued.*
Who may appeal, 766. Either plaintiff or defendant, 766. One of several parties may, 766. Stranger cannot bring it, 767. Party sued by fictitious name, may, 767. Respondent cannot reverse on appellant's appeal, 767. Plaintiff may appeal because damages too small, 767. Same rule as to defendant, 767. *From what judgments*, 767. Must be final judgment, 768. Judgment of nonsuit, with costs, 768. Not from nonsuit, if no costs awarded, 768. From nonsuit in county court, 768. From a void judgment, 768. Not from void judgment procured by appellant, 768. Justice had no jurisdiction of subject matter, 768. Need not be from litigated case, 768. Judgment procured by false statement of plaintiff, 769. In actions on contract or for tort, 769. In summary proceedings by landlords, 769. Mechanics' lien cases, 769. *Appeal only mode of review*, 769. Old practice abrogated, 769. Value of old authorities, 769. *Appeal to what court*, 770. To county courts, 770. To common pleas in New York city, 770. To superior court in Buffalo, 770. *Appeals where more than $50 is claimed*, 770. When pleadings of either party demand judgment for more than $50, 770. If judgment on issue of law, 770. If on issue of fact, 770. Appellant may avoid new trial, 770. No new trial when claim or recovery is less than $50, 770. Nor when no issue was joined, 770. *Appeals where $50 or less is claimed*, 770. *Appeal, when to be brought*, 771. Where process was not served on defendant, 771. If not in time appeal is lost, 771. Notice to limit time for appealing, 771. *Affidavits not necessary*, 771. Are proper when error in fact is assigned, 772. So of cases of relief from default, 772. Such affidavits no part of the action, 772. NOTICE OF APPEAL, 772. Notice takes place of old writ of *certiorari*, 772. Notice states grounds of appeal, 772. *Notice of appeal must be in writing*, 772. Must state grounds of appeal, 772. Must be served on justice and on respondent, 772. Verbal notice a nullity, 773. *Notice must state grounds of appeal*, 773. Object of this requirement, 773. To give information, 1. To justice; 2. To respondent; 3. To appellate court, 773. What a sufficient statement in affidavits under old practice, 773, 774. Justice not to draw appeal papers, 773. How to state grounds when appellant desires a return of all the evidence, 774. How to state grounds if new trial desired, 774. Common practice to return all the evidence, 774. Should exclude useless matter, 775. *How grounds of error ought to be stated*, 775. Cases illustrative of statements, 776, 777. Should point out defect in affidavit or process in court below, 777. So as to other errors in proceedings or on the trial, 777. General statement when sufficient, 777, 778. When restricted to grounds stated, 778.

APPEAL — *continued.*
Need not state particular grounds when a new trial is desired, 778. Consequences of defective statement, 779. Appeal dismissed in some cases, 779, 780. Judgment affirmed in others, 779, 780. Party limited to grounds stated, 779, 780. Decided upon what appears in the return, 780. Objection to defect to be raised by motion to dismiss the appeal, 781. Proper practice stated, 781. Notice of appeal amendable by stating grounds of appeal, 782. Amendments allowed liberally, 782. Surprises to be guarded against, 782. Grounds should be stated fully, 783. *Notice of appeal must be returned*, 783. *Defective or irregular service of notice*, 783. Objection to be taken by motion to dismiss, 783. Service on justice, but not on respondent, 783. County court must dismiss in proper case, 783. When defect may be cured by amendment, 784. Forms of notice of appeal, 784, 785. *Stamps upon notice*, 786. *Time of serving notice of appeal*, 786. Must be served within twenty days, 786. Exception to rule, 786. If not served in time appeal lost, 786. Court cannot relieve party, 786. Admission of due service sufficient, 786. May be brought before judgment docketed, 786. Must be within twenty days of judgment, not from time of docketing, 787. *Manner of serving notice of appeal*, 787. Must be in writing and served by copy, 787. Must be served in due season, 787. Upon each respondent, 787. Upon the justice personally, &c., 787. When by filing in appellate court, 787. When upon respondent's family, 787. How served when respondent non-resident, 787. Due diligence must be shown, 787. Copy must be delivered absolutely, 787, 788. Service on clerk of inferior court, 788. Service on justice's family, 788. Verbal service a nullity, 788. *Payment of costs, &c.*, 788. Indispensable to valid appeal, 788. To be paid on service of notice, 788. Justice may accept at a subsequent time, 788. Dismissal the remedy for non-payment, 788. Power of court to relieve appellant, 788. Rule under the old practice, 788. Return, if made, valid even if no fee paid, 789. *New York city*, 789. *Staying execution*, 789. Must give security in cases where new trial is had in county court, 789, 790. Omission to serve undertaking may be relieved, 790. Appeal does not extinguish judgment below, 790. If new trial not to be had, appellant may give security or not, as he pleases, 790. Form of undertaking, 791. Undertaking stays issuing of execution, 791. Or a levy, 791. Service of certified undertaking, 792. No stay until undertaking executed and delivered, 792. Levy not discharged, but sale stayed, 792. Fraudulent levy set aside, 793. Defective undertaking amendable, 793. Or a new one may be filed, 793. Court cannot stay upon any but

APPEAL — *continued.*
statutory grounds, 793. *Offer to correct judgment.* Appellant must state particulars in his notice. 793 to 796. When respondent may offer, 797. Offer must be in writing, and served on justice and opposite party, 797. Form of offer by respondent, 797. Acceptance by appellant, 797. Form of acceptance by appellant, 798. RETURN ON APPEAL, 798. *General object and features*, 798. No case or bill of exceptions, 798. Case heard on the return, 798. Return to grounds stated, 798. Full return generally made, 798. Until return is made, appellate court cannot review judgment, 798. Certified copy of return, 798. *Return, when to be made*, 798. After ten and within thirty days, 798. Strict rule not enforced, 799. Return valid whenever filed, 799. Dismissal of appeal for want of return, 799. Return after justice goes out of office, 799. *What return to contain*, 799. Two kinds of return under present system of practice, 799. Where case is decided upon the return the evidence, &c., is returned, 799, 800. When a new trial is had in county court, evidence not returned, 799. In cases heard on the return, the evidence and proceedings must all be returned, 800. Court will intend that all is returned, 800. Particular facts which should be stated in all such returns, 800, 801. Process, pleadings, proceedings and judgment should be returned, 801. Objections taken below to be returned, 801. Judgment to be returned, 801, 802. So of documentary evidence, 802 Appeal not heard until such evidence is returned, 802. Papers annexed must be referred to as a part of the return, 802. Papers referred to, but not annexed, 802. Postscripts no part of return, 802. If return imperfect for want of papers, amended return is remedy, 802. Return must contain whole history of case, and not refer to other papers, 802. Should show jurisdiction of justice, 802, 803. Should show regularity, 803. Need not be seal to return, 803. Return need not notice matters not within knowledge of justice, 803. Justice cannot move to quash return, 803. Not proof of time, action was begun in case of statute of limitations, 803. Defects in notice of appeal no ground for not making a return, 803. *Who to draw return*, 803. Not attorney for appellant, 804. May be by respondent's attorney, 804. Matter in discretion of appellate court, 804. *Evidence in place of a return*, 804. Witnesses, when to be examined, 805. Removal of justice from county no excuse for not returning, 805. *Conclusiveness of return*, 805. Excludes all extrinsic evidence, 805. Cannot be contradicted, 805, 806. Facts omitted must be procured by an amended return, 806. So of objections and exceptions taken, 806. So of questions and rulings thereon, 806. *Forms of returns*, 806. Form of return where new trial is

APPEAL — *continued.*
not had, 807. Form of, where new trial is had, 808, 809. *General facts to be stated in return*, 809. Process, affidavits, undertakings, &c., 809. Objections thereto, 809. What objections may be taken in county court as to process below, &c., 810. If no jurisdiction below, appeal will be dismissed, 810. May be by answer or by motion, 810. *Returning a ministerial act*, 811. *Defective return*, 811. Remedy is by amendment or further return, 811. *Compelling return*, 811. Done by attachment, 811. Order to show cause, 812. Notice to justice to make return, 812. Form of notice, 812. Application for attachment, 813. No notice thereof necessary, 813. Form of affidavit, 813. Motion may be made on notice, 813. Form of order for attachment, 815. Form of attachment, 816. Indorsement by clerk, 816. Order by judge to take bail, 816. Sheriff's return to attachment, 816. Bond given by justice, form of, 817. Filing interrogatories, 817. Order to file interrogatories, 818. Form of interrogatories, 818. Answer to interrogatories, 819. Order discharging attachment, 819. Order convicting defendant of contempt, 819. Warrant of commitment, 820. Papers in attachment proceedings need not be served on respondent, 820. His remedy is to dismiss appeal, 820, 821. Not dismissed unless delay, 821. *Amended or further return*, 821. County court always open for this purpose, 821. Application should be promptly made, 821. May be at any time before argument, 821. Return must be filed before notice can be given, 822. Motion on face of the return, 822. Motion on affidavits, 822. Must be made before argument, 822. But court may order cause to stand over for motion, 822. How often return may be amended, 822. Ordered liberally for justice of case, 822. Amendment not ordered unless material, 823. Not ordered if it will not change result, 823. Affidavit must state wherein the errors consist, 823. Order does not compel return of a particular fact, but whether it is true or false, 823. Argument not heard until amended return is filed, 823. Errors must appear affirmatively, 824. When to file amended return, 824. Motion papers for amended return not served on justice, 824. But copy of order must be, 824. Justice may correct return on his own application, 824. Appellate court may order amended return on its own motion, 824. Contradictory or evasive returns, 825. Form of additional return on justice's motion, 825. Affidavit for amended return, 826. Form of, 826. Notice of motion, and form of, 827. Court always open for this motion, 827. Argument of motion, 827. Grounds of opposing it, 827. Affidavits to oppose, 828. Filing affidavits with clerk, 828. Form of order for amended return, 828. Notice of order, and service of it, 829. Form of amended

APPEAL — *continued.*
return, 829. Filing amended return, &c., 830. ARGUMENT OF APPEAL, 830. Made upon facts appearing on face of return, 830. *At what term of court*, 830. General term, when there is one, 830. In county court at any term, 830, 831. *Either party may bring on argument*, 831. *Upon what notice*, 831. *Putting cause on calendar*, 831. Filing note of issue, 831. Order of disposing of causes, 832. Forms of notes of issue, 832. *Dismissing appeal for not bringing it to hearing*, 832. Statute requires this, 833. Continuing by special order, 833. Notice of argument, and form of, 834. *Hearing to be on original papers*, 834. Return must be produced at argument, 834. Certified copy may be used, 834. *Practice on the argument*, 835. Argument of cause upon the return, 835. Order of argument, 835. Furnishing points to court and opposite party, 836. Argument of a cause involves all the questions made on the appeal, 836. *Relief from default in court below*, 837. Appellate court may relieve, 837. No relief can be granted unless an appeal is brought, 837, 856. Notice must assign manifest injustice as ground of appeal, 837. Entitling affidavits used, 838. Form of affidavit to excuse default, 833. Service of copies thereof, 839. Notice of affidavits, 839. Service of notice and of affidavits, 840. Examining witnesses orally, 840. Relief a matter of discretion, 840. *Excusing default*, 840. Must show reasonable excuse, 840. Relief even though appearance at joining issue, 841. *Sufficient excuses, what are*, 842, 843. *Insufficient excuses*, 844, 845. Court generally liberal and inclined to grant relief, 846. *Manifest injustice must be shown*, 847. Facts must be set forth, not mere general allegations of injustice, 847. Taking judgment without allowing a just set-off is injustice, 848. Conflict in affidavits, 849. Evidence balanced, 849. Burden of proof on appellant, 850. Court will decide as justice requires, 850. *Terms of opening default*, 850. Harsh terms not imposed, 851. Payment of costs sometimes ordered, 851. Conditions must be complied with or benefit of order lost, 851. Order, when vacated, 851. *New trial before the justice*, 851. Before what justice, 851. New issue to be joined, 851. Certified copy of order granting new trial sufficient evidence for justice, 851. Trial must be on day ordered or on adjourned day, 852. Former judgment as security, 852. Order must name justice who is to try cause, 852. Entry of order with clerk, 852. Service of order, how done, 852. Form of order for new trial, 853. Imposing terms discretionary, 853. *Error in fact*, 853. What it is, 853, 854. Established by proofs outside of the justice's return, 854. Infancy, coverture, &c., 854. False return of constable as to service of process, 854. Trial in wrong town, 854. Relationship of justice to party, 855. Service of process on wrong person,

APPEAL — *continued.*
855. Appearance of infant by attorney, 855. Misconduct of jury, 855, 856. Cannot contradict record below, 856. *Assigning error in fact*, 856. What is sufficient assignment, 857. *Form of affidavits*, 857. *Service of copies of affidavits*, 857. *Notice of hearing*, 857. *Practice on hearing*, 857. *Decision of the court*, 857. *Transfer of cause to supreme court*, 858. *Reargument of appeal cause*, 858, 859. NEW TRIAL, 859: *General considerations*, 859. Value of the new system, 859, 860. *New trial, in what cases*, 861. Recovery exceeding fifty dollars, 861. Pleadings claiming more than that sum, 861. Must have been an issue joined, 861. *Return must be made*, 861. *What is to be returned*, 861, 862. Evidence not returned, 862. Nor objections nor exceptions, 862. *Preliminaries to notice of trial*, 862. Dismissing appeal, 862. Motion for amended return, 862. Amendment of pleadings, 862. *Notice of trial*, 863. On what notice, 863. Form of notice, 863. Proof of service of notice, 864. *Note of issue*, 864. *Offer of judgment*, 864. *In what actions*, 864. *Who may offer*, 864. Either party, 864. Not by one of several defendants, 864. May be by attorney, 864. *At what time, and in what cases offer is to be made*, 865 to 867. Review of the subject, 867. *Form of offer, and its service*, 867. Must be written, 867. To what effect, 867. With or without costs, 867. May be made by attorney, 867. Ten days to accept or refuse, 868. Notice of acceptance, 868. Affidavit of acceptance, 868. Entering judgment on offer, 868. Form of judgment on offer, 869. *Effect of refusing offer of judgment*, 869. *More favorable judgment*, 869. What is such, 869 to 872. *Preparations for trial*, 872. Procuring evidence, 872. Subpœna, form of, and ticket, 872. Power of subpœna, 873. Service of, 873. *Practice on trial in the county court*, 873. *Amendment of pleadings*, 874. Motion for a new trial on a case or exceptions, 874. Amount of verdict, and its effect as to costs, 874. JUDGMENT ON APPEAL, 874. *General considerations*, 874. *According to justice*, 875. To disregard technical errors, 875. To observe legal rules and principles, 875. *Reversal in whole or in part*, 875. Power clearly given by Code, 875, 876. Reversal as to some items and affirmance as to others, 876. Cases illustrative of this rule, 876 to 880. Reversal in part in cases of fraud, 880. Reversal as to part of damages, 880, 881. Order for reversal, &c., 881. Consent to reduce judgment, 882. *Reversal as to any or all the parties*, 882. *Judgment by default*, 883. Power to reverse by default, 883. Not usually done by court, 883. Court should examine the return, 883. Opening default, if one taken, 884. Terms of opening, 884. *Errors not stated in notice of appeal*, 885. Case decided on facts returned without reference to notice, 885. *Review of discretionary decisions*, 885,

APPEAL — *continued.*
886. *Reversal upon questions of fact*, 886. Definition of term, 886. Cannot reverse if material evidence given on both sides, 887. But may in a case of palpable injustice, 887. Cases in which appellate court will reverse, 888. 1. Where plaintiff fails to prove a case on the whole evidence given. 2. Verdict against overwhelming and undisputed evidence. 3. Verdict result of prejudice, &c. 4. Where jury have disregarded controlling evidence. Cases of total or material defect of proofs, 888 to 892. Cases against overwhelming balance of evidence, 892 to 898. Cases of verdict resulting from prejudice, partiality, passion or fraud, 899. Cases of total disregard of unimpeached evidence, 899 to 902. *Reversal upon questions of law*, 902. Reviews all legal questions in the case, 902. *Objections first taken on the argument*, 903. Objections must be taken below to be available, 903. Every proceeding below may be reversed, 903. Assuming facts below, conclusive above, 904. Objections to evidence must be taken below, 904. May object on appeal if objection could not have been obviated if taken below, 904. *Reversal for want of evidence*, 904. *Admitting illegal or incompetent evidence*, 905. Judgment reversed if illegal evidence admitted, 905. No answer to say there is sufficient good evidence without the illegal, 905. Illegal evidence where defendant does not appear at trial, 905. Mere ruling as to evidence no harm, 905. *Excluding legal and competent evidence*, 905. Exclusion of such evidence a ground of reversal, 906. Reducing plaintiff's judgment by exclusion of evidence, 906. Offers of evidence, 906. *Payment of judgment below*, 906. *Intendments by appellate court*, 907. Jurisdiction not intended, 907. Regularity of proceedings and practice is presumed, 907. *Restitution*, 908. Order for, how obtained, 908. Where made on notice and motion, 908. Where made on hearing, 908. Restitution a matter of right, 909. Facts to be shown to entitle to, 909. Affidavits and service, 909. *Form of notice, &c.*, 910. Order for restitution, form of, 910. Judgment of affirmance, form of, 911. Judgment of reversal, form of, 911. Reversal in part or conditionally, 911. Reversal with restitution, 912. Judgment of dismissal of appeal, 912. Judgment for plaintiff on verdict, 912. Judgment for defendant on verdict, 913. Judgment in cases of offers, 913. *Judgment roll*, 913. *Enforcement of the judgment*, 914. Collecting judgment by execution issued by court below, 914. By executions issued by appellate court, 914. COSTS ON APPEAL, 915. *Appellant's costs when case heard on return*, 915. *Respondent's costs when case heard on return*, 915. *Costs in discretion of court*, 916. *Costs on new trial in county court*, 916. *Taxation of costs*, 916, 917. EXECUTION, 917. Execution on transcript of justice's judgment docketed with county clerk, 917. Form of execution on affirmance, 918. Form of execution in case of a new trial in county court, 919. APPEAL TO SUPREME COURT, 919. *Appeal, when to be taken*, 920. *From what judgments*, 920. *Authority of supreme court*, 920. Cannot review discretionary decisions, 921. Will not review case or exceptions before county court has passed upon questions, 921. *Appeals from orders of county courts*, 922. Forms of notices of appeal, 922. Form of undertaking, 922. APPEALS TO COURT OF APPEALS, 923. Leave to appeal must be obtained, 923. Order must be obtained in time, 924. Leave when granted or refused, 924.

APPEARANCE: *What it is*, 217. Must be by some act in the action, 217. General or special appearance, 217. *When to appear*, 217. *Non-appearance of the justice*, 217. Action discontinued if justice does not appear, 217. Defendant not bound to wait more than one hour, 218. Justice engaged in an other action, 219. Parties may waive irregularity and try the cause, 219. Agreement to try on condition, &c., 219. *Non-appearance of plaintiff*, 219. Action discontinued if plaintiff fails to appear, 219. Defendant need not wait longer than time required by law, 219, 220. In warrant cases, how long, 220. *Non-appearance of defendant*, 220. *Rules relating to appearance by the defendant*, 220 to 222. *How the parties are to appear*, 222. By attorney or in person, 222. On warrant must be in person, 222. Corporations appear by attorney, 222. Officers of corporation may appear, 223. Idiots, lunatics, &c., must appear in person, 223. Committee of lunatic may appear, 223. Married women, 223. Cause dismissed if plaintiff fails to appear, 223. So when he fails to appear at the trial, 224. *Appearance by attorney*, 224. Who may appear by attorney, 224. Not attorneys as in courts of record, 224. Constable who served process cannot appear on the trial as advocate, 224. Nor any other person who served the process for commencing the action, 224. What is appearing as attorney in such a case, 225. Justice's clerk or partner cannot appear before him, 225. One attorney cannot appear for both parties, 225. Authority for appearing, 225, 226. May be verbal or written, 225, 226. Proof of authority, 226. Admitting authority, 226. Must be proof of authority, unless waived, 227. Waiver of proof of authority. 227. What sufficient proof of authority, 227. Warrant of attorney for appearing, 228, 229. Stamp on power of attorney, 229. *Appearance by next friend or guardian*, 229. Infant plaintiffs to appear by next friend, 229, 230. Infant defendants by guardian. 229, 230. Next friend must be a real person, 231. Must also be responsible, 231. Infant plaintiff obtaining judg-

APPEARANCE — *continued.*
ment without next friend is valid, 231. Must be guardian for infant defendant, 231. Several defendants, and one an infant, 231. Next friend or guardian may employ attorney, 231. Revoking judgment obtained by infant, 232. Consent to appear as next friend or guardian, 232. Appointing guardian for infant defendant prudent in all cases, 232. Application by infant plaintiff, 232. Consent of next friend, 233. Appointment by justice, 233. Application for guardian, 233. Consent of guardian, 233. Appointment of guardian, 233. General form of application, &c., 234.

ARBITRATION: Answer of, 979.

ARREST: *What it is,* 111. *Who may arrest* on civil warrants, 111. Person may be deputed for the purpose, 111. Constable cannot serve warrant in his own favor, 111. *When to arrest,* 111. Within a reasonable time, 111. *Where to arrest,* 112. *Who exempt from arrest,* 112. Attorneys, &c., attending court, 112. So of clerks, constables, &c., 112. Parties to suit exempt, 113. Party attending a reference, 113. Witnesses also exempt, 113. Canal officers, 113. Persons engaged in military duty, 113. Members of legislature, 114. Voters on election or town meeting days, 114. Fictitious name of defendant, 114. Notifying defendant of warrant and of arrest, 114, 115. Resisting officer, 115. Showing process, 115. Regular officer not bound to do so, 115. But specially deputed person must, 115. Breaking open houses, 115. Entering open outer door, 115. Who protected by house, 115. Breaking inner doors, 116. Privilege of arrest extends to curtilage, 116. Escaping and breaking to rearrest, 116. Taking defendant before justice, 116. Should be done promptly, 116, 117. Delay renders officer liable, 117. Defendant must not be detained too long or action lies, 117. Justice unable to hear cause, or absent, to go before next justice, 117. Indorsement on warrant, 117. Going before nearest justice, 118. Defendant cannot be detained longer than 12 hours, 118. Notifying plaintiff of arrest, 118. Form of notice, 119. Proceeding with case on return of warrant, 119. Defendant must be taken personally before justice, 119. Defendant may have adjournment, 119. Constable cannot take bail of defendant, 120. Constable liable for escape, 120. Defendant moving for discharge because exempt from arrest, 120. Constable's care and custody of defendant while under arrest, 120. Forms of returns to warrant, 120. ARREST ON EXECUTION, 744, 745. *Arrest of witness on attachment,* 558. *Arrest of juror on attachment or execution,* 641.

ASSAULT AND BATTERY: Justice has no jurisdiction of civil action for, 36. What is such an action, 36. What is not, 36.

ASSIGNEE: To be plaintiff in action on assigned demand, 268. Separate assignees

ASSIGNEE — *continued.*
cannot each sue separately, 268. Assignee for benefit of creditors, 268. Assignee of claim for unliquidated damages, 268. Assignee of claim for torts, 269. Possession of note evidence of title, 269. Assigment may be verbal, 269.

ASSIGNMENT: How made of choses in action, 269.

ASSIGNOR: Declaration of, not evidence against assignee, 376, 377.

ATTACHMENT: *General review of the subject,* 121 to 124. LONG ATTACHMENT, 124. Has long been in use, 124. Statutory provisions, 124. Must be for a demand against defendant personally, 125. Demand must arise on contract, 125. Or upon a judgment rendered within this state, 125 Claim for tort does not authorize attachment, 125. Provisions of non-imprisonment act, 125. AFFIDAVITS FOR ATTACHMENT. See *Affidavits.* APPLICATION FOR ATTACHMENT, 154. Must be in writing, 154. Contents of application, 154, 155. Should be the same in all cases, 155. Should not state the grounds for the attachment, 155. Application may be made by agent, 156. Form of application, 156. Drawing affidavits, 156. Form of affidavit, 156. BOND FOR ATTACHMENT, 157. Statutory provisions, 157, 158. Who to execute bond, 158. Form of bond, 158. *Must be bond in all cases,* 159. *Covenant will not do in place of bond,* 159. *Deposit of money not sufficient,* 160. *Bond must describe parties correctly,* 160. *Execution of the bond,* 160. Bond means a sealed instrument, 160. Scrawl is not a seal, 160. What a seal is, 160. Bond must be signed, 160. Place of signing bond, 161. Signing by agent, 161. *Who to be sureties,* 161. Should be responsible persons, 161. Duty of justice as to approving sureties, 161. *Liabilities of sureties,* 162. Extends to all damages and costs, &c., 162. Liable for final judgment on appeal, 162. *Penalty of the bond,* 163. *Condition of the bond,* 163. Payable to defendant, 163. To pay damages and costs, 163. *Bond, when to be executed,* 163. Before issuing attachment, 163. *Amendment of bonds,* 163. Statutory provisions, 163, 164. Consent of obligors in bond, 164. Containing useless conditions, 164. *Action upon attachment bond,* 164. What damages defendant may recover, 164. Failure of plaintiff to appear in attachment action, 165. Defenses by sureties in the bond, 165. What attachment must contain, 165. Form of attachment, 165. Attachment need not recite or refer to statute, 166. Amending attachment on return day, 166. If attachment action defeated defendant entitled to property. SHORT ATTACHMENT, 166. Time of return, 166. Must be both affidavit and bond, 167. Must show facts and circumstances, 167 to 170. Must be proof of non-residence, 170. Cannot supply defects afterwards, 170. Form of affidavit, 170. Form of bond, 171. *Short*

ATTACHMENT — *continued.*
attachment, against whom issued, 171. Only attachment allowed against non-resident, 171. Absconding debtor, 171. Non-resident of state, 171. Cannot issue against resident, 172. Issuing short summons on return day, 172. SERVICE OF ATTACHMENT, 172. Executed by officer or deputed person, 172. *When to serve attachment*, 172. *Where to attach*, 172. Must be in the county where issued, 172. Cannot pursue property out of county, 172. May if he has previous valid levy. 172. Levy gives constable a lien, 172. *What property exempt*, 173. *How to attach*, 173. Must take goods and chattels, 173. May take enough but no more, 173. Cannot attach books of account, promissory notes, &c., 173. Must not take property of stranger, 173. As to breaking into buildings, 173. Making inventory, 173. Form of inventory, 173. Serving copies of it, 173. Certificates on attachment and on inventory, forms of, 174. Copies, where left, or how served, 174. When to be served, 174. Officer liable for attached property, 174. Receipting goods taken, 174. *Defendant may take possession of goods*, 175. Bond to prevent removal, 175. Form of bond, 175. Penalty and condition of bond, 175. Condition must conform to statute, 175. Assigning bond after breach, 175. Bond does not destroy lien of attachment, 176. Lien may be lost by neglect, 176. Lien continues until execution can be issued, 176. But not until plaintiff pleases, 176. Approval of bond by constable, 176. Claim of property by third person, 177. Claimant must give bond, 177. Penalty must be double the value of the property attached, 177. Constable not to deliver property until such bond is given, 177. Constable not liable to action until such bond is given, and a request to deliver property, 177. Claimant must prove himself owner, 178. A mere lien not enough, 178. In action on bond, jurisdiction of justice need not be shown, 178. But claimant may show want of jurisdiction, 178. Appeal does not destroy levy, 178. Should be two sureties, 178. Approval by constable or by justice, 178. Form of bond given by claimant, 179. Must be executed to plaintiff, 179. Claimant may prove ownership if sued on bond, 179. If he fails to do so, sureties liable, 179. Measure of damages, 179. *Return to attachment*, 180. Should state time of attaching, 180. Should show manner, 180. See particulars stated, 180. Forms of returns, 181. Should show property to be defendant's, 181. Proceedings on return day of attachment, 182. When to issue summons, 182. When not to issue it, 182, 183. *Returns to summons*, 182. Return to be upon original attachment, 182. Delivery of papers, process, &c., to justice, 183. Return protects justice, 183. ATTACHMENT AGAINST WITNESS, 555. Proceedings

ATTACHMENT — *continued.*
thereon, 555 to 562. ATTACHMENT AGAINST JUROR, 640, 641. ATTACHMENT AGAINST JUSTICE, 811 to 820. ATTACHMENT AFFIDAVIT. See *Affidavit.* ATTACHMENT BOND. See *Attachment.*

AUCTION: Sales on execution.

AWARD: Complaint on 959. Forms of proceedings, 994 to 1001.

BAIL: See *Attachment bond, Warrant, Replevin.*

BALANCE STRUCK: Complaint in actions for. 958.

BEST EVIDENCE: See *Evidence.*

BILL OF PARTICULARS: Either party may require this, 320. Demand for must be at joining issue, 320. Justice may fix other time, 321. Justice should require both parties to exhibit full particulars, 321. Right to take copies of items, 321. When items to be furnished, 321. Penalty for not furnishing, 321. Time to be specified by the justice, 321. If items not shown as required, the justice may exclude evidence of them, 322. Items should be furnished in detail, 322. Price, dates and amounts should be given, 322. Need not give credits, 322. Variance, 322.

BILLS OF SALE: Form of, 1003. Sales on execution, 741, 742.

BLANKS: Process to be filled up, 41 to 43.

BONDS: See *Attachment, Warrant, Short summons, Replevin, Appeal. Execution of a bond*, 160. *Amendment of bonds*, 163. Liability of sureties in attachment bond, 162. Bond for short summons, 83. Bond for civil warrant, 105. Bond to detain canal boat, 109. Bond for attachment, 158. Bond to prevent removal of goods, 175. Bond in replevin, 198. Bond for return of property to defendant, 213. Bond on claim of third person, 215. Bond on answer of title to lands, 254. Bond for adjournment, 351, 352. Bond to indemnify constable, 726. Bond given by justice who has been attached for contempt of court, 817.

CARRIER: Measure of damages in actions against. 668 to 670.

CERTIFICATE OF JUSTICE: On appeal undertaking, 790.

CERTIORARI: Superseded by appeal, 763, 764.

CHALLENGE: Nature and object of challenge, 598. Manner of making it, 598. Challenge to *array*, what is, 598. Challenge to the *polls*, what is, 599. *Peremptory* challenge, what is, 599. *Principal* challenge, what is, 599. Challenge to the *favor*, what is, 599. *Challenge to the array*, 599. May be either a principal challenge or one to the favor, 599. Nominating jurors, 599. Constable servant, &c., of party, 599. Constable interested, 599. Action pending between party and constable, 599. Relationship, 599. Panel made by stranger, 599. Partiality in constable is ground for setting aside panel, 599. So of bias or ill feeling, 599. Challenge to the polls, nature of, 600. *Principal chal-*

CHALLENGE — *continued.*
lenges to the polls, 600. Juror not qualified, 600. Person intoxicated, 600. Exemption as a ground of challenge, 600. Juror a tenant of party, 601. Expressed an opinion, 601. Formed an opinion, 601. *Challenge to the polls for favor*, 601. Juror should be free from all exceptions, 601. Intimate friends of one party, 601, 602. Enmity with one party, 602. Hypothetical opinion formed by juror, 602. Should be entirely indifferent, 602. *Time of making challenge*, 602. Not until full jury appears, 602. Order of stating grounds of challenge, 602. What is a waiver of some of the grounds, 602. Challenge by one party does not prevent challenge by the other, 602. Order of making challenges, 602. Challenge to array, when made, 603. Challenge to polls, when made, 603. Too late after juror is sworn, 603. Which party to challenge first, 603. Challenges first made by one party must be completed before other party bound to begin, 603. Both parties entitled to full challenges to each juror, 603. Challenge first made must be first tried, 603. Challenge must show whether to be favor or a principal challenge, 603. Question to be tried by the triers, 604. Errors corrected on appeal, 604. Principal challenge to be tried by the justice, 604. *Form of oath to witness*, 604. Juror may be called as a witness, 604. May be examined fully, 604. *Form of oath to juror*, 604. Challenge to array for favor is triable by triers, 604. Finding of the triers, 604. *Form of oath to triers on array for favor*, 605. *Form of oath to triers to polls for favor*, 605. Mode of forming issue for trial by triers, 605. Appointment of triers, 605. Substitution of jurors for triers as sworn, 605. Overruling principal challenge ground of appeal, 605. Peremptory challenges, 605, 606. This challenge reserved as last resort, 606. Effect of challenge on juror's feelings, 606.

CHARGE TO JURY: Justice not bound to charge jury, 612. May do so if he pleases, 612. Erroneous charge ground of appeal, 612. Must charge fully if he charges at all, 612. Importance of this duty, and benefits to parties if properly done, 612.

CHARACTER: See *Evidence*, *Impeaching witnesses.*

CHATTEL MORTGAGE: Complaint on, 927.

CLAIM AND DELIVERY: See *Replevin.*

CLERK: Certificate of, 401, 404. Search for lost papers, 405. To issue executions, 715, 717, 917. To enter judgment on offers, 869. To tax costs, 916, 917. Making up calendar, 832.

COMMENCEMENT OF ACTIONS: Statutory provisions, 55. Delivery of process to constable not a part of justice's duty, 55. Time of such delivery a matter of proof, 56. Entry in docket of time of delivery, 56. In absence of proof, action deemed commenced on service of process, 56. Indorsement of sheriff or constable not proof of time of receiving process, 56. When important to know when process was actually delivered, 57. In justice's courts action is commenced at time of delivering process to constable, 57, 58. Otherwise in courts of record, 57, 58. ACTION, WHERE TO BE COMMENCED, 52 to 54. OF ACTIONS AND PROCESS. See *Process.*

COMMISSION TO TAKE EVIDENCE: Intended to secure evidence not within power of subpœna, 563. Must show witness material and not within reach of subpœna, 563. To whom commission directed, 563. Application for, when made, 563. May be by either party, 563. Notice must be given, 563. Proof of service of notice must be made, 363. How long adjournment allowed, 563. Names of witnesses inserted in commission, 563. When this is excused, 563, 564. How long notice of application must be given, 564. When plaintiff should give notice, 564. *Form of notice of application*, 564. Appearance at time and place specified, 564. Proof of service of notice, 564, 565. *Form of proof*, 564. Oath of service, form of, 565. Notice of application may be served by any one, 565. Effect of not proving service of notice, 565. Objection, when to be taken, 565. Proof of materiality of evidence, and of absence of witness beyond reach of subpœna, 565. Proof, by whom made, 565. Need not swear to advice of counsel, 566. Must prove witness beyond subpœna, 566. Need not state what witness will prove, 566. Admitting what witness will prove, 566. If suspicion must state what witness will prove, 566. Offer to admit what witness is expected to prove, 566. Admission must be that such facts are true, 566. *Form of commission*, 567. *Form of interrogatories and cross-interrogatories* 567, 568. *Assent of parties to interrogatories*, 568. *Settlement of them by justice*, 568. *Commissioner's summons to witness*, 568. *Commissioner's subpœna to witness*, 568. *Oath to be administered to witness*, 568. *Caption of deposition*, 569. *Indorsement of exhibit*, 569. *Return to commission*, 569. Presumption as to mailing commission, 569. *Certificate of mailing*, 569. Return of commission by an agent, 569. Return of it by express, 569. *Affidavit of agent, form of*, 570. Nature of interrogatories and cross-interrogatories, 570. Manner of framing them, 570. Either party may insert any question, 570. May put general interrogatories, 570. Agreement to waive objections to questions, 570. Presumed waiver of objections, 570. Interrogatories annexed to commission, 571. How sent to commissioner, 571. Provisions of statute to be annexed, 571. Oath to witness examined, 572 Oath presumed regular, 572. Commissioner may employ clerk to do his writing, 572.

COMMISSION TO TAKE EVIDENCE—*continued.*
Examination must be reduced to writing, 572. Witness must subscribe deposition, 572. Exhibits must be annexed, 572. Certificate as to exhibits, 572. Mode of returning commission must be directed by justice, 572. Direction, how indorsed, 572. If not done evidence not admissible, 572. Direction may be in body of commission, 573. But must be signed by justice, 573. Neglect of commissioners to deposit papers immediately, 573. Omission to send copy of statute, 573. Presumption as to proper mailing, 573. Mistake in caption as to commissioner's name no harm, 573. All interrogatories must be answered, 573. To whom commission is to be returned, 573. Examining a party on commission, 574. Presumption as to form of oath, 574. If form of oath returned, and irregular, evidence inadmissible, 574. Copy of original paper may be made and annexed to commission, 574. Return upon commission, 574. But valid upon any of the papers, 574. Commissioner must comply strictly with statute, 574. Returning commission for purpose of correcting mistakes, 574, 575. Leading questions in commission, 575. Depositions not evidence until read, 575. Objections to competency of witnesses must be made when deposition offered in evidence, 575. If question or answer improper, the rule is the same, 575. Appearing by counsel at examination, 575. Witness must answer fully, and not refer to former answers, 575. Interpreter may be employed, 576. Judicial notice taken of commissioner's signature, 576. May be in full or abbreviated, 576. Fastening papers together, 576. Deposition not suppressed because some of the answers are objectionable, 576. Objection must be confined to objectionable parts, 576. Witness must answer orally, and is not allowed to read answers drawn by counsel, 576. Party not bound to introduce commission, 576. May waive commission by going to trial before its return, 576. Party need not read all the evidence returned, 576. Opposite party may read balance, 576. Evidence of a party taken on commission, 576. Answer not responsive struck out, 577.

COMMITMENT FOR CONTEMPT: See *Contempt.*

COMMON COUNTS: Are as valuable as under old system, 319. Drawn more fully than formerly, 319. When special contract is a ground of action, and common counts sufficient, 320.

COMPETENCY OF WITNESSES: Changes in the law on this subject, 367. It is more a question of credit than of competency, 367. Idiots and lunatics not sworn, 368. Nor intoxicated persons, 368. Deaf and dumb persons presumed incompetent, but may be shown to be competent, 368. How such persons are examined, 368, Children of tender age, 368. Instructing child, 369. Persons convicted of felony incompetent until pardoned, 369. Petit larceny not a felony, 369. Pardon restores competency exempt as to perjury, 369. Incompetency must be proved by objecting party, 369. A witness may be *competent* and yet not *credible*, which is left to jury, 369. Husband and wife not witnesses for each other, 369. A kept witness is competent, 370. When husband and wife competent, 370. Attorney competent for his client, 370. Impropriety of being frequent witness, 370. Juror competent for either party, 370. Religious belief no ground of rejection, 370. But goes to credit, 370. Objections to competency must be taken before witness is sworn, 370, 470. Statutes relating to competency, 371. Objections because of youth or insanity should be made before swearing witness, 471. So when question relates to competency, 471. Objection as to interest may be taken whenever that fact appears, 471. Interest goes to credit of witness, 472. Swearing witness on *voir dire*, 471. Competency a question for the court, not for the jury, 471.

COMPARISON OF HANDS: Generally not competent evidence, 433, 434. See *Handwriting.*

COMPROMISE: Offer to compromise not legal evidence of admission, 378. Admitting particular items may be evidence in some cases, 378. Letters written "without prejudice," 378.

COMPLAINT: Formal parts of, 312. *Number of parties*, 312. Complaint must agree with process as to number of parties, 312. *Names of parties*, 312. Must all be stated in complaint, 312. Names must be stated in full, 313. Fictitious names changed, 313. *Character or right in which action is brought*, 313. Actions in representative capacity, 313. *Assignee for benefit of creditors*, 313. Complaint should show him assignee, 313. *Action by administrator or executor*, 313. *By infant and next friend*, 314. *By receivers*, 314. *By public officers*, 314. GENERAL RULES OF PLEADING, 314. Complaint must show cause of action, 314. That plaintiff is the proper party to sue, 314. Complaint must agree with character in which plaintiff sues, 314. *Cause of action stated in the process*, 314. Complaint need not agree with cause of action stated in process, 314. *Within jurisdiction*, 314. Must show cause within jurisdiction, 314. *Complaint on contract*, 315. Cause of action local, 315. Cause of action transitory, 315. Complaint need not be dated, 315. Nor show action complete when commenced, 315. *Complaint, when to be special*, 315. Action for breach of executory agreement, 315. Damages for breach of agreement, 315. *Inducement*, 316. *Plaintiff's interest in subject matter of the action*, 316. *Consideration*, 316. Must show consideration for promise sued on, 316. Consideration of written instruments, 316. *Promise*

COMPLAINT — *continued.*
by defendant, 317. Express promise to be alleged as made, 317. Implied promise arises on the facts alleged, and promise need not be alleged, 317. Contract or promise to be stated truly, 317. *Profert*, 317. Need not make profert of papers, &c., 317. *Averments of performance by plaintiff*, 317. Plaintiff must show performance of conditions precedent, 317. Must state facts showing performance, 318. Not sufficient merely to allege performance, 318. *Request, notice, demand, &c.*, 318. These must be alleged when necessary, 318. *Breach of the agreement, &c.*, 318. Must show breach by defendant, 318. Action on special agreement facts of breach must be stated fully, 318. When general allegation sufficient, 318. *Damages*, 318. Complaint must allege damages, 319. *Conclusion of complaint*, 319. Should show what judgment is demanded, 319. Must be within jurisdiction, 319. *Several counts*, 319. Not allowed unless there are separate causes of action, 319. Must be stated separately, 319. Form of commencing each count, 319. *Common counts*, 319. Are in common use, 319. What may be recovered under, 319, 320. *Bill of particulars*, 320. See *Bill of particulars*. COMPLAINTS IN ACTIONS FOR TORTS, 322. General rules applicable, 322. *Plaintiff's interest is the thing injured*, 323. Complaint must show plaintiff's interest, 323. Special interest in property, 323. *Motives, intent or negligence of defendant*, 323. Action lies for trespass, although no bad motive on part of defendant, 323. Bad intent sometimes the gist of action, 324. Bad motives may increase damages, 324. Infants liable for torts, 324. *Statement of wrongful acts of defendant*, 324. Complaint must set forth the facts, 324. For negligence, must state the facts, 324. For fraud, the facts must be alleged, 325. So for false and fraudulent representations, 325. Injuries to real and personal property, 325. Trespass by agents of corporations, 325. *Time and place*, 325. *Scienter*, 325. Knowledge, when essential to cause of action, 325. Injuries by animals, knowledge important, 326. Sheep, killed by dogs, knowledge not essential, 326. Nor when animals do injuries when trespassing, 326. Knowledge essential in actions for frauds, 326. *Demand*, 326. Not necessary if taking or conversion wrongful, 326. Otherwise if possession lawful, 326. Demand sometimes indispensable, 326. *Penalties*, 327. Complaint in actions for, 327. Statutory form of pleading sufficient, 327. Need not refer to statute, 327. Public statutes need not be recited, 327. *Assignment of demand or right of action*, 327. *Damages*, 327. *Conclusion*, 327. See *Pleadings, Parties to actions.*

CONFESSIONS: See *Admissions.*

CONFESSION OF JUDGMENT: See *Judgment.*

CONFIDENTIAL COMMUNICATIONS: How far protected by the courts, 511, 512. May relate to actions or to other matters, 512. Privilege is that of the client, 513. Client may waive privilege, 513. One of several cannot waive rights of other parties, 513, 514. Extends to all future time, 513. Does not protect criminal matters, 513. Made in presence of third person is not protected as to him, 513. Ministers or priests cannot disclose, 514. Physicians and surgeons, same rule, 514. But may disclose abortion cases, 514. Where relation of counsel ceases, 514.

CONSANGUINITY: What it is, 24. Disqualifies justice from acting, 25 to 27. Disqualifies juror, 599. See *Jurisdiction, Affinity, Juror.*

CONSENT: How far it confers jurisdiction, 16 to 19. See *Waiver.*

CONSTABLE: Execution of process, 48. When protected in executing process, 49. Bound to execute it, 49, 50. Cannot take reward, 50. Service of summons, 65 to 75. See *Summons, Service.* Service of warrant, 111 to 120. See *Warrant.* Service of attachment, 172 to 182. See *Attachment.* Service of replevin process, 202 to 216. See *Replevin.* Service of attachment for contempt, 558. Service of attachment on juror, 643. Service of warrant for a contempt, 645. Service of execution, 719 to 756.

CONSTRUCTION: Of pleadings, 311. Of justice's return, 800. Intendments of appellate court, 907.

CONTEMPT: Power of punishing contempts of court, 642, 643. Party entitled to be heard, 643. *Warrant of arrest*, 643. Executed by constable, 643. Proceedings on hearing, 643. Conviction of offender, 644. *Record of conviction*, 644. Manner of drawing record, 644. *Warrant of commitment*, 645. Justice not liable to civil action, 645. Proceedings must be regular on their face, 645. If jurisdiction, record conclusive, 645. Conviction may be reversed if erroneous, 645. Refusal to produce paper, when not a contempt, 645.

CONTRACT: Complaints on, 315, 925 to 960.

CONVICTION: Of a defaulting juror, 640 to 642. For a contempt of court, 644. Of a witness for not testifying, 646.

COPIES: Service of summons by, 68, 69, 71. Of attachments, 174. Of replevin process, 205, 206. Of notice to produce papers, 406. Of notice of appeal, 787. See *Appeals.*

CORPORATION: Service of process on, 69 to 74. Suing by short summons, 79, 80. Attachments against, 134. Appearance by, in actions, 223. Actions by, 272, 283. Actions against, 279, 285.

COSTS: Right to, given by statute, 707. When plaintiff entitled to, 707. When defendant entitled to, 707. Amount of costs, 707. When no costs taxable, 707, 708. Costs not affected by amount of recovery, 708. But must be verdict for some amount,

COSTS — *continued.*
708. What costs taxable in the judgment, 708. Costs taxable for the prevailing party, 708. Judgment not reversed for error in taxing costs, 708. When costs may exceed $5.00, 709. Taxing costs where decision in favor of, or against one of several parties, 709. Costs not taxed on demurrer, 709. For allowing amendment, 709. Proof of right to tax costs claimed, 709, 710. Taxing costs a judicial act, 710. *Double and treble costs*, 710. Action against overseer of highways, 711. Not allowed to plaintiffs, but defendants, 711. What are double or treble costs, 711. Party may waive them, 712. Proof that party is public officer, 712. Prospective costs, when taxable, 712. BILL OF COSTS AND FEES, 712 to 714. Notice of taxation, 916, 917.

COUNTERCLAIM: See *Set-off.*

COUNTY COURTS: May grant leave to issue executions, 718. See *Appeal.*

COUNTY JUDGE: See *Appeal.*

COURTS: See *Jurisdiction, Process, Trial, Evidence, Judgment, Execution, Appeal,* &c.

COVENANT: Will not answer in place of bond, 159.

CREDIT: See *Evidence, Impeaching witnesses.*

CRIMINATING ANSWERS: See *Evidence.*

CROPS: Sale of, on execution, 729. When not liable on, 729.

CROSS-EXAMINATION: See *Evidence.*

CUSTOM: Cannot control written contracts, 464. If known may affect some contracts, 462. May be resorted to to explain the meaning of commercial instrument, 459. Parties contracting are presumed to know, 389.

DAMAGES: Definition of the term, 648. Ought to be commensurate with the injury, 648. Must be result of injury complained of, 648. What are general damages, 648. Presumed to follow violation of right or duty implied by law, 648. Special damages, what are, 648. Law generally gives remedy to injured party by way of damages, 648, 649. Measure of damages a matter of law, 649. Compensation not always equal to injury, 649. *Nominal damages*, 649, 650. What such damages are, 650. Given in nearly every case where larger damages not recoverable, 650. Value in establishing a right, 650. Plaintiff entitled to nominal damages cannot be nonsuited, 650. *Remote and consequential damages*, 651. What such damages are, 651. Selling poisonous medicines, 651. Damages resulting from defective engines or machinery, 651. Must be such as parties contemplated, 652, 656. Landlord and tenant, 652. Breach of implied warranty of title, 652. Damages resulting from torts, 652. From negligent acts, 652. *Actions for breach of contracts*, 653. Substantial damages, 653. Plaintiff must show damages, 653. Contract furnishes the measure of damages, 653. Damages limited to consequences of breach of contract, 653. When full damages not allowed, 653.

DAMAGES — *continued.*
Limited to actual loss, 654. Extreme cases, 654. Actions by assignees, 654. By party having special or limited interest, 654. Damages for things prior to contract not recoverable, 654. Leaving lodgings and board before time expires, actual damages the rule, 655. Dissolving partnership wrongfully, 655. Breach of continuing covenants, 655. To keep gate in repair, 655. To furnish food, clothing, &c., 655. Assigning pretended judgment, 656. Telegraph, delaying message, 656. Payment to be made as work progresses, and employer refuses to go on with work, 656. Estimated prices under special contract, 656. Work to be done according to specified plan, and variations by consent, 657. Discharging employee, 657. Employee leaving service, 657. Excuse for non-performance, 657. Contract void by statute of frauds, 657. Services to be paid for in land, 658. *Actions on bills and notes*, 658. Interest the measure of damages, 658. Notes payable in chattels, 658. Neglect to pay in chattels makes it a cash debt with interest from default, 658. Market price of goods immaterial, 659. Interest as damages in actions on contract, 659. Interest given by law, not discretionary, 659. Interest upon judgments, 659. *Sales of personal property*, 659. Refusal to deliver or to receive, 659. Vendor fails to deliver goods, 660. Damages the difference between market value and the agreed price, 660. Rule when price is paid in advance, 660. Where price not paid in advance, 660. In executory contracts to sell goods, and refusal to deliver, 660. Interest as damages, 661. Market value the test, 661. Price at place of delivery controls, 661. Delivery of part of the articles, 661. Damage to goods before delivery, 661. Refusal to accept goods, 662. Measure of damages in such case, 662. Article manufactured to order, 662. Delivery of part, and refusal to accept balance, 662. Market price for what is delivered, if residue not accepted by purchaser, 662. Difference between contract and market price, 662. Refusal to give bill or note for goods purchased on credit, price due at once, 662. Notice that goods ordered to be made will not be accepted, 662. Notice by either party of refusal to perform, dispenses with allegation of performance, 663. Damages where a part of goods delivered, but balance sold to another person, 663. *Warranties as to quality or quantity*, 663. No implied warranty of quality, 663. Vendee may recover damages for breach, and still retain goods, 663. Warranty of soundness, the damages are the difference between article as represented and as it is, 663, 664. Damages on sales by sample, 664. *Warranty of title*, 664. Breach of implied warranty of title to horse, 665. Sale of forfeited pledge, 665. Expenses of litigation on warranty on resale, 665. Not recoverable if plaintiff

DAMAGES — *continued.*
negligent on resale, 666. Pay for keeping horse by vendee, 666. *Principal and surety,* 666. *Principal and agent,* 666. *Landlord and tenant,* 666. Landlord's refusal to give tenant possession, 667. Tenant cannot recover profits, 667. Nor injury from packing goods, 667. Nor interest on value of stock of goods, 667. Damages on the difference between price agreed and the yearly value of the premises, 667. Trespass by landlord, 667. Carrier not delivering goods, 668. Carrier not delivering goods in time, 668. Special agreement to deliver on a particular day, 669. Ordinary damages for non-delivery, 669. Agent not presenting bill of exchange, 669. Against factor for not remitting price, 670. Factor selling contrary to instructions, 670. Articles not having any marked value, 670. Innkeeper for loss of goods, 670. *Liquidated damages,* 670. General rules relating to, 670, 671. Covenants as to secrets of trade, 671. Dissolution of partnership, 671. Not to practice a profession, 671. Difficulty in ascertaining actual damages generally considered liquidated, 672. Damages uncertain in nature, 672. Damages for any single act, 672. If agreement clear, damages liquidated, 672. Sales of land or other property, 673, 674. Sale of personal property, 674. Extension of time of performance, 674. Limiting right as to amount of recovery, 674. Cases considered as a penalty, 674. Using word "forfeit," &c., 674, 665. Payment of a larger sum to secure smaller, 675. DAMAGES IN ACTIONS FOR TORTS, 675. General principles relating to, 675. Measure of damages a matter of law, 675. Motives do not affect right of action, 675. *Trover,* 676. Value of property generally the rule, 676. When greater sum may be given, 676. Time when value is to be fixed, 676. When the highest price before trial, 676. Property enhanced in value by wrongdoer, 676. Logs made into lumber, &c., 676. Changing article into different species, 677. Willful trespass cannot change title, 677. Interest as damages, 677. Interest a matter of right, 677. Market value, not purchase price, the rule, 678. Wrongful sale of pledge, 678. Removing property levied on, 678. Party having a lien or special interest, 678. Mortgagee against mortgagor of chattels, 678. Conversion of a promissory note, 678, 679. Return of property in mitigation, 679. Conversion of stock, 679. Conversion by vender of goods sold, 679. *Replevin,* 679. Both parties may claim damages, 679. Amount of plaintiff's damages, 679, 680. Amount of defendant's damages, 680. Exemplary and vindictive damages, 680. Indemnity the rule, 680. When more than this is recoverable, 680, 681. Highest market price not always the rule, 681. Market value sometimes not the rule, 681. Mitigation in replevin, 681. *Trespass upon real estate,* 681. Nominal

DAMAGES — *continued.*
damages always to be given, 681. Exemplary damages for malicious trespass, 682. For insulting conduct, 682, 683. Aggravated assault and battery, 683. Poisoning poultry, 683. Vindictive damages limited to willful injuries, 683. Trespass under honest mistake limited to compensation, 683. Smart money, when allowed, 683, 684. *Nuisance,* 684. *Negligence,* 684. Limited to reasonable compensation, 684. Collision of vessels and loss of trips, 684. Burning trees, grass, &c., 684. *Trespass to personal property,* 684. Willful killing of a horse, 685. Willful breaking of a wagon, &c., 685. Abuse of legal process, 685. Sale under illegal process, 685. Trespass by taking promissory note, 685. Market value, when the rule, 686. Auction price as evidence of value, 686. *Actions against sheriffs or constables,* 686. For an escape, 686. For neglecting to levy, 686. ASSESSMENT OF DAMAGES, 687. *Time of assessing damages,* 687. Damages must accrue before action, 687. Exceptions to this rule, 687. Trespass and nuisance, rule in actions, 687. *Amount of damages,* 687. Must be such as law allows, 687. Must not be less than that sum, 687. When judgment not reversed, if no damages allowed, 687. *Interest as damages,* 687. *Double and treble damages,* 688. Jury may double and treble damages, 688. Or may give single damages and court will increase them, 688. *Several defendants,* 688. Cannot assess different amounts, 688. Several cattle doing damage, 688. Damage done at different times, 688. *Remitting damages,* 688.

DATE: Paper presumed executed at, 388. Time of execution question of fact, 629.

DEATH: When presumed, 388. Of witness, 485. Entries by deceased persons, 393. Evidence of deceased witness, 395. Of subscribing witness, 430. Of plaintiff or defendant in execution, 718.

DECEIT: In service of process, 51.

DECLARATIONS: See *Admissions.*

DEEDS: May be given in evidence in some cases, 34, 35.

DEFAULT: In not appearing, 217 to 222. Judgment by, cannot be taken in justice's courts, 690. Relief from, by taking appeal, 837 to 852. On appeal, arguments, 883.

DEFENSES: Must be pleaded to be available, 309. Mode of setting them up in the answer, 327 to 329.

DELAY: When officer liable for, 117. Telegraph message of, 656. See *Vigilance.*

DELIVERY OF PROCESS, &c.: Action commenced by, 55. No part of justice's duty, 55. Indorsement of, by officer not evidence, 56. Effect of delivery, 57, 58.

DEMAND: Before bringing action, 2. Before commencing replevin action, 186. Of a trial by jury, 589, 596.

DEMURRER: *What it is,* 262, 330. Raises an issue of law, 262. Objections to pleadings must be by demurrer, 330. Defects

DEMURRER — *continued.*
waived if not objected to by, 330. Admits material allegations, 263, 330. Judgment given on the whole record, 330. Each pleading stands by itself, 331. *In what cases interposed,* 331. When not sufficiently explicit, 331. By one of several defendants, 331. For misjoinder of defendants, 332. Or misjoinder or non-joinder of parties, 293. To answer, 332. To part of a single defense, 332. To answer, amended on the trial, 332. When to be interposed, 332. To separate cause of action or ground of defense, 332. *Judgment on demurrer,* 311, 332. Must be according to law, 311. Should be reasonable, 311. Given at joining of issue, 332. Issues of law to be first tried, 333. Amendment must be ordered instead of final judgment, 333. Justice cannot decide what amendment shall be made, 333. General demurrer reaches every defect, 333. Waived by joining issue of fact, 333. Appeal from judgment on, 334.

DENIAL: See *Answer.* What may be proved under, see Vol. I. 879 to 884. Of charges or assertions made by others, 379, 380. General denial, what may be proved under, 309. What cannot be proved under it, 309.

DEPARTING: From county or residence, a ground for an attachment, 124, 145.

DEPUTY: Constable cannot make, 48. Justice may depute person, 48. Summons served by deputed person, 65. So warrant may be, 111. So of an attachment, 172.

DISCHARGING DEFENDANTS: May be done in actions for torts, 696, 697.

DISCHARGE OF JURY: See *Jury.* In case of disagreement, 623.

DISCONTINUANCE: By failure of justice to appear, 217. By failure of plaintiff to appear, 219. By irregular adjournment of cause, 358. By withdrawing action, 578, 692. By failing to appear and hear verdict, 624. Judgment of, when rendered, 694.

DISCRETION:

DOCKET: How proved in evidence, 401. Statute must be complied with, 401. Producing and proving docket, 402. Death or absence of justice, 402. Conclusive evidence, 402. What facts to be entered in, 402. Parol evidence to contradict, 403. Transcript of, 403. Certificate of justice to transcript, 403. Certificate of county clerk, 404. *Form of justice's docket,* 699. Justice no power to alter judgment in, 702.

DOCKETING JUDGMENT: Transcript docketed in county clerk's office, 706. Transcript need not show jurisdiction of justice, 706. Becomes judgment of county court, 706. *Setting aside docketed judgments,* 707.

DOMICIL: Every person has one, 62.

DRUNKENNESS: Answer of, 974. Drunken witness will not be sworn, 368. Drunken juror set aside, 600.

DURESS: Answer of, 982, 983.

ELECTION OF ACTIONS: When tort preferable to contract, 291. When replevin preferable to trover, 291. Replevin to secure exempt property, 291.

ENTITLING PAPERS: Not to entitle attachment affidavits, 128. What the title of an action is, 129. Replevin affidavits not to be entitled, 189. Entitling complaint, 312, 925.

ENTRY: Of judgment, 694.

ERROR. See *Appeal.*

ERASURES: See *Alteration of instruments.*

ESCAPE: Complaint for, 967. Rearrest on warrant, 120.

ESTOPPEL: Answer of, 984.

EVIDENCE: *General preliminary view,* 361 to 364. Definition of terms, 365, 366. What evidence is, 361. Not permitted to prove everything desired, 361. Admissibility decided by justice, 361. Trial of cases by jury, 361, 362. General principles of evidence, 362. Faith in human veracity, 363, 365. Excluding principles or rules, 364. Direct and indirect evidence, 365. Competent and incompetent, 365. Credible, relevant, cumulative, conclusive and satisfactory evidence, 366. MATTERS JUDICIALLY NOTICED, 303, 304, 366, 367. Of general statutes, 366. Common law rules, 366. Territorial extent of jurisdiction, 366. Divisions into states, counties, towns, &c., 366. Public officers, 367. Navigable rivers, 367. Not of foreign laws, 367. Nor those of other states, 367. Meaning of English words, 367. COMPETENCY OF WITNESSES. See *Competency of witnesses.* ADMISSIONS. See *Admissions.* ESTOPPEL, 386. PRESUMPTIONS, 386. Definition of term, 386. Of fact for jury, 386. Of law for court, 386. Test whether presumption of law or of fact, 387. Sanity presumed, 387. Motives presumed good, 387. Consequences of acts intended, 387. Not presumed a wrongdoer, 387. Officer presumed to have discharged his duties, 387. Giving note, presumed that nothing was due to the debtor from payee, 387. Presumption may be rebutted, 387. Money received presumed to be due, 387. Answers to letters presumed to be from person addressed, 387. Paper presumed executed at date of it, 388. As to handwriting of indorser, 388. Possession of unmutilated railroad ticket, 388. Receipt evidence of payment of previous rent, 388. Laws of other states presumed to be like our common law, 388. What conclusive as presumptions, 388. What not conclusive, 388. When death presumed rather than that a crime has been committed, 388. When no such presumption arises, 389. Continuance of partnership presumed, 389. Presumed to contract with reference to known customs, 389. HEARSAY, 389. What it is, 389. Hearsay is not evidence, 389. Reasons for its rejection, 390. Exceptions to the general rule, 390. Acts or declarations as evidence of feelings

EVIDENCE — *continued.*
at a particular time, 390. Action for enticing wife, wife's declarations, 390. Person afflicted with bodily paio, 390. Declarations as *res gestæ*, 390, 391. Rule relating to such acts or declarations, 391. Officer's return conclusive against himself, 391. Also evidence in his own favor, 391. Hearsay excluded even though stated on oath, 391. Hearsay admissible in somo cases, 391. In matters of public or general interest, 391. Reputation that one holds a particular office, 391, 392. Such as sheriff, constable, collector, trustee of school district, &c., 392. When not receivable as to private officer, 392. Hearsay is evidenco in matters of pedigree, 392. Entries in family bible or register, 393. Declarations of deceased parents, 393. Entries in physician's books as to birth, 393. Ancient possession, 393. Dying declarations not admissible in civil actions, 393. Declarations against interest by persons since deceased admissible, 393. Not so as to living persons, 394. *Entries in the course of office or business*, 394. Protest of a notary, 394. Memorandum of cashier, 394. But such third person must be dead, or entries not evidence, 394. Entry must have been in the usual course of business to be evidence, 395. Must have been cotemporaneous with the event recorded, 395. Indorsements to save statute of limitations, 395. *Evidence of a deceased witness*, 395. Evidence given, how proved, 395. By any one who heard it, 395. Minutes, when evidence, 396. Need not prove precise words used, 396. Must show that former witness is dead, 396. BEST EVIDENCE, 397. Rule requiring the best evidence, 397. Presumption of fraud if best evi dence is withheld, 397. Rule relates to quality not quantity of evidence, 397. Cases in which secondary evidence is excluded, 398. Oral evidence cannot be substituted for instrument required by law to be in writing, 398. May prove contents of lost instrument, 398. Admissions of party will not supply the place of a record, or of an instrument required by law to be in writing, 398. Oral evidence to prove direction on warrant, 398. Oral evidence cannot be substituted for written evidence of a contract put in writing by the parties, 398. Bill of sale cannot be proved by parol, 399. So of a lease, 399. A copy of a copy not evidence, 399. Written part of a printed contract prevails over printed part, 399. Sufficiency of proof may be objected to even if parol proof is received, 399. So the evidence may be struck out, 400. Oral evidence cannot be substituted for any writing whose existence is disputed, 400. Cannot call for contents of a letter without first producing the letter, 400. Exceptions to rule requiring best evidence, 400. May prove records by examined copy, 400. Appointment of public officers may be proved by reputation and their acts, 400. A mere collateral agreement does not need to be produced, 401. Proceedings before justices of the peace may be proved as the statute provides, 401. Docket cannot be proved by parol evidence, 401. Statute must be complied with to make transcript evidence, 401. Producing and proving docket, 401. Death or absence of the justice, 402. Pleadings and proceedings, how proved, 402. Docket conclusive evidence, 402. Not evidence in some cases, 402. What is to be entered in docket, 402, 403. Parol evidence not admissible to contradict docket, 403. Minutes of justice no better evidence than those of counsel, 403. Form of certificate of transcript, 403. To be certified by county clerk, 403. Form of clerk's certificate, 404. Clerk's seal, 404. *Producing paper, &c., on notice*, 404. Notice should be given to produce it, 404. Cannot give parol evidence of contents unless notice has been given. 404. Notice not necessary if pleadings give notice to be prepared to produce paper, 404. So of a case where the original is a duplicate, 404. Or is itself a mere notice, 404. Notice to produce need not be given to a party who has wrongfully destroyed a paper, 404. So of a paper lost by a party without his fault, 404. Need not allege loss of paper in pleading, 404. Paper filed but clerk unable to find it, parol evidence is admissible, 405. Paper in possession of party out of the state, 405. Refusal to produce paper authorizes parol evidence of contents. 405. But service of notice to produce must be shown, 405. What notice necessary, 405. Paper in court does not require any notice to be given, 405, 406. Form of notice to produce paper, 406. Notice, how served, 406. Describing paper desired, 406, 407. Proof of service of notice to produce, 407. Notice not like a subpœna, *duces tecum*, 407. Notice does not compel production, 407. But allows parol evidence of contents, 407. Notice served on a party not in possession of paper does not authorize parol evidence of contents, 407. Duplicate papers do not require any notice to be given to produce, 407. Original must be shown to exist before a certified copy is evidence, 407. Loss of a paper, how proved, 407, 408. Form of oath to party, 407. Paper produced on notice must be proved by him who offers it, 408. Notice to produce need not be given more than once, 408. PROVING SUBSTANCE OF THE ISSUE, 408. Only the substance of the issue need be proved, 408. Immaterial averments need not be proved, 408. Variance of little consequence, 408 to 413. Strictness of earlier cases not followed, 409. Sale of goods, what proof sufficient, 409. Proof of trespass, time of trespassing, 409. Taking of goods, ownership not material, 409. Services

EVIDENCE — *continued.*
rendered, 410. Work performed under special contract, 410. False warranty, need not prove fraud for false warranty sufficient, 410. Waiving tort and suing on contract, 410. But if complaint is on contract, plaintiff cannot recover for fraud, 410, 411. Such a case is more than a variance, 411. When cannot nonsuit for variance, 411. Disregarding variance when no one was misled, 411. But plaintiff cannot recover when all the material allegations of the complaint are disproved, 411. Variance must be objected to below, 411. Variance between answer and evidence, 411, 412. Defective pleading may be proved, 412. Disregarding variances, 412. BURDEN OF PROOF, 413. Party asserting affirmative has burden of proof, 413. Test as to who has burden of proof, 413. Where both parties hold affirmative issues, 413. Legal presumptions standing for proof, 413. Rule when law presumes the affirmative, 413. Criminal omission not presumed, 414. Affirmative has opening and closing of the case, 414. Rule when usury is pleaded, 414. Rule when unliquidated damages claimed, 414. Answer of payment, 414. Matter especially within knowledge of the defendant, 414. Penalty for selling liquor without license, 414. Pleading bankrupt's discharge, 415. Plaintiff holding affirmative on one issue entitled to open and close, 415. Changing of burden of proof during trial, 415. RELEVANCY OF EVIDENCE, 415. What is relevant evidence, 415. Must tend to prove or disprove issues, 415. Impeaching evidence relevant, 415. Offer to prove connected facts, 416. Relevancy must be shown if required, 416. Two facts, one relevant, and the other not, 416. Offer to prove several propositions or facts, some relevant and some not, 416. Proper mode of making the offer, 416. Must be relevant at time of offering the proof, 416. How shown to be relevant, 416. Court may require this to be done, 416. Impeaching evidence relevant, 416, 417. Evidence against one party but not against the other. 417. Frauds in procuring sales of goods, and statements to other persons, 417. Ratifying such a sale, evidence relevant, 417. Fraud in procuring acceptance of bill, 417. Action for injury from negligence, proof of value of plaintiff's services is well, 417. Inevitable accident to excuse breach of contract, 417. Proving how long time required to stop railroad train, 418. Court may, of its own motion, exclude irrelevant evidence, 418. Omitting to state evidence in opening does not exclude it, 418. Exclusion of evidence, relevancy must appear affirmatively on appeal, 418. WRITTEN EVIDENCE, 418. Nature of written evidence, 418. Record how proved, 418. Exemplification of records, 418, 419. Proved by sworn copies, 419. Copies, how made, 419. Copy, when admissible, 419. Proof of accuracy of copy,

EVIDENCE — *continued.*
419. Proof of chattel mortgage by copy, 419, 420. Existence of corporations, how proved, 420. Will, how proved, 420. Record of, must include the proofs, 420. Proof or acknowledgment of other instruments, 420. Clerks authorized to make certified copies of papers, 421. Seal, when not required, 421. Seal, how impressed, 421. Form of certificate by county clerk, 421. Form of certificate by town clerk, 422. Should show official character of clerk, 422. Statute must be strictly complied with, 422. Justice's certificate evidence in his own favor, 422. JUDICIAL DOCUMENTS, 422. Nature of, and rules relating to, 422. Judgment when conclusive evidence, 423. When not conclusive, 423. Effect of a record as evidence, 423, 424. Strangers not bound by, 424. Judgment protects court rendering it, 424. Judgment is evidence in favor of officer executing it, 425. Conclusiveness of judgment, 425. Must be same parties, 425. Facts must be identical, 426. Judgment must be upon same point, 427. PRIVATE DOCUMENTS OR WRITINGS, 427. Admissible against party making them, 427. Difference between sealed and unsealed writings, 427. Sealed writing generally conclusive, 427. SUBSCRIBING WITNESSES, 428. Subscribing witness must be produced, 428. Exception as to bills or notes, 428. Bond must be proved by subscribing witness, 428. Admissions of party does not dispense with subscribing witness, 428. Who is such a witness, 428, 429. Paper produced on notice must be proved in same manner, 429. Exception to this rule, 429. Pooof of handwriting of subscribing witness, 429. Dispensing with witness, when he is dead, insane, or out of jurisdiction, 430. So if he becomes infamous, 430. Handwriting may be proved when witness cannot be found, 430. What diligence in search required, 430. Keeping witness out of the way, 431. Fictitious names of subscribing witnesses, 431. Proof of execution in presence of witness, 431. Witnesses must be accounted for if absent, 431. Need not all be called to prove paper, 431. Proof of signature of party, 432. Proof of identity of party, 432. Impeaching subscribing witness, 432. HANDWRITING, 432. Best proof of, 432. Proof of, by character of handwriting, 432. Such evidence is by nature mere comparison, 432. Degrees of evidence as to its value, 433. Degree of familiarity with writing, 433. Weight of evidence for the jury, 433. Seeing a party write, 433. Receiving letters, 433. Identity of paper and of writer, 433. Comparison of hands not admissible, 433, 434. What is not comparison, 434. ALTERATION OF WRITTEN INSTRUMENTS, 434. See *Alteration of written instruments.* ACCOUNT BOOKS, 436. See *Account books.* PAROL EVIDENCE TO CONTRADICT, &c., 452. Papers construed

EVIDENCE — *continued.*
by the court, 452. So of lost instruments proved by parol evidence, 452. Jury decides in justice's courts, 452. Words construed in their ordinary sense, 452. Secondary sense when allowed, 452. Words of legal import taken in technical sense, 452. Effect given to intention of parties if possible, 453. No substitute for writings. 453. Cannot contradict or vary by parol evidence, 453. May defeat and show useless, 453. May apply to subject matter, 453. Explaining meaning of foreign words, 453. Parol cannot supersede written evidence, 454. Nor give effect to void written instrument, 454. Patent ambiguity, what is, 455. Latent ambiguity, what is, 455. Parol evidence as to ambiguities, 455, 456. Parol evidence to add to, or contradict, or vary written instruments, 456. May disprove legal existence of writing, 457. May show paper procured by fraud, 457. May reform written instruments, 457. Aiding written evidence by parol evidence, 457. May give effect or apply it, 457, 458. Usage and custom, 459, 462, 463. Meaning of commercial terms, 459. Writing presumed to contain entire contract, 459, 460. Cannot change terms of instrument by parol evidence, 460. Signing by agent, 461. Prior negotiations merged in writing, 461. Modification of writing by parol, 461. Meaning of characters, &c., may be shown, 462. Terms of art, 462. Meaning of writing in doubt, 463. Applying writing to subject matter, 463. Warrant signed without official character, 463. Cause of action on which judgment was rendered, 464. Consideration clause explainable, 464. Custom cannot control law, 465. If no ambiguity, no parol evidence, 465. Written and verbal authority, verbal sufficient, 465. So of written and verbal notice, 465. Give effect to intention of parties, 465. Introducing conditions by parol, 465. May show paper not to take effect until condition performed, 465. Paper without date, time of execution may be shown, 466. May show when instrument was to take effect, 466. PAROL PROOF AS ORIGINAL EVIDENCE, 466. General principles, 466. Contract reduced to writing by stranger does not exclude parol evidence of contract, 466. So by a memorandum, 466. What papers have an exclusive operation, 467. Agreement reduced to writing by parties, 467. Matters of record, 467. Proceedings in justices' courts, 467. Release conclusive, 467. Bill of sale explainable by parol, 467. Writings in duplicate, errors in may be corrected by parol evidence, 468. Signing upon a condition not performed, 468. Receipts may be explained, 468. Receipt conclusive if not explained, 469. Receipt constituting contract not varied by parol evidence, 469. Bills of lading how far varied, 469. Rights of sureties, 469. Receipt for purchase price, 469. Modification

EVIDENCE — *continued.*
of writing by subsequent parol agreement, 470. COMPETENCY OF WITNESSES. See *Competency of witnesses.* OATH TO WITNESSES, 472. All evidence of witnesses given under oath, 472. What an oath is, 472. Manner of administering oath, 472, 473. Object of oath to bind conscience of witness, 473. Statute relating to swearing witnesses, 473. Religious belief does not render witness incompetent, 473. Interpreters, 474. Form of interpreter's oath, 474. Deaf and dumb witnesses, 474. Obligation to tell whole truth, 474. Duty of witness in answering questions, 475. Not to volunteer statements, 475. MANNER OF TESTIFYING, 475. Its effect upon his evidence, 475. Advantages of public examination, 476. Demeanor of witness, 476. His fairness, bias or interest, 476. His means of knowledge. 476. His experience or inexperience as a witness. 476. His motives, 476. Chances for mistakes by repetitions. 476. EXAMINATION OF WITNESSES, 477. Manner of examining witnesses, 477. Regular mode not always pursued, 477. Object of examination, cross-examination and re-examination, 477. Affirmative to introduce all his evidence in first instance, 477. Departure from this rule, 477, 478. Questions to be relevant to matters in issue. 478. Court cannot call witnesses, 478. Effect of examination by court, 478, 479. CROSS-EXAMINATION, 479. When this right exists, and when not, 479. Value of cross-examination, 479. Object of it, 480. What may be asked of witness, 480. Credibility of witnesses, how tested, 480. What goes to make credibility, 480. Knowledge, disinterestedness, integrity and veracity are elements, 480. Test of knowledge, 480. Danger of unskillful cross-examination, 481. Relevancy of questions on cross-examination, 481. Cannot inquire into collateral matters, 481. Answers on such questions conclusive, 481. Cross-examination as to contents of writings, 481. Cannot establish paper by asking for its contents, 481. Paper must be shown to witness, and asked whether he wrote it, 482. If he did, letter must be put in, 482. At what time paper is to be put in evidence, 482. Asking as to representations made by witness, 482. May ask if he said certain thing, 482. Cannot ask witness if he wrote certain specified thing without producing the paper, even for impeaching purposes, 483. Paper proved on cross-examination need not be used until party comes to his own side of the case, 483. Right to see paper cross-examined upon, 483. Cross-examination does not waive previous valid objection, 484. Correcting abuse of cross-examination, 484. Cross-examination liberally allowed, 484. Discretion of the court in the matter, 484. Time of cross-examination, 485. Recalling witnesses who have left stand, 485. Death of witness before cross-examination,

EVIDENCE — *continued.*
485. RE-EXAMINATION, 485. Rights and objects of, 485. Cross-examination as to inadmissible matter entitles to re-examination about it, 486. FURTHER EXAMINATION, 486. Intended to supply omissions, defects, &c., 486. Or because new facts have come to light, 486. Liberally allowed by courts, 486. Order of calling witnesses, 486. How often further examined, 487. Evidence taken without objection cannot be struck out, 487. In what cases it may be done, 487. Party must abide by evidence introduced by himself, although unfavorable to him, 487. Moving to strike out evidence, 487, 488. Parol evidence of a writing given by both parties estops them from questioning the competency of the evidence, 488. So of allowing opposite party to introduce inadmissible evidence, 488. Questions as to what witness testified, 488. OPINIONS AND BELIEF, SKILL AND SCIENCE, 488. Witnesses to speak of facts, 488. Not ordinarily examined as to belief or opinions, 488. Belief not evidence, 489. May be on questions of identity, &c., 490. Opinions are evidence on questions of skill or science, 490. But it must be, 1. A matter of skill and science; and, 2. The witness must be competent, 490. Farmer cannot prove value of clerk's services, 491. Damages for breach of contract not a matter of opinion, 491. Tenant against landlord, 492. Damages for not properly feeding cattle not proved by opinion, 492. But may prove whether bricks or tiles were well burned, 492, 493. Not competent to prove payment necessary for an infant, 493. Nor whether one party was negligent, 493. Witness must have skill or cannot give his opinion as evidence, 494. Medical books not competent, 494. Damages for torts not a matter of opinion, 494, 495. For a trespass by a landlord, 495. Preventing the use of a mill, 495. Value of a dog killed, 495. Damage from nuisance, 495. Value of property is a matter of opinion, 495, 496. So of value of services, 495, 496. But not so as to property not seen by the witness, 496. Price brought at auction competent, 496. Possession of real estate may be shown by opinion, 496. Party may testify as to his intent where fraud is charged, 497. Terms of a contract may be proved in general terms, 497. Party may be asked whether he is liable for a claim made against him, 498. Witness not allowed to give his understanding of an agreement, 498. But he need not give the precise words, 498. Opinion as to mental condition, 498. As to intoxication, 498. Sanity of testator or grantor, 499. Subscribing witnesses competent, 499. But not so of others, unless skilled, &c., 499. Opinions of medical men, 499. Age of signature from appearance of ink, 499. Skilled witness now out of the business, 499. Showing machine defective, 499. As to car brakes, 500. Value of opinions for jury, 500. *Examining witnesses separately*, 500. LEADING QUESTIONS, 500. Not allowed on direct examination, 500. Reason of rule and departure from it, 501. What is a leading question, 501. Evils resulting from such questions, 501. What is not a leading question, 501. Must not assume fact proved, which is not proved, 501. Leading allowable if witness adverse, 502. Party as a witness, 502. Leading questions as to details of a conversation, &c., 502. Want of memory may be assisted, 502. Omitting to cross-examine, and afterwards calling witness by other side, 502. Leading questions as to previous contradictory statements, 503. Examination of witness called for for contradiction of previous witness, 503. Not allowed to lead him, 503, 504. Putting leading questions discretionary with the court, 504. Are allowed on cross-examinations, 504. Adverse witness varies the rule, 504. REFRESHING MEMORY, 505. Witness may refresh memory by reading or hearing paper read, 505. If no want of recollection, then paper not to be put in hands of witness, 595, 506. Cases in which refreshing memory of witness is allowed, 506. When writing examined by witness need not be produced, 507. When such writing must be produced, 507. Memorandum or writing, when evidence where the facts are forgotten by witness, 507. Kinds of memoranda admissible, 508. Testimony after refreshing memory, 508. CRIMINATING ANSWERS, 508. Witness need not criminate himself, 508. Nor answer questions tending to do so, 508, 509. Court to decide whether question tends to criminate, 509. Privilege belongs to witness alone, 509. Counsel not allowed to argue objection for party, 509. Counsel no right to instruct witness, 509. Duty of court to apprise witness of his rights, 509. If punishment barred answer may be required, 509. But must be very clear case, 510. Defense of usury, 510. Witness cannot be asked if he has been convicted of larceny, 510. When party may raise objection, 510. Privilege must be allowed whenever claimed, even after first answers, 510. Witness not to answer what will subject him to a penalty, 510. Otherwise as to liability to civil action, 510. Witness may waive his privilege, 510. DEGRADING ANSWERS, 511. Must answer as to points in issue, 511. Not so as to collateral matters, or for impeachment, 511. Refusal to answer no discredit, 511. Dissuading witnesses from attending court, 511. Or suborning them, 511. CONFIDENTIAL COMMUNICATIONS, 511. See *Confidential communications*, 511. IMPEACHING CREDIT OF WITNESSES, 515. Witness may be impeached by cross-examination, 515. Or by general evidence affecting his credit, &c., 515. Limits of cross-exami-

EVIDENCE — *continued.*
nation for this purpose, 515. Courts liberal to cross-examining counsel, 515. As to mere collateral matters discretionary, 515. Court may protect witness, 515. Cannot cross-examine as to collateral matter for purpose of contradicting witness, 515. Impeaching evidence must relate to general character alone, 515. Impeaching witness must know character of witness attacked, 516. What sufficient knowlege, 516. What not sufficient, 516. Question is as to general reputation, 517. Cannot use manufactured evidence, 517. Petit larceny does not destroy competency, 517. But it goes to credit, 517. Particular acts of immorality not admissible, 517. Interest does not affect competency, 517. But it goes to credit, 517. Party may be impeached like other witnesses, 517. Proving general bad moral character not enough, 517, 518. Must show he is not to be believed on oath, 517, 518. Contrary statements out of court by witness, 518. Proved by any one who heard them, 518. Witness need not state what he swore on a former trial, 519. Sworn statement for impeaching purposes may be put in evidence before asking witness about statement, 519. Witness has a right to explain, 519. Paper must be read to be evidence, 519. Must be facts, not mere opinions, to be contradicted, 519. Rule not invariable, 519, 520. Party calling witness cannot show his former contradictory statements, 520. Witness not to be impeached by contrary statements until interrogated as to the alleged former statements, 520. Must point out words, time, place, persons, &c., 520. If witness says he does not recollect, the facts may be shown, 521. So if he declines to answer because of tendency to criminate, 521. Witness examined conditionally must still be interrogated as to former contradictory statements, 521. Contradiction not allowable until witness first interrogated, 521. May show witness hostile, 521. Witness not to be sustained until impeached, 521, 522. What does not amount to impeachment so as to allow proof of good character of witness, 522. When it may be proved, 522. Evidence sustaining must relate to truth and veracity, 522. If impeached by record, the record cannot be shown to be erroneous and false, 522. Attempt to show witness biased in favor of party calling him, may be met by proof that he and witness are on bad terms, 522. Corroboration by proof of former statements, 523. Impeaching witness may be impeached, 523. IMPEACHING A PARTY'S OWN WITNESS, 523. Party cannot impeach a witness called and sworn for him, 523, 524. Not by proof of contradictory statements, 524. Rule the same where parties call each other, 524. Cross-examination does not make one the witness of the cross-examiner, 524. May be otherwise if new matter is inquired about,

EVIDENCE — *continued.*
524. Witness of necessity, such as subscribing witness, may be impeached, 524. So party may prove facts to be different from statement of witness called by him, 525, 526. Party not bound by all the statements of his witness, 525. DUTY OF A JURY IN WEIGHING EVIDENCE, 525. General principles, 525 to 529. No scales to weigh evidence, 526. Rules for government of jury, 527. Juries bound by presumptions and rules of law, 527. To give effect to proved instruments, 527. To render verdict on the evidence, 527. Evidence competent as to one defendant, but not as to an other, 528. Confessions or admissions by one party, 528. Evidence need not reduce matter to a mathematical certainty, 528. Rule in criminal cases, 528. Rule in civil actions, 528, 529. Affirmative must have balance of proof, 529. Presumptions to be disproved, 529. *Primâ facie* evidence, what it is, 529. *Conclusive* evidence, what it is, 529. Testimony is direct or circumstantial, 529. Rules as to credit due to witnesses, 529. These relate to, 1, integrity; 2, ability; 3, number and consistency; 4, conformity to experience; 5, coincidence with circumstances, 529. Witness must be able and willing to tell the truth, 529. Sanction of an oath, 529. Fear of temporal punishment, 530. Motives cannot be detected, 530. Influences to be weighed by jury, 530. Demeanor of witness on the stand, 530. Evidences of insincerity, 530. Evidences of sincerity, 530. Ability of witnesses, 531. His knowledge of facts and circumstances, 531. Facts stated which are result of reasoning of witness, may be unreliable, 531. Casual declarations the weakest of all evidence, 531, 532. Number and consistency of witnesses, 532. Single witness sufficient, 532. Number important when direct testimony is opposed by conflicting evidence, by experience, or by probabilities, 532. Consistency also a test of credibility, 532. Nature of coincidences important, 533. Human cunning cannot foresee all cases, 533. Substantial truth under circumstantial variety, 533. Witnesses are weighed, not counted, 534. Conformity of the testimony with experience, 534. Doubts, when statement is contrary to ordinary experience, 534. Yet witness may tell the truth, 535. Conformity with collateral circumstances, 535. Circumstantial evidence, what is such, 535. Nature and vrlue of such evidence, 535, 536. Probability of a hypothesis, 536. Motives and feelings a test of action, 537. Dependent and independent facts, 537. Rules relating to circumstantial evidence, 537. Circumstances must be established, 538. Facts should consist with the hypothesis, 538. Circumstances should be of a conclusive nature and tendency, 538. They should exclude every hypothesis but the one proposed, 539. Circumstantial evidence never

EVIDENCE — *continued.*
to be relied on when direct evidence can be had, 539. *Weighing conflicting evidence*, 539. Reconcile all, if possible, 539. If not, what rules applied, 539. Partial discrepancies, 539. Natural talents of witness, 540. Degree of cultivation or skill, 540. Differences of advantages for observation, 540. Positive against negative evidence, 540. Negative may equal affirmative, 541. Deciding upon credit of witness who are in conflict in their statements, 541. What circumstances are to be taken into account, 541, 542. Consistency of the evidence of the witnesses, 542. Remoteness of time of transaction spoken of, 542. Value of depositions, 542. False in one instance, false in all, 543. Not the rule as to honest mistake, 543. Nor when party is sworn. 543. Presumption is in favor of veracity, 543. Test of perjury in a witness, 543, Rule where jury is in doubt, in cases of conflicting evidence. 544. Juror's excuses for verdicts against law and evidence and justice, 544. In doubtful cases the affirmative must fail. 545. EXAMINATION OF WITNESSES, 477. See *Evidence*, title *Examination, Cross-examination, Re-examination, &c.*

EXECUTION: *What it is.* 714. *Kinds of execution*, 714. *Forms of execution*, 714. *Forms of execution against property*, 714. *Form of same against body*, 715. *Forms of execution for plaintiff in replevin*, 715. *Form of execution issued by county clerk*, 716. *Indorsements on executions*, 716, 717. *Execution by, when issued*, 717. *Time of issuing it*, 717. At any time within five years, 717. After justice out of office, 717. If transcript docketed in county clerk's office, 717. Void if issued after five years, 717. Leave to issue when granted by county court, 717. Permission of surrogate, 718. After plaintiff's death execution cannot issue, 718. Remedy is to sue over, 718. After death of defendants or one of them, 718. May issue against surviving defendant, 718. *Execution, when returnable*, 718. *General requisites of an execution*, 719. Must describe the right party defendant, 719. Trespass lies for a mistake in this respect, 719. *To whom directed*, 719. *Signatures, blanks, &c.*, 719. *Delivery of execution to officers*, 719. *Who to execute it*, 719. Duty of constable to do so, 719. Must levy and sell within life of execution, 719. He cannot act by deputy, 719. But justice may depute person, 720. Sheriff executes execution issued by county clerk, 720. Neither sheriff nor constable can levy or sell on execution in his own favor, 720. *Mode of executing*, 720. Arrest or breaking house of defendant, 720. When house may be broken, 720. Resisting officer if his acts unlawful, 720. Breaking inner doors, 720. Breaking cupboards, chests, trunks, &c., 720, 721. Breaking store, shop, barn, &c., 721. Breaking to seize goods of a stranger, 721. *From what time property is bound*, 721. Statute relating to this subject, 721. After levy purchaser gets no title from defendant in execution, 721. Otherwise when levy is kept secret, 721. *Priority of executions*, 721. Statute on the subject, 722, 724. Priority from time of delivery, 722. Priority in order of levy, 722. Sale on execution last delivered, 722. Executions delivered at the same time, 722. Against member of partnership, 722. Giving notice of sale and selling, 723. Delay by officer does not injure plaintiff, 723. But if he directs delay, he may lose his preference, 723. *What kind of property may be levied on*, 724. Nothing but goods and chattels, 724. Does not reach choses in action, 724. *Claim of property by third person*, 724. Officer must not levy upon goods of stranger, 724. Calling jury to try title to property, 724. Bond of indemnity, 724, 725. Number of jurors to be called, 725. *Form of notice of trial of claim to property*, 725. Service of notice, 725. *Form of oath to jurors*, 725. Attendance of witnesses, 726. *Form of oath to witnesses*, 726. Trial before the jury, 726. *Form of inquisition of jury*, 726. *Form of bond of indemnity to constitute*, 726. *Fraudulent sales or mortgages*, 727. *Levy, when to be made*, 728. Must be within life of execution, 728. Levy after return day, void, 728. May not always have sixty days, 728. *Levy, where made*, 728. *Levy, how made*, 728. What property may be seized, 728, 729. Upon all goods and chattels not exempt, 729. Growing crops, 729. Hops and grass growing, &c., not leviable. 729. Money may be levied upon, 729. Bank bills must be sold, 729. Coin may be applied on execution, 729. Levying upon money made on an execution by virtue of another execution against plaintiff, 730. Levy upon pledged goods, 730. Upon mortgaged goods, 730. Upon goods of tenants in common, 730. Upon partnership goods, 731. Rights of purchaser of partnership property, 731. Against goods of husband and wife, 731. Against joint debtors, 731. Title of unpaid vendor, 731. *What acts constitute a levy*, 732. What acts do not, 732. Need not be manual taking, 733. Execution in attachment cases, 733. Duty of officer in making a levy. 733. Should levy upon enough, but no more, 733. May levy second time if first not sufficient, 733. Officer liable for excessive levy, 734. *Forms of indorsement of levy*, 734. *Form of inventory of goods seized.* 734. *Disposition of goods after levy*, 734. *Form of receipt for goods levied on*, 734. Demand of receiptor before action, 735. *Rights and liabilities of constables after levy*, 735. Liable for safe keeping, 735. But not an insurer, 735. Levy covers subsequently acquired goods, or goods that have been changed, 735. Relinquishing levy, 735. Levy upon growing crops, 735. *Effect of a levy*, 736. Mere levy does not extinguish judgment, 736. Nor where officer has to

EXECUTION — *continued.*
pay for the goods, 736. Nor where levy abandoned at request of defendant, 736. But levy and loss or destruction of goods will extinguish judgment, 736, 737. First levy inures for benefit of later executions, 737. *Sale of property*, 737. Sale prevented by payment of execution, 737. Constable cannot pay with his own money and retain levy for his own security, 737. Nor can he take a bond for that purpose. 737. Cannot deliver the goods to the plaintiff in satisfaction of his judgment, 737. But plaintiff may purchase at sale, 737. May apply amount of, paid on execution, 737. Otherwise if other creditors have preference, 737. Sale of pledgor's interest in goods, 737. *Sale, when to be made*, 738. Must be before return day, 738. May levy at once, 738. Postponement for convenience of defendant, 738. *Notice of sale*, 738. *Form of constable's notice of sale*, 738, *Time and place of sale*, 739. *Postponement of sale*, 739. When it may be done, 739. To prevent sacrifice of property, 739. Sale must be in town, 739, *Sale, how conducted*, 739. Must be at time and place fixed, 739. Sale by vendue to highest bidder, 739. Property to be present, 739. To be pointed out specifically, 739. Must separate from others, 740. Sale subject to chattel mortgage, 740. Sale of stereotype plates from impressions, 740. Property part present and part absent, 740. Postponement for want of bidders, 740. Sale at great sacrifice, officer liable, 741. What title passes on execution sale, 741. Nothing but the interest of the defendant. 741. Selling too much property, trover lies, 741. Retracting bid before striking off, 741. Bid is a mere proposition, 741. Refusal to accept, and resale of goods, 741. Statute of frauds, goods over $50, 741, 742. *Form of memorandum of sale of goods, &c.*, 742. *Constable's right to fees, &c.*, 742. Not entitled to fees until levy, 742. Entitled to poundage after levy, 742. Or after arrest of defendant, 742. Fees no part of judgment, 742. Cannot sell for fees after judgment paid, 742. *Replevin actions*, 742. Property in possession of successful party. 742. Demand of property by constable, 742. Breaking buildings to get it, 743. Levying upon other property of defendant, 743. Arrest of defendant, if no property, 743. Clause of arrest in first execution, 743. *Execution against the person*, 744. First to take goods, &c., if any found, 744. Defendant's denial of having property, 744. Reasonable time to search for property before arrest of defendant, 744. Rules as to arrest, 744. Taking defendant to jail, 744. Execution against plaintiff in replevin, 745. Effect of taking body of defendant. 745. When plaintiff remitted to his former rights, 745. *Discharge of defendant from jail*, 745. *Form of affidavit for discharge*, 745. *Escape*, 745. *Property exempt from execution*, 745. General rule all goods and chattels liable, 745. Statutes of exemption liberally construed, 746. Articles exempt by statute, 746. Medical books of physician, 746. Cloth and wool, 746. Household furniture under Revised Statutes, 746. Cow and ten sheep, 746. Potatoes for family use, 746. Milch cow of widow, 747. Wearing apparel, 747. Exempt even though off the person, 747. Must be necessary wearing apparel, 747. Tools and implements, 747. Surgical instruments exempt, 747. But not so as to threshing machine, printing press, types or machine, 747. Team is exempt, 747. One horse a team, 747, 748. Part owner of a horse, 748. Buggy wagon, tow line, 748. Clock, if necessary, 748. What are necessaries, 748. Execution on demand for purchase-money, 749. What property liable to, 749. Claim must be enforced separately, 749. Surety's property exempt, 749, 750. Necessity of articles must be shown affirmatively, 750. Not enough to show it convenient, 750. Must show that articles do not exceed the statute value, 750. Must show that the exempted amount was not left after sale, 750. Plaintiff must prove himself a householder, 750. Rule as to deciding what is necessary, and therefore exempt, 751. Jury should be liberal, 751. Election of articles by defendant, 751. Exemption a mere personal privilege, 752. No other person can set up the claim, 752. Turning out property by defendant, 752. Who is a householder, 752, 753. Goods exempt during removal, 753. *Omission to return execution*, 753. Return within five days of return day, 753. Delivery to another officer no defense, 653. Mere neglect to return renders constable and sureties liable, 753. Recovery is amount of execution and interest, 753. Must show that judgment was valid, 753. Consent of plaintiff to delay paying money does not discharge sureties, 753. Defense for not paying over, because officer sued and beaten, 753. Surplus money to be returned to defendant by constable, 754. Must be demand before action lies, 754. Sureties of constable, 754. Statute relating to, 754. What a sufficient instrument, 754. Who may sue on it, 754. Action must be within two years, 755. In six years as to constable, 755. *Form of instrument given by constable*, 755. *Return of an execution*, 755. Constable may take whole sixty days, 755. *Forms of returns to executions*, 755, 756. *Renewal of executions*, 756. Return unsatisfied before renewal, 756. Manner of renewing, 756. Renewal retains lien of previous levy, 756. Renewal to give time to sell, 756. Renewal by justice out of office, 756. *Forms of renewals*, 757.

EXECUTORS: May sue, but cannot be sued in justices' courts, 28, 270. Summons in

EXECUTORS — *continued.* favor of, 64. Actions by, 270. Sole acting executor may sue, 270. Next of kin cannot sue for share of estate, 270.

EXEMPLIFIED PAPERS: How made, 418. The whole must be exemplified, 419. Exemplification of record of will includes proofs, 420.

EXEMPT PROPERTY: See *Execution.*

EXPERTS: May give opinions as evidence, 490. What may be proved by them, 499. Value of such evidence, 500. See *Evidence.*

EXTENDING TIME: For furnishing bill of particulars, 321. For trial of cause. See *Adjournment*, 334. Holding open cause, 577. For entering judgment, 694, 695. May be done by consent, 695, 696. By renewing execution, 756. For bringing an appeal, 771. For argument of appeal, 833.

EXTINGUISHMENT: Judgment not extinguished by mere levy, 736. Sometimes otherwise, 736.

FACT, ISSUES OF: Answer raises issue of fact, 327 to 329. Must be issue before adjournment, 350. May be tried by justice alone, 584. May be tried by a jury, 589. Must be such issues before a jury can be called, 589.

FACT, QUESTIONS OF: What are such, 627. Evidence on both sides of question, 627. Verdict contrary to evidence, 628. Assessing damages in actions for tort, 628. Credit of witnesses a question of fact, 628. So of fraud, 628. So whether goods were delivered or accepted, 628. Whether note taken before or after due, 628. Whether bill or note taken as payment, 628. Or sale to hinder or delay creditors, 629. Or license given, 629. Or goods delivered in reasonable time, 629. Or whether money paid or lent, 629. Or if payment usurious, 629. Whether services were gratuitous, 629. Or delivery of contract absolute or conditional, 629. Or for whose benefit accommodation note, 629. Or authority of agent, 629. Whether paper executed at date, 629. Or when alterations made, 629. Or when undated instrument was made, 629. Whether negligence existed, 629. Whether acts are a nuisance, 630. Facts undisputed it is question of law, 630. See also. *Pleadings*. title *Questions of fact.*

FALSE RETURN: May be alleged as error in fact, 74 Justice liable for, 811.

FICTITIOUS NAMES: May be inserted in summons or warrant, 44. But not in attachment, 45. Appeal from judgment in such name, 767.

FICTIONS IN PLEADINGS: Abolished by Code, 299.

FILING PAPERS: Justice ought to file affidavits, 128. So of replevin bonds. 197. In offers of judgment, 257, 258. Filing pleadings, 293. Filing transcript of judgment, 706. Filing notice of appeal, 801. Of the return, 798. Of amended return. 823, 824. Interrogatories, 818. On offer of judgment, 868. Affidavits used on

FILING PAPERS — *continued.* motion, 828. Papers filed not presumed to have been altered after filing, 435. Papers on confession of judgment, 703.

FINE: Cannot replevy property taken for, 191. Upon witness for disobeying subpœna, 559. For contempt of court, 645. No action lies for imposing, 645. Upon justice for not making return, 820. For not making amended return, 821.

FOLIO: What it is, 128, 187.

FOREIGN JUDGMENTS:

FOREIGN LAWS: Not judicially noticed, 367. Presumed to be like our common law, 388. Must be proved, 388.

FORGERY:

FORMS: See *Index to Forms.*

FORMER RECOVERY: Answer of, 977.

FRAUD: Answer of, 983. Setting aside process for, 51. A ground for a warrant, 90. Ground for attachment, 124, 125, 145, 416. Not presumed, 387. Not presumed as to papers filed, 435. A question of fact for jury, 628.

FRAUDS, STATUTE OF: Answers of, 981, 982. Sales on execution, 741, 742.

FREEHOLDERS: Warrants against them, 96. Who is a freeholder, 95. What is not a freehold estate, 95.

GENERAL DENIAL: Answer of, 973.

GOODS BARGAINED AND SOLD: Complaint for, 955.

GOODS SOLD AND DELIVERED: Complaint for, 955.

GUARDIAN: Appearance by, 222, 229. Distinction between next friend and guardian, 229. Next friend for plaintiff, 230. Guardian for defendant, 230. On whose motion appointed, 230. Object of appointing, 231. Infant must have, 231. Consent to act, 232. Mode of appointing, 232, 233.

HANDWRITING: See *Evidence*, title *Handwriting.*

HEARSAY: See *Evidence*, title *Hearsay.*

HIGHWAY: Encroachments on, 34. Right in, raises questions of title to land, 34.

HOLDING OPEN: Justice may hold open court, 577. For how long a time, 577. For what reasons, 577. Over Sunday, 617, 618.

HOUSEHOLDER: Who is such, 752. Property of, exempt from execution, 752, 753.

HYPOTHETICAL: Pleadings must not be, 299, 300. Answer must not be, 328.

HYPOTHESIS: Rules relating to proof of, 537 to 539.

HUSBAND AND WIFE: Action by married women, 273, 274. Actions against married women, 280. Liability of husband, 280. Married women liable for torts, 285. Not witnesses for each other, 367. 370.

IDENTITY: Provable by opinion, 490.

IDIOTS: Must sue in their own names, 223. Not competent as witnesses, 368.

IGNORANCE OF LAW: Parties presumed to know the law, 263. Parties accountable for, 340.

IGNORANCE OF FACT: Answer alleging, 982.
ILLEGALITY: Never presumed, 387, 389.
IMPEACHMENT: See *Evidence*, title *Impeaching credit of witnesses.*
IMPRISONMENT: Action for false imprisonment, 97, 98. On execution, 715, 744, 745. Imprisoned debtor, 20.
INDEMNITY: Bond of, to constable, 724 to 727.
INDORSEMENT: On process for penalties, 47. Upon replevin papers, 192. On answer of title to land, 253. Upon executions, 717. Of levy by constable, 734. When evidence to renew bar of statute of limitations, 395. Of return evidence of officer's levy, 391.
INFANCY, INFANT: Answer of, 974. Appearance by guardian, 229. Actions by infants, 273, 283. Actions against them, 279. Competency as witnesses, 368, 369. Infancy may be assigned as error in fact, 855.
INNOCENCE: Always presumed, 387, 389.
INTEREST: Goes to credibility of witness, 369. As damages in actions on contract, 659. As a part of damages, 687, 688. As damages for torts, 677 to 680. Disqualifies justice, 22 to 24. So of a juror. 601. Disqualifies constable from serving venire, 594.
INTERROGATORIES: Annexed to a commission, 567. On proceedings for contempts, 818. Answer to, 819.
INTOXICATION: Answer of, 974. Disqualifies witness, 368. So of a juror, 600.
INVENTORY: Of articles attached, 173. Certifying by constable, 174. Service of copy of, 174. Of goods levied on by execution, 733, 734.
IRREGULARITY: As a matter of jurisdiction, 4. When waived by pleading, 17. Not waived if proper objection made, 20. Not presumed, if jurisdiction is shown, 21. In adjournment of a cause, 358 to 360. In summoning a jury, 593, 594, 599. In conduct of jury, 620, 621. Setting aside docketed judgment for, 707.
ISSUE: Must be found on first appearance of parties, 294. By putting in answer, 327. By interposing demurrer, 330. Of fact, 627. Of law, 630. Judgment on issues of law or fact, 691. *Issue without process*, 54, 55.
ISSUING PROCESS: See *Process.* See also, *Summons, Warrant, Attachment and Replevin.*
JOINDER OF CAUSES OF ACTION: General remarks on the subject, 287. Splitting causes of action, 268, 287. Items of contract must all be joined, 287. But must all arise out of same contract, 287. Items at different times need not be joined, 288. Torts cannot be divided, 288. Recovery against one bars action against the other, 288. *Several causes of action on contract*, 288. Several causes may be joined in one action, 288. So of promissory notes, 288. *Trespasses may be joined*, 289. So of penalties, 289. *Cannot join contracts and torts*, 289. Trover and contract not joined, 289. Nor warranty and fraud, 289. *Causes of action must be in the same right*, 289. Must all belong to same plaintiff, 289. Must be interested in entire cause of action, 290. *Must affect all the defendants in same right*, 290. Constable and his sureties, 290. Demand against part, but not all the defendants, 290. As trustee and individually, 290. Principal and his surety, 290. Must affect all the defendants, 290. *Misjoinder, how corrected*, 290. *Appeal does not lie*, 290. Remedy is by demurrer, 290. *Election as to kind of action*, 291. Waiving tort and suing on contract, 291. Replevin, when preferable, 291. Recovering exempt property, 291.
JOINDER OF PARTIES, 259 to 286. See *Parties to action.*
JOINT DEBTORS: May be sued by long summons, 60. Where one is an infant, 61. May be sued by short summons, 78. Attachment against property of, 133, 134. Indorsement on execution against, 717.
JOINT STOCK COMPANIES: Actions against, 279. In whose name to sue, 283.
JOINT TENANTS: Actions by tenants in common, 275. Action, by whom brought, 284.
JUDGE: Disqualified by relationship, 22, 24 to 28. And by interest, 22. Merely declares the law, 689. Not liable to civil action, 424, 562.
JUDICIAL ACTS: Not a ground of action, 424, 562. 645.
JUDICIAL NOTICE: Matters judicially noticed, 303, 304, 366.
JUDGMENT: *What a judgment is*, 689. *Kinds of judgment*, 689. Four classes of, 689, 690. Interlocutory and final, 690. *Judgment by default*, 690. Not allowed in justices' courts, 690. Must prove case if defendant fails to appear, 690. Must be by legal evidence, 690. Relief from default, 691. *Judgment on issues of law*, 691. *Judgment on issues of fact*, 691 Judgment where there are several issues, 691. In actions for trespasses, 691. Actions for separate demands on contract, 691. When in favor of plaintiff, 691. When for defendant, 691. Costs of the action, 691, 692. In actions of replevin, 692. *Judgment on issues of law and fact*, 692. *Judgment of nonsuit*, 692. On failure of proof by plaintiff, 692. By withdrawing action, 692. No bar to a new action, 693. Cannot nonsuit after cause given to jury, 693. Nor after submission to justice, 693. May reserve right to withdraw, 693. May reserve decision as to nonsuit, 693. Mere submission no bar to new action, 693. Cannot contradict docket if it shows nonsuit, 693. Error in granting nonsuit, how corrected, 693. *Judgment of discontinuance*, 694. *Judgment, when to be rendered*, 694. When to be forthwith, 694. When within four days, 694. When in cases of

JUDGMENT — *continued.*
offer of judgment, 694. Tried by justice, must be within four days after submission to him, 694. May take four days from final submission, 694. When Sunday is the fourth day, 694. Must be entered somewhere, 694, 695. Parties may extend time for rendering, 695. Trial by jury, judgment must be rendered forthwith, 695. Taxing costs part of rendering judgment, 695. Entry in minutes of justice sufficient, 695. Error in time of entering must appear affirmatively to reverse judgment, 695. Extended by parties, estops them, 695. Defendant arrested on warrant, judgment must be rendered forthwith, 696. Cannot be rendered on Sunday, 696. May be on Saturday against persons holding that as Sabbath, 696, On election day, 696. *Judgment, how rendered,* 696. To be entered in docket, 696. May be in minutes at first, 696. Transcribing into docket, 696. Entry must be in English, 696. If intelligible, bad English no harm, 696. Separate judgments, 696. In actions for torts, 696, 697. Discharging one defendant, 696, 697. Separate judgment in actions on contract, 697. *Form of entering judgment,* 697. Should show regularity, 698. Remitting part of verdict, 698. Remitting entire damages found, 698. Judgment in favor of defendant for set-off, although plaintiff proved no claim, 698. Docket cannot be contradicted, 698. Not the rule as to strangers, 698. Omission of justice to make entries, 698. *Form of justice's docket.* 699. *Forms of judgments in replevin,* 700, 701. Form, when one defendant acquitted and one convicted. 701. Mode of entering separate judgments. 701. *Opening or altering judgment,* 701. Justice no power to open judgment, 702. Cannot increase or reduce amount, 702. Cannot change amount of costs, 702. May open by consent of parties, 702.

JUDGMENT BY CONFESSION: For what amount, 702. Who may confess it, 702. One partner cannot, 702. *How confessed,* 702. Confession must be written, signed and filed with justice, 703. Must also be on affidavit, 703. Must be personal appearance by defendant before justice, 703. Confession need not be signed at the justice's office, 703. May be at a distance in same town, 703. Or may be taken out of the town, 703. If no process is issued, confession must be in writing, 704. May be oral if process served, 704. Judgment should show in whose favor it is entered, 704. *Form of confession of judgment.* 704. *Form of affidavit, if over* $50, 705. Effect of omitting affidavit, 705. Valid as to parties, though otherwise as to creditors, 705. Plaintiff's presence at confession, 705. Nature of cause of action to be stated in the confession, 705. Affidavits not required if judgment less than $50, 705. *Stamps,* 705. If judgment over $100, 705. *Actions on judgments,* 706. *Transcripts of judgments,* 706. Justice bound to furnish, 706, 707. Filed and docketed in county clerk's office, 706. No lien on lands unless above $25, 706. To furnish defendant with a transcript, process, pleadings, proof, &c., 706. Showing jurisdiction, 706. *Prima facie* evidence of that, 706. Clerk's certificate, when sufficient, 706. Docketed transcript becomes judgment of county court, 706. Transcript may be made after justice out of office, 706. Evidence in his own favor, 706. Good, though in bad English, 707. *Setting aside docketed judgments,* 707. County court may set aside fraudulent ones by confession, 707. But not in other cases, if the application is by motion, 707. Remedy in such case is by appeal, 707.

JURAT: What it is, 148. When it shows regularity, and when not, 148.

JURISDICTION: Acting is a claim of, 4. Definition of the term, 4. It relates to the right to act, 4. Difference between mere error and want of jurisdiction, 4, 5. Authority of law to act is the test of, 5. *Its incidents,* 5. Grant of power carries necessary incidents, 5. *Where to be exercised,* 5. Within territorial limits of officer, 5, 6. Justice cannot try causes out of his town, 6. Constable cannot serve civil process out of his county, 6. Cannot so serve summons, warrant, attachment or execution, &c., 6, Service void if out of county, 6. Presumed to have served it in county, 6. *Territorial extent, or kind of process,* 6. Process runs into any part of county, 7. Exception to rule, 7. Serving in wrong town, judgment erroneous, 7. Said to be also void, 7. Serving non-resident by wrong process, 8. Judgments will be void, 8. Process to be returnable in town in which justice resides, 9. Whether justice a town or a county officer, 10. Subpœna extends beyond county, 11. Commission may go anywhere, 11. *Jurisdiction of the person,* 11. Process must be served to confer it, 11. Must be proper kind of process, 11. Effect of issuing wrong process, 11. Whether justice a trespasser, 12. Trespass to issue warrant or attachment without proof or security, 12, 13. Must also be legal service of process, 13. Clerical error in process amendable, 13. *Jurisdiction of the property,* 13. For fraudulent acts of defendant, 13. Must be strict compliance with statute, 14. Trespasser to issue attachment without affidavit and bond, 14. Judgment both erroneous and void, 14, Also void collaterally, 14. May sometimes be valid collaterally, 14. *Jurisdiction as to amount,* 14. Must keep within sum limited by law, 15. Statement of too large a sum in summons, 15. Defendant must appear and answer, 15. *Jurisdiction of subject matter of the action,* 15 Void if no jurisdiction over subject matter, 15. *When void for want of jurisdiction,* 15, When statute has not conferred subject

JURISDICTION — *continued.*
matter, 15. Want of, may always be shown, 15. *Erroneous for want of jurisdiction*, 16. Must comply with statute, 16. Difference between erroneous and void judgments, 16. Erroneous adjournment, judgment not void, 16. It may be erroneous, 16. So of receiving verdict in absence of plaintiff, 16. *Proceedings necessary to confer jurisdiction*, 16. *How far consent will confer it*, 16. Cannot confer jurisdiction, 16. Consent may waive errors, 17. Party at liberty to renounce benefits, 17. *Errors waived by pleading, &c.*, 17. Implied waiver by taking subsequent steps, 17. Pleading waives error in process, 17, 19. Pleading no waiver after objection taken, 20. Imprisoned debtor, 20. Taking any step waives previous irregularities, 20. *How far jurisdiction lost*, 20. *Ought to appear on face affirmatively*, 20. Inferior courts must show jurisdiction, 21. Superior courts it is presumed, 21. If jurisdiction judgment is conclusive, 21. Return on appeal must show jurisdiction, 21. *Personal disqualifications*, 21. Impartiality of highest importance, 21. Justice should not act as adviser in actions before him, 22. *Justice interested as a party to record*, 22. Statute as to interest or relationship, 22. Beneficial interest disqualifies, 22. Justice one of a court, 22. Slightest interest disqualifies, 23. Same rule whether separate or joint interest, 23. Where town is concerned, 23. *Relationship as a disqualification*, 24. Consanguinity and affinity, 24, 25. Related as cousins and second cousins, 25. Other relationships, 25, 26. Judgment rendered is void, 27. Relationship as error in fact, 27. How made to appear, 27. *Innkeepers*, 28. *Actions expressly excepted by statute*, 28. *People a party*, 29. *Title to lands in question*, 29. Object of the statute, 29. Not absolute in all cases, 29. Sections of the statute, 29. If title not set up in answer it cannot be shown by defendant as a defense, 30. Title on plaintiff's own showing, 30. Actual possession not a question of title, 30. Nor is a right of possession always so, 30. It is otherwise if right of possession is founded on title, 31. License is not a question of title, 31. Contract for stone to be blasted, 31. Title is always a question of ownership, 32. Dower right no title so as to be a breach of covenant to convey good title, 32. Fraud in sale of real estate, 33. Title must be interposed below if at all, 33. Claim to own growing trees and vines, 33. Action of waste for forfeiture, 33. Right by prescription to plow lands, 33. Action by tenant for injury to house does not raise question of title, 33. Agreement to remove road fences, 34. Overseers suing for penalties, title is not any defense, 34. Answer of public highway raises title, 34. So of a right of way over lands by prescription, 34. Trespass on wild lands, plaintiff must show title, 34.

JURISDICTION — *continued.*
Defendant may object to deeds, 34. If no objection, nor any dispute of title, plaintiff may recover, 34. Defendant must dispute plaintiff's title, if he would raise the question, 34. Deed, when competent evidence, 35. What is disputing title, 35. Whether judgment is void, 35, 36. *Assault and battery*, 36. Justice has no jurisdiction of, 36. What is and what is not such, 36. *Demands exceeding* $400, 36. Must be litigated accounts, 37. Reduced below $400, by payments, 37. Reduced by set-offs, 37. Whether more than $400 a question of fact, 38. If over $400, judgment void, 38. *Actions against executors, &c.*, 38. Executors may sue in this court, 38. But cannot be sued as such, 38. *Oath of office*, 38. Officer *de facto* without oath, 38. His acts bind third persons, 38. Acting without oath a misdemeanor, 38. He cannot recover his fees in such a case, 38. Office is void as to him, but valid as to strangers, 39. *Nature of justice's jurisdiction*, 39. Not a common law authority, 39. Takes nothing by implication, 39. Must comply strictly with statute, 39. *Amendments, &c.*, 39.

JURORS: See *Jury*, and *Trial by jury*.

JURY: See *Trial by jury*.

JUSTICE: See *Jurisdiction*, *Process*, *Trial*, *Trial by jury*, *Discretion*, *Evidence*, *Judgment*, *Execution*, *Appeals*. JUSTICE A MATERIAL WITNESS, 237. See *Witness*.

JUSTIFICATION: Answer of, 979, 980.

KNOWLEDGE: When it must be alleged in pleading, 310. When in complaints for torts, 325, 326. Parties presumed to know the law, 263.

LACHES: Irregularities waived by, 17 to 19. Consequences of, by not appearing, 220 to 222. In applying for adjournment, 343. In serving subpœna, 561. In returning execution, 753.

LAND: When title to, is in question, 29 to 36.

LANDLORD AND TENANT: Complaints in actions between, 936, 937. Answers, 981.

LAW, QUESTIONS OF: When a question of law arises, 296. Must be on undisputed facts, 296. Conclusions of law not alleged in pleadings, 296. What is such an allegation, 296. Alleging a conversion of property, 297. Law presumes legality of acts, 297, 301. Facts showing fraud must be stated, 297. General allegations, when allowable, 297. Competency of witnesses as matter of law, 630. So whether particular evidence is admissible, 630. So of construction of written instrument, 630. So whether certain evidence tends to prove fraud, 630. Rulings by the justice on the trial, 630. Deciding motion for nonsuit, 631. Jury may decide matters of law submitted to them on the merits, 631. See also *Pleadings*, title *Questions of law*.

LAW OF OTHER STATES: Presumed to be like our common law, 388. Foreign laws must be proved, 367. Contracts made elsewhere, 301.

LEADING QUESTIONS, 500 to 505. See *Evidence*, title *Leading questions*.

LETTERS: May contain authority for attorney to appear, 226. Contents of, not provable by parol 400. Cross-examining as to contents of, 481 to 483. Refusal to produce on notice, 405. Written "without prejudice," 378.

LEVY: See *Execution*. Answer of, 979, 980.

LIEN: Answer of, 984.

LIMITATIONS, STATUTES OF: Indorsements on bonds, &c., 395. Answer of, 978.

LOSS OF PAPERS: Parol evidence of their contents, 404. What sufficient proof of loss, 405.

LUNATIC: Actions by, 273, 283. Liable for his torts, 285. Not competent as a witness, 368. Liable for torts, 285.

MARRIAGE AND MARRIED WOMEN: Wife's right to appear for husband, 227. Married woman needs no guardian, 223. Actions by and against, 273, 274, 283. Liable for her torts, 285. Cannot be witness for husband, 369, 370. Admissions of as against husband, 373. Widow may be housekeeper, 747, 753.

MATERIAL ALTERATION: See *Alteration of instruments*.

MEMORANDUM: See *Evidence*.

MERGER: Of prior negotiations in written instruments, 461. Prior instrument, how far in force, 461.

MESNE PROCESS: See *Process*.

MILEAGE: Constable's fees, 713. Sheriff's fees, 714.

MILITIA: Process not to be served on, 113.

MISJOINDER: Of plaintiffs in actions on contract, 276. Of plaintiffs in actions for torts, 284. Of causes of action, 290.

MISTAKE: Answer of, 983. See *Amendments*.

MISSTATEMENT: Obtaining judgment by, 843.

MONEY: May be levied upon, 729.

MORTGAGE: Mortgaged property may be levied on, 730. Complaint on, 927.

MUTUAL ACCOUNTS: See *Account Books*.

NAME: Fictitious names in process, 44. Process to state names of parties, 43. Altering name in process, 42. Signing name, 42. Trespass for arresting by wrong name, 44. How stated in complaint, 312, 313. Appeal in whose name brought, 767.

NECESSARIES: What exempt as such from execution, 745 to 752. See *Execution*, title *Exempt property*.

NEGLECT: By officer, not presumed, 387. complaints for, 966.

NEGLIGENCE: Complaint for, 965, 970.

NEW TRIAL, 859 to 874. See *Appeal*, title *New trial*.

NEXT FRIEND: See *Guardian*.

NEXT OF KIN: Cannot sue for distributive share of estate, 270.

NIGHT: Jury retiring to consider their verdict, 617, 618. Sales on execution not allowed at, 739. Jury going out on Saturday night, 617, 618, 627. Day begins and ends at midnight, 47.

NON COMPOS MENTIS: See *Lunatic*, *Idiot*, *Infant*, *Guardian*.

NON-IMPRISONMENT ACT: Authorizes short summons, 75. Its effect upon civil warrants, 88, 89. Its effect upon attachments, 127, 167 to 170. Its effect upon executions, 715, 716, 744.

NON-RESIDENT: Summons by non-resident plaintiff, 59, 60. All parties non-residents, 61. Defendants non-residents, 60, 96. Short summons for, 75 to 81. Warrants against, 87, 88. Short attachments for and against, 166 to 172.

NONSUIT: Voluntary or compulsory, 579. Made before cause is finally submitted, 579. Too late after submission to justice on merits, 579. Motion usually decided at trial, 579. May be reserved by justice, 579. Grounds for should be stated, 579. To be pointed out specifically, 580. This rule applies only where special defect is intended to be pointed out, 580. Rule not applied when plaintiff not entitled to recover on whole case, 580. Motion usually made when plaintiff rests his case, 580. But may be made at the close of the trial on all the evidence given, 580. Rarely granted on the whole evidence, 580. Usually some conflict of evidence, 580. Motion denied in doubtful cases, 580. Or when plaintiff entitled to nominal damages, 650. Granted if material defect in plaintiff's proofs, 580, 581. Granted whenever verdict would be set aside as against evidence, 581. Error to deny motion if nonsuit a matter of right on the case, 581. No ground of refusal, because jury might be disposed to disregard evidence, 581. Defects in proof may be supplied, 581. Refusal of such evidence sometimes error, 581. If motion made and denied defendant ought not to supply defects, 581. If supplied during trial by either party, that is sufficient, 581. Nonsuit granted as to some of the defendants, 581. Motion to discharge some of the defendants, 581. Nonsuit may be granted in replevin, 582. On appeal any ground may be urged to sustain nonsuit, 582. If correct on any ground, that is sufficient, 582. Nonsuit when a bar to a now action, 582. Nonsuit in action brought for tort and recovery sought on contract, 582. *Judgment of nonsuit*, 692, 693. See *Judgment*, title *Judgment of nonsuit*.

NOTARY: Certificate of, how far evidence, 394.

NOTICE: Before bringing action. 2. Of service of warrant, 118, 119. To be inserted in replevin summons, 201. Of acceptance of offer of judgment, 258. Judicial notice, 303, 304. 366. 367. Alleged in complaint, 318. Producing papers on notice, 404. Form of such notice, 406. To produce books of account, 451. In a subpœna *duces tecum*, 549. Of application for commission, 564. Of trial of claim of property under execution, 725. Constable's notice of sale, 738. Of appeal, 772. Form

NOTICE — *continued.* of notice, 784. Form of notice of stay of execution, 792. Form of notice to make return, 812. Form of notice for attachment, 815. Form of notice for amended return, 827. Form of notice of order for, 829. Form of notice of argument, 834. Form of notice to excuse default, 839. Form of notice of trial, 863. Form of notice of acceptance of judgment, 868. Of vicious propensity of animal, 892. Of application for restitution, 910. Of taxation of costs, 916. Form of notice of appeal to supreme court, 922.

NUISANCE: Complaint for, 962. By keeping open area in public street, 325. Damages in actions for, 684.

NULLITY: Process issued without authority, 7. Want of jurisdiction judgment void, 15. Judgment by justice related to party, 27. Process issued in blank, 41.

OATH: See *Affidavit, Process, &c.* To affidavit, 148. Of authority to appear as attorney, 226. That justice is a material witness, 239. To obtain adjournment, 350. Administered to witnesses, 472. Statute relating to, 473. Interpreter's oath, 474. By witness examined on a commission, 572. On trial of challenge, 604, 605. Of juror on trial of action, 606. Of witness on trial of action, 607. Of constable retiring with jury, 618. On taking judgment by confession, 705.

OBJECTIONS: To irregularities in process or proceedings, 17 to 19. If property taken. not waived by taking steps in the action, 20. Objecting before pleading, 235. To witness before swearing him, 370. *Taking objections at trial,* 631. Mode of making, 631. Justice ought to take in writing, 632. Party may take any number he pleases, 632. Presumed to be made in good faith, 632. That evidence irrelevant, immaterial, incompetent, illegal or improper, 633. Omission to object is a waiver of it, the matter of the answer, 633. Illegal 633. As to form of question, 633. As to evidence given under objection is error, 633. This rule firmly enforced, 634. Grounds of objection must be fully and clearly stated, 634. General objection, when sufficient, 634. As to defect of paper offered in proof, 634. As to evidence competent as to one party but not the other, 634. Several facts offered in connection, 634. Time of taking objection, 634. So that other party might obviate, 634. As to matters of practice, 634. Deceptive or unfair mode of taking not favored by court, 634. Raising for first time on appeal, 635. When no appearance below, may take as to evidence, 635. Not so as to pleadings or jury, 635. To jurisdictions, may be taken at any time. 735. If ruling erroneous, but no evidence given under it, no error, 635. Reasons for decision, 635. Evidence received under objection must be acted on, 636. Evidence objected to must be received or rejected, 636. Parties may consent to different rule, 636. Fact assumed below no objection above, 636. So if matter treated as matter of law cannot be called matter of fact, 636. Fact assumed as proved below, 636. That plaintiff owns chose in action sued on, 636. Fact assumed to be in pleadings, 636. That plaintiff is corporation, or a public officer, 636. Objection to sufficiency of evidence must be taken distinctly below, 636. Otherwise if no conflict in evidence, 636. For rejecting legal evidence, 636. Care in taking specific objections, 636. Taken too broadly will be unavailing, 637. Several papers or letters offered, 637. Evidence valid for one purpose, but not for an other, 637. Offers to prove state of facts, 637. Sometimes made very broadly, 637. Ought to be made in good faith, 637. Ought not to be ambiguous, 637. Agreement that all matters shall be considered as objected to, unavailing, 637. Useless as to discretionary matters, 637. May be waived though originally valid, 637.

OFFER OF JUDGMENT: *In what actions allowed,* 255. Plaintiff must accept or refuse at his own risk. 255. Offer in actions of tort advisable, 255. Liberality of offer in such cases, 255. *Who may make the offer,* 256. Not one of several defendants in torts, 256. Nor in actions on contract, 256. One partner cannot offer, 256. *At what time to be made,* 256. *How to make offer,* 256. Must be in writing, 256. For a specified amount, 256. Not until after complaint put in. 256. Plaintiff's election as to accepting, 256. Acceptance must be in writing, 257. Offer to be left with justice, 257. Acceptance also to be filed with him, 257. Judgment entered on offer and acceptance, 257. Plaintiff's liability to subsequent costs, 257. Form of offer of judgment, 257. Form of offer in replevin, 257. Form of acceptance of offer, 257. Form of judgment on offer, 258. Practice on entering judgment, 258. Offer and acceptance may be by attorney or in person, 258. Form of oath to attorney, 259. Proving his power to offer, 259. OFFER OF JUDGMENT IN COUNTY COURT, 864. *In what actions,* 864. *Who may offer,* 864. Propriety of making offer, 864. By one defendant does not affect costs, 864. May be made by attorney, 864. *At what time, and in what cases made,* 865. Subject discussed, 865, 866. Most convenient practice, 867. *Form of offer, and its service,* 867. May be by attorney, 868. Served by copy, 868. Ten days to accept or reject offer, 868. Acceptance must be written, 868. *Form of acceptance,* 868. Acceptance must be in writing, 868. May be by attorney, 868. Clerk entering judgment on offer and acceptance, 868. *Form of affidavit of acceptance,* 868. Filing papers with clerk, 868. *Form of judgment on offer,* 869. *Effect of refusing offer of judgment,*

OFFER OF JUDGMENT — *continued.*
869. Offer deemed withdrawn, 869. No proof of offer allowed, 869. Plaintiff liable for costs unless he recovers more favorable judgment, 869. *More favorable judgment,* 869. Offer $100, recovery $25, 869. Counterclaim extinguished, 870. Set-off balanced or extinguished, 870. Need not recover larger amount, 871. Offer to be furnished to court, 872. Refusal does not bar costs accrued before offer made and refused, 872.

OFFICER: Bond to execute process, 43, 49. When protected by his process, 49. Cannot take reward, extra fees, &c., 50. Delivery of process to, 55, 56. Actions by, form of process, 64, 65. Officer not bound to show his process, 115. Breaking into outer doors of dwellings, 115. Keeping prisoner securely, 120. Executing replevin process, 203 to 205. Judicial notice taken of, 367. Return evidence for himself, 391. Certificates of as evidence, 421, 422. Presumed to have discharged his duty, 387. That he served process in proper county, 6. Damages recoverable by, 678. Liable for oppressive abuse of process, 685. For permitting an escape, 686. For neglecting to levy, 686. Entitled to double costs, 711, 712. Making a levy, and how made, 732.

ONUS PROBANDI: See *Evidence*, title *Burden of proof.*

OPINIONS: See *Evidence*, title *Opinions.* Justice ought not to give any to parties, 21, 22.

ORDERS: See *Appeals.* To show cause against attachment, 814. To file interrogatories, 818. Convicting of contempt, 819. Discharging attachment, 819. For amended return, 828. For new trial before justice, 853. Conditional for reversal of judgment, 881. For restititution, 910. Appeal from, 922.

PARTIES: Who to be parties to an action, 264. Plaintiff to be real party in interest, 264. Assignee as plaintiff, 264. Executor, &c., or trustee, &c., 264. PLAINTIFFS IN ACTIONS ON CONTRACT, 264. *Principals, actions by,* 265. Suing on contract made by agent, 265. Right of action cannot be transferred conditionally, 265. May sell note and agree not to be paid until collected, 265. Owner of a note not indorsed may still sue as equitable owner, 266. Payable to order, and not indorsed, owner may sue as real party in interest, 266. In such case possession not evidence of title, as in ordinary cases, 266. Plaintiff must be sole owner of demand sued on, 266. Action by plaintiff for consideration moving from stranger, 267. *Agents, actions by,* 267. May sue on contracts made in their names, 267. Principal also entitled to sue, 267. Both cannot sue at same time, 267. Auctioneer may sue for price, 267. So of factor, &c., 267. So of agent for foreign corporation, 267. *Assignee, action by,* 268. Causes of action arising on contract, 268. Several owners all must

PARTIES — *continued.*
join in assignment of demand, 268. Cannot be actions by separate assignees, 268. Legal title need not pass if equitable does, 268. Guaranty of note passes with note, 268. Assignee for benefit of creditors may sue alone, 268. Unliquidated damages may be assigned, 268. Survivor entitled to annuity, 269. Claim for money fraudulently obtained, 269. Note usuriously transferred, 269. Possession of note or check evidence of ownership, 269. When rule otherwise, 269. Assignment of demand may be written, sealed or unsealed, or verbal, 269. *Executors and administrators, actions by,* 270. Need not join party to be benefited, 270. Suing on note given to himself, 270. Action by sole acting executor, 270. Next of kin cannot sue for estate, 270. Transfers by next of kin and others, 270. *Trustees of an express trust, actions by,* 271. Assignee for benefit of creditors, 271. Consignee or indorsee of bill of lading, 271. Merchandise broker, 271. Committee of lunatic or habitual drunkard, 271. Receiver of insolvent corporation, 271. *Persons authorized by statute to sue, &c.,* 272. Supervisors of county, 272. Loan officers, &c., 272. Superintendents of poor, 272. Supervisors of town, 272. Overseers of poor, 272. Commissioners of highways, 272. Trustees of school districts, 272. Trustees of gospel and school lots, 272. In whose name to sue, 272. Officer suing to set out title of office, 272. Joint stock company may sue or be sued in name of president or treasurer, 272. Suing on a note owned by such company, 273. *Lunatics, &c., actions by,* 273. Committee of drunkard, 273. If no committee, lunatic must sue in his own name, 273. Person *non compos mentis,* 273. *Infants, actions by,* 273. Action must be in their name, 273. Next friend must also be joined, 273. *Married women, actions by,* 273. She may sue alone, 273. Must sue alone for her separate property, 274. May appear by attorney, 274. But if an infant must have guardian, 274. Entitled to her own earnings, 274. Husband and wife join where claim belongs to them jointly, 274. *Joinder of plaintiffs,* 274. Statutes relating to this subject, 274, 275. Interested parties must be joined, 275. Assigned demand, all interested must sue, 275. Cannot split single claim, and several sue, 275. Recovery of rent by heirs-at-law, 275. Tenants in common must all join, 275. One firm against another, 275. Action by surviving partner, 275. *Misjoinder and nonjoinder in actions on contracts,* 275. Parties same as in courts of records, 276. *Misjoinder of plaintiffs,* 276. Objection how raised, 276. By answer in abatement, 276. By demurrer, 276. By motion for nonsuit, 276. By appeal to correct error, 276. *Non-joinder of plaintiffs,* 276. By answer in abatement, 276. By demurrer, 276. By

PARTIES — *continued.*
motion for nonsuit, 276. By appeal to correct error, 277. *Defendants in actions on contract*, 277. Must be against all principals guilty of breach. 277. Principal not agent when sued, 277. Survivors to be sued, 277. Surety in administrator's bond, 277. *Who to be defendants* under §§ 119, 120 of Code, 277. Does not apply to several parties to a negotiable bill or note, 278. *Partners, actions against*, 278. Must all be joined as defendants, 278. When one alone may be sued, 278. Dormant partner, 278. Retiring partner, 278. Dissolution of firm, 278. Executor of partner not suable in this court, 279. Nor can he be sued at all, unless, &c., 279. *Joint stock companies, actions against*, 279. May be sued in name of president, treasurer, &c.. 279. *Corporations, actions against*, 279. *Infants, actions against*, 279. Contracts voidable not void, 279. A personal defense, 279. Guardian must be appointed, 279. Liable for necessaries, 279. Must join infant with adult defendants, 279. Answer of infancy and proof of it discharges him, 279. *Married women, actions against*, 280. Statutes relating to, 280. Debts of wife before marriage, 280. Law does not affect vested rights of creditors, 280. Husband liable for family necessaries, 280. Her separate property or earnings not liable for husband's debts, 280. *Principal and surety, actions against*, 280. One promise absolute, the other conditional, 280. Cannot be joined as defendants, 281. Where statute applies, all or any may be sued, 281. *Joint debtors, actions against*, 281. If liability joint all must be joined, 281. Statute exception as to service of process on all, 281. *Counties, towns, and public officers, actions against*, 281. Counties, board of supervisors sued, 281. Board must be named, not the individuals, 281. Town to be sued by name, 281. Action against town and county officers to be against them individually, 282. *Change of parties, &c.*, 282. Does not affect pending action. 282. No abatement of action, but substitution of parties, 282. *Misjoinder of defendants in actions on contracts*, 282. By answer in abatement, 282. By motion for nonsuit, 282. By demurrer, 282. By appeal to correct errors, 282. *Non-joinder of defendants in actions on contracts*, 282. By answer in abatement, 282. By demurrer, 282. But not by motion for nonsuit, 282. PLAINTIFFS IN ACTIONS FOR WRONGS, 283. All injured parties should join, 283. *Action by assignee*, 283. *Actions by executors, &c.*, 283. *By husband and wife*, 283. *By partners*, 283. *By corporations*, 283, *By joint-stock companies*, 283. *By town and county officers*, 284. *By infants*, 283. *By lunatics*, 283. *By tenants in common and joint tenants*, 284. *In actions for penalties*, 284. When individuals may sue, 284. When to sue in name of board, &c., 284. *Misjoinder of plaintiffs in actions for torts*, 284.

PARTIES — *continued.*
Remedy by answer in abatement, 284. By motion for nonsuit, 284. By demurrer, 284. By appeal, &c., 284. *Non-joinder of plaintiffs in actions for torts*, 284. Remedy by answer in abatement, 284. By motion for nonsuit, 284. By appeal, &c., 284. *Who to be defendants in actions for torts*, 284. Party doing the injury, 284. Principal liable for acts of agent, 285. *Infants, lunatics, &c.*, 285. Liable for their torts, 285. *Married women*, 285. Liable for her torts, 285. Her husband must be joined, 285. *Prior authority or subsequent ratification of tort*, 285. Action lies against party assisting in tort, 285. Or who assents subsequently, 285. This rule does not apply to infants, lunatics or married women, 285. Ratification must always be made with full knowledge of facts. 285. *Executors, &c*, 285. Cannot be sued in justice's courts, 285. *Corporations*, 285. Liable for negligence or other torts, 285. Liable for acts of officers or agents, 285. But not for willful trespass of agent, 285. Lies for building a dam across a stream, 285. *Penalties*, 286. Those liable therefor must be defendants, 286. When only one penalty recoverable, 286. *Cannot be both plaintiff and defendant*, 286. *Joinder of defendants*, 286. For torts, plaintiff may sue one or all, 286. May sue and recover against all, separately, and then elect damages, 286. Cannot collect but one judgment, 286. But may collect costs in all, 286. Payment of one judgment bars further recovery, 286. *Misjoinder and non-joinder of defendants*, 286. Defendants cannot object to, 286. Injuries done by animals belonging to several defendants, 286.

PARTNERS: Actions against, 275, 278. See *Parties to action*.

PAPERS: Not in evidence until read, 519. Executed at same time, . Presumed to have been executed at their date, 388. See *Fiting papers.*

PAYING MONEY INTO COURT: Effect of, 384.

PAYMENT: Answer of, 982. Of money, when presumed to be due, 387. If alleged, must be proved to be available, 414.

PENALTY: Complaint for, 968. Witness need not convict himself of, 510. Actions for, 284, 286. Pleadings in actions for 327. Party not presumed liable for, 414.

PENDENCY OF ACTION: Another action pending, answer of, 973.

PERFORMANCE: Answer of, 976. Averments of, in complaint, 317.

PERJURY: Witness false in one thing, false in all, 543. Not to be imputed to witnesses if possible to avoid such charge, 544. Not to be presumed, 544. Conviction for, destroys competency of witness, 369. Jury need not believe perjured witness, 544.

PERSON: Corporation a person, 134.

PERSONAL PROPERTY: May be recovered in replevin, 183 to 185. Execution may be levied upon, 729. Sale of, how

PERSONAL PROPERTY — *continued.*
affected by statute of frauds, 741, 742. What is such, 184.

PHYSICIAN: Charges of, in account books, 441, 449. Presumed to have license, 452. His horse and wagon exempt from execution, 747, 748. So of his books and surgical instruments, 746, 747.

PLACE OF TRIAL: Action, where to be commenced, 52 to 54. Must be in town where justice resides, 9. Must be at place of joining issue if defendant does not appear, 577. But justice may change place, 577.

PLEADINGS: See *Answer*, *Complaint*, *Demurrer*, *Parties to action.* General principles relating to, 259 to 264. Importance of being accurate, 259. Should show cause of action or ground of defense, 260. Value of such a system, 260. Amending on appeal, 260. Joining issue, what it is, 261. Objections to be then taken, 261. Must demur then if at all, 261. May be written or oral, 261. Denial puts plaintiff to proofs of his case, 261. Affirmative defenses, 261, 262. When preferable, 262. Must be set up in the answer, 262. Court must decide on sufficiency of demurrer, 262. Demurrer always raises an issue of law, 262. No reply allowed to affirmative defense, 262. Answer considered as denied, 262. Plaintiff may prove reply without setting it up in pleadings, 262, 263. Must demur, if answer objectionable in form or substance, 263. Parties presumed to know the law, 263. Amendment of pleadings, 263. Must sometimes be in writing, 263. Demurrer and decisions thereon, 263. Complaint to be put in and proved, even though defendant does not appear, 263. *Pleadings may be read to jury*, 638. GENERAL RULES OF PLEADING, 292. Forms of action abrogated, 292. Code introduces a system of special pleadings, 292. Principles of pleadings not abrogated, 292. Change is as to manner of stating facts either of case or defense, 292. Difference between pleadings of courts of record and those of justices' courts, 292. Justices' courts have all necessary powers, 293. *Forms of pleadings*, 293. No particular form required, 293. May be oral or in writing, 293. Must be in writing in some cases, 293. Oral pleadings to be entered in docket, 293. Means material allegations to be entered, 293. None need be entered but those made by the parties, 293. Demurrer to pleadings, 293. Effect may be to require written pleadings, 293. Written pleadings to be filed, 293. General carelessness in pleading, 293. *Must be pleadings and issue*, 294. After appearance must be issue before adjournment, 294. Unless defendant refuses, &c., to answer, 294. If no pleadings, judgment reversed, 294. *Facts are to be stated*, 294. Those allegations which, if true, constitute a cause of action or a defense, 294, 295. Not allegations of evidence, 294. Nor of

PLEADINGS — *continued.*
admissions, 294. Nor of conclusions of law, 295. *State enough to show cause of action or ground of defense*, 295. Means that all material facts must be alleged, 295. Rule may be waived by parties, 295. If no demurrer, any pleading will do, 295. *Questions of fact*, 296. What such questions are, 296. Intention sometimes a material allegation, 296. So allegations of conversion of property are questions of fact, 296. So as to assenting to a transaction, 296. Or whether a fraud has been committed, 296. Or who is in possession of land, 296. The rule is that every fact put in issue by the pleadings is a question of fact, 296. Mixed questions, 296. See also *Fact, questions of. Questions of law*, 296. See also *Law, questions of.* Arises on undisputed facts, 296. There can be no mixed question of law and fact, 296. Alleging that a party released is bad, 296. So that defendant is guilty of a breach of duty, without setting out how, 296. So that defendant has failed to fulfill his contract, 296. May allege act to be wrongfully or unlawfully done, 297. Or that act was fraudulently done, 297. Or negligently done, 297. Or that things are unjustly detained, 297. Such allegations permitted as a matter of convenience, 297. *Questions of law and fact*, 297. Strictly no such questions exist, 297. Alleged cases of this kind are such as relate to necessaries, notices, diligence, &c., 298. *Statement of evidence*, 298. Evidence ought never to be stated, 298. Allegation of admissions improper, 298. Not sufficient to allege these facts which would authorize jury to find verdict, 298. *Legal presumptions*, 298. Need not allege what the law presumes, 298. *Fictions in pleadings*, 299. *Positively*, 299. Allegations must be positive, 299. *Hypothetical allegations*, 299. Such allegations not allowed, 299. Parties should deny or confess and avoid, 299. This rule must be observed in drawing answers, 299. Demurrer lies for violation of the rule, 300. *Duplicity*, 300. Cannot blend separate causes of action in same complaint, 300. How separate causes of action to be distinguished, 300. Justice has power to enforce the rule as to separate statements, 300. *Certainty as to time, place, quantity and value*, 301. Material facts must be alleged with time, 301. So as to place which is material, 301. Contract made elsewhere must allege that contract valid by law where made, 301. Quantity and value of articles, 301. Value a matter of proof, 302. *Facts necessarily implied need not be stated*, 302. Implied promise need not be alleged, 302. State facts, and law will imply promise, 302. Consideration must appear, 302. Matters implied may be traversed, 302. Action by payee of note, or by holder, 302. Allegation that defendant made note, is sufficient without alleging delivery of it, 303. Promises under statute of frauds

PLEADINGS — *continued.*
need not be alleged to be in writing, 303. Allegations by assignee, 303. In action of trover, 303. *Judicial notice*, 303. Such matters need not be alleged, 303. *Negativing defense*, 304. Need not negative facts constituting a defense, 304. Action on fire policy need not negative a breach of conditions, 304. So need not allege officer had funds in action for not making repairs, 304. Need not allege new promise or part payment to meet statute of limitations, 305. When defendant knows facts, less particularly required in pleadings, 305. Exceptions in a statute, 305. *Surplusage*, 305. What it is, 305. Does not vitiate, 305. May be struck out, 305. In trespass, surplusage may impose additional proof on plaintiff, 305. In torts, sufficient to prove a case, 305. *Repugnant, inconsistent, &c.*, 305, 306. What inconsistent defense, 306. Denial and affirmative defenses not so, 306. *How facts ought to be stated*, 306. According to their logical and legal effect, 306. Act done by agent may be alleged as act of principal, 306, 307. Statute of frauds, need not allege agreement to be in writing, 306. Sufficient to allege a sale without stating facts, 307. Facts may be stated if party prefers, 307. Setting out written agreements with necessary allegations, 307. Account, how to plead under Code, 307. *Recitals*, 307. In a written instrument, set out constitute part of the allegations, 307. Otherwise if instrument does not show cause of action or defense on its face, 307. If it shows consideration, a recital of its contents is a pleading of the facts, 307. *Facts not denied are admitted*, 307. General denial puts complaint in issue, 307. Special denial covers facts denied, 307. Answer of new matter considered denied, 307. So new matter by way of reply will be provable, 307. Admission of complaint by the answer, 308. May be express or implied, 308. If defendant does not appear, plaintiff must prove his case, 308. Same rule if issue joined, but no appearance at trial, 308. If complaint admitted by affirmative defense, no proof needed, 308. Admission may be, however, for merely nominal damages, 308. Facts admitted by pleadings cannot be disproved by evidence, 308. *What are material allegations*, 308. Is one that is necessary to constitute a cause of action or a ground of defense, 308. Test is whether it could be stricken out and leave sufficient pleading, 309. Special damages and matters in aggravation may be material allegations, 309. They are not traversable, 309. Affirmative defense without denial merely entitles to nominal damages, 309. *Facts not alleged cannot be proved*, 309. Variance not fatal now, 309. But cannot declare for one cause of action and recover for another, 309. Special damages must be alleged to admit proof of them, 309. Affirmative defense must be pleaded, 309. Defective

PLEADINGS — *continued.*
pleadings sufficient if not demurred to, 309, 310. Defense proved without objection will be well if not pleaded, 310. *Matters in aggravation*, 310. *Special damages*, 310 What are such, 310. What are general damages, 310. Amendment to insert claim for special damages, 310. *Scienter, &c.*, 310. Knowledge as an item of cause of action, 310. As a matter to increase damages, 310. *Duly, &c.*, 310. Allegation that act or thing was duly done, 311. *Profert, &c.*, 311. Not made of papers in pleading, 311. *Construction of pleadings*, 311. According to law, 311. If doubtful, demurrer sustained, 311. To be reasonable, 311. To be liberal if no demurrer, 311.

PLEDGED GOODS: May be sold on execution, 730.

POSSESSION: Of goods under attachment, 173. Defendant retaining possession, 175. Of goods by replevin process, 203. Of goods under an execution, 732. Of land provable by opinion, 496. Of lands not a question of title, 30.

PRACTICE: See the various titles in this volume: *Process, Summons, Warrant, Attachment, Replevin, Judgment, Execution, Appeal, Trial, &c., &c.*

PRESCRIPTION: Title to lands cannot be proved in justices' courts, 35.

PRESUMPTIONS: Every one presumed to know the law, 43, 263. Presumes every act lawful and innocent until contrary is proved, 297. Definition of term, 386. Of fact for jury, 386. Of law for court, 386. Test, whether it is of law or fact, 387. Sanity presumed, 387. Good motives presumed, 387. So consequences of act that they were intended, 387. One not presumed a wrongdoer, 387. Officer presumed to have done his duty, 387. Note presumptive evidence nothing due to maker, but may be rebutted, 387. Money received presumed to be due, 387. Letters received in answer to others sent presumed to come from person addressed, 388. Instrument presumed made at date, 388. Difference in ink, 388. Railroad ticket unmutilated, 388. Receipt for rent, previous rent presumed paid, 388. Payment of workmen, 388. As to laws of other states, 388. Few presumptions conclusive, 388. Stand for proof until rebutted, 388. Of continuance of life, 388. Of innocence of crime, 389. Conflicting presumptions, 388. As to contracting with reference to a general custom, 389.

PRINCIPAL AND AGENTS: Action by principal, 265. Actions by agents, 267. Actions against principal, 277, 285. Action against agent, 277. Admissions made by agent, 373, 374, 385.

PRINCIPAL AND SURETY: Actions against principal and surety, 280. Contract not the same, 280. Admissions of principal as evidence against his surety, 376. See *Attachment bond, Replevin*

PRINCIPAL AND SURETY — *continued.* *bond; Security for warrant, Appeal undertaking, Adjournment bond, &c., &c.*

PRINTING PAPERS ON APPEALS: Costs of, cannot be taxed by either party, 916.

PRIVATE STATUTES: Courts take judicial notice of public statutes, 366. Private statutes must be pleaded, 303.

PRIVILEGE: From arrest. 112 to 114, 120. From serving on a jury, 590 to 593, 600. From testifying, 508, 511. From arrest on execution, 744.

PROCEEDINGS, WHEN STAYED: When defendant served with process by fraud, 51. For appearance of absent witness, 343. To allow witness to procure paper, 638. On appeals to county courts, 789 to 791.

PROCESS: See *Actions and process,* 39. Action defined, 40. Forms of action abolished, 40. Who plaintiff, and who defendant, 40. What process is, 41. Different kinds of in justices' courts, 41. *To be in name of people,* 41. *To be in English,* 41. Abbreviations, figures, &c., 41. Bad English no harm, 41. *Must be signed,* 41. *Must not be issued in blank,* 41. Object of this statute, 42. Amending date or names of parties, 42. Need not be signed in person, 42. Violation of statute a misdemeanor, 42. Clerical errors by mistake no offense, 42. Intendment in favor of innocence, 43. *Must be properly directed,* 43. Officer not bound to execute process not directed, 43. Liable for executing process not directed to him by name or as a class of officers, 43. *To state name of plaintiff,* 43. To state name truly and accurately, 43. But one name known to the law, 43. Names of all the plaintiffs to be stated, 43. Parties' names to be stated in full, 44. Town and county officers, with name of office, 44. Representative character, how stated, 44. Actions by infants, 44. By executors or corporations, 44. By lunatic, 44. *To state name of defendant,* 44. *Fictitious names,* 44. Allowed in summons or warrant, 44. Not allowed in attachments, 45. *Return day,* 45. Summons and attachment must have, 45. Must state time and place of return, 45. So of the constable's return of service, 45. *Time, how computed.* 45. Exclude day of date and include return day, 45. Sunday intervening day, 45. Short summons issued Saturday returnable Monday valid, 46. Long summons, 46. Fractions of a day not counted, 46. Same rules apply to service of process, 46. *Plea in process,* 46. Need not now be stated, 46. *Issuing or service on Sunday,* 46. Or on day kept as Sabbath, 46. Day is twenty-four hours, 47. Sunday begins and ends at midnight, 47. *Election or town meeting days,* 47. *For penalties to be indorsed,* 47. Mode of indorsing, 47, 48. *As to amount of jurisdiction,* 48. *Deputing person to serve process,* 48. Who may be deputed, 48. Constable cannot make deputy, 48. *Form of deputation,* 49. Must be at request of plaintiff, 49. *Officer, when protected by process, and when not,* 49. Ministerial officer protected by process regular on the face, 49. Knowledge of defects does not change the rule, 49. If void on face, no protection, 49. Officer may, but not bound to execute invalid process, 49. *Officer bound to execute process,* 49. Refusal to swear witness a misdemeanor, 49. Refusal to serve process indictable, 49, 50. May demand fees in advance, 50. May be bad faith although not willful, 50. Sickness as an excuse, 50. *Officers cannot take reward, extra fees, &c.,* 50. Nor recover extra pay although promised, 50. *Process amendable,* 50. *Waiver of defects in process,* 50. *When set aside for fraud,* 51. Law condemns fraud, 51. Justice not to tolerate abuse of his process, 51. Setting aside process fraudulently used, 51. Party inveigled within jurisdiction by fraud, 51. *Served by constable in his own favor,* 52. May serve summons, 52. Cannot be deputed to do so, 52.

PROCHIEN AMY: Who is such, 229, 230. See *Appearance, Guardian.*

PRODUCTION OF PAPERS: See *Evidence,* title *Production of Papers, &c.*

PROFERT: Not now required in pleadings, 311, 317. See *Pleadings,* title *Profert.*

PROOFS: See *Evidence.*

PROMISE: Alleging in pleadings, 317. Need not allege to be in writing, 303. How proved, see *Admissions, Handwriting, &c.* See *Agreements, Bonds, Undertakings, &c.*

PROPERTY: What liable to execution, 729. What exempt from execution, 745. What may be attached, 173. What not to be replevied, 191.

PUBLIC POLICY: How far it operates to exclude evidence, 364. Its effect as to conclusiveness of judgments, &c., 424.

PUIS DARRIEN CONTINUANCE: Nature of defense, 582, 583. Form of answer of, 985.

PURCHASER: At execution sale, 741, 742. What title he gets on such sale, 741.

QUESTIONS OF FACT: See *Fact, question of, Law, question of, Mixed question, Pleadings, Trial, Evidence.*

RATIFICATION: Of irregularities, 17 to 19. Of acts of agent.

REASONS FOR DECISION: Of no consequence if decision right, 582, 635.

REASONABLE DILIGENCE, TIME, &c.: How alleged in pleadings, 301, 310. A question of fact, 629. Mixed question of law and fact, 298. In serving summons, 67. In serving warrant, 111. In serving replevin process, 202, 203. In appearing in action, 220 to 222. In discovering irregularities before pleading, 235. For witness to appear at trial, 551, 555.

RECEIPTS: Open to explanation or contradiction, 468. Mistakes may be shown (see illustrations), 468. Conclusive if not

RECEIPTS — *continued.*
explained, &c., 469. Given on settlement of disputed matter conclusive, 469. When part of a contract conclusive, 469. Given to settle claim for damages, 469. Receipt for purchase price not conclusive, 469. Presumptive evidence of settlement, 388. Of payment of previous demands, 388.

RECEIPTOR: Constable may take receipt for goods, 734. Form of receipt, 734. Action against him, 735. Of attachment property, 174.

RECORD: Presumptions in favor of courts of, 20, 21. Generally conclusive evidence, 388. Admissions of party do not supply place of, 398. May be proved by examined copy, 400. Justices' dockets, how proved, 401. Not by parol evidence, 401. Docket not contradicted by parol evidence, 403. Not direct evidence of a fact, 423. Conclusive between parties, 424. Strangers to, not bound, 424. When stranger may take benefit of, 425. Judgment, how far conclusive, 425. Justice cannot alter docket, 701, 702.

RECORDING: See *Filing papers, &c.*

RECOUP, RECOUPMENT: Answers of, 977, 978. As an affirmative defense, must be pleaded, 309.

RELATIONSHIP: Disqualifies justice, 24 to 28. Or juror, 593, 599. Or constable, 599. Goes to credit of witness, 530.

RELEASE: Answer of, 978. Sealed agreement not released by parol, 470. Cannot be contradicted as to terms or legal effect by parol evidence, 467.

RELEVANCY: See *Evidence*, title *Relevancy of evidence, &c.*

REMEDY: Preliminary considerations to be weighed before bringing action, 1 to 4. Generally where there is a right the law will give a remedy, 648, 649.

REMITTING: Verdict or judgment, 698.

REMOVAL: Of property when a ground for an attachment. See *Attachment.* Of goods levied on, 732, 733.

RENEWAL: Of execution. See *Execution.*

RENOUNCING BENEFIT: As to jury, or as to taking oath, 618.

REPLEVIN: *Nature of the action*, 183. *Nature of the property to be taken*, 183. Limited to personal property, 183. What is personal property, 184. What is real estate, 184. Plaintiff may recover notes, bills, bonds, mortgages, books of account, evidences of debt, &c., 185. May recover paid note, receipt, &c., 185. *What title or right plaintiff must have*, 185. Actual owner entitled to possession, 185. One having right to immediate possession, 185. Officer having lien, 185. Where trespass or trover will lie for taking, 185. Exception to this rule, 185. It is a defense to show plaintiff not entitled to immediate possession, 186. *Value of property*, 186. *Demand before action*, 186. *Time of claiming delivery of property*, 186. *Must be affidavit in all cases*, 186. *Who to draw affidavit*, 186. Justice not bound to draw

REPLEVIN — *continued.*
it, 187. Before sworn to, 187. Justice bound to administer oath to, 187. Attorney may draw affidavit, 187. Also proper for justice to draw it, 187. Justice gets paid by the folio for the service, 187. Fee is part of the costs, 187. Party employing justice is primarily liable, 187. *Who to draw copies for service*, 187. Constable not bound to do it, 187. He may do it if requested, 187. Entitled to pay, 188. Plaintiff must furnish complete papers, including copies for service, 188. Printed blanks may be used, 188. *Who to make affidavits*, 188. By plaintiff or by agent, 188. By any person knowing the facts, 188. *Affidavits not to be entitled*, 189. *Belief as to facts stated*, 189. *Description of the property*, 189. To be particularly described, 189. If this cannot be done give best possible description, and of place, &c., 189. Horse how described, 190. Note how described, 190. Information the object in view, 190. *Ownership, how stated*, 190. *Right to immediate possession, how stated*, 190. When plaintiff claims as bailee, 190. Or by virtue of a lien, 190. Action lies whenever plaintiff entitled to immediate possession, 190. Stating facts showing right by levy, lien or other special mode, 191. *Wrongfully withheld, &c.*, 191. *Cause of detention, &c.*, 191. Law requires a statement of the cause of detention by defendant, 191. Must state best knowledge upon subject, 191. *Not taken for any tax, fine, &c.*, 191. Must show affirmatively that property was not taken for fine, tax, &c., 191. If taken on execution or attachment must show it exempt, 192. How to show it, 192. *Actual value of property*, 192. *General rules as to affidavits*, 192. *Indorsing direction upon affidavit*, 192. *Form of indorsement*, 192. *Controverting affidavits*, 192. This cannot be done, 192. To retain possession of property defendant must give undertaking, 192. *Defective affidavits*, 193. Amended in supreme court, 193. No reason against doing it in justices' courts, 193. *Form of affidavit in ordinary cases*, 193. *Form to recover exempt property*, 194. Articles exempt absolutely, 194. Facts as to exemption, how stated, 195. *Form of affidavit made by agent*, 195. *Must be security in all cases*, 195. *Security must be in writing*, 195. Statute requires writing, 195. Bond is proper form, 195. *Who to execute bond*, 195. Plaintiff with one or more sureties, 195. Justice not to approve any but good sureties, 196. *Penalty of bond*, 196. Double the value of the property, 196. *Condition of the bond*, 196. To be drawn with care, 196. That plaintiff will prosecute the action, 196. That property shall be returned if return adjudged, 196. That the sureties will pay any sum adjudged against plaintiff for any cause, 196. *Approval of sureties in bond*, 196. To be indorsed on bond, 196. Must be done before action commenced, 196. Approval

REPLEVIN — *continued.*
required by statute, and indispensable, 196. *Delivery of bond to justice*, 197. He should file and preserve it, 197. If a breach occurs, to deliver bond to defendant, 197. Justice should retain possession until after the trial, and until breach, 197. Either party entitled to a copy of it, 197. *Amendment of bond*, 197. New sureties allowed, 197. Liability of such sureties, 197. *Liability of the sureties in the bond*, 197. To pay costs and damages if plaintiff fails in the action, 197. Or does not return property if required, 197. Liability continues on appeal even to court of appeals, 197, 198. *Form of bond*, 198. *Summons, when to be issued*, 198. After proper affidavits and bond, &c., 198. Delivery of papers and copies to constable, 199. *Statutory requirements of summons*, 199. Must be a summons, 199. Notice in the summons, 199. Summons to be directed to defendant, 199. To specify a time and place for appearance, 199. Time not to exceed twelve days, 199. Ordinary time to be given, 199. Either long or short summons as the case may require, 199. *Long Summons*, 199. In what cases, 199, 200. *Short summons*, 200. In what cases, 200. *Must be a summons and not a warrant*, 200. No process but summons allowed, 201. *Notice in summons*, 201. Summons not to describe property, 201. *Form of summons*, 201. It is process, and runs in name of people, 202. SERVICE OF REPLEVIN PROCESS, *where to be made*, 202. Must be in county where process issued, 202. *When to be served*, 202. Property to be taken forthwith, 202. Copy of affidavit, summons and notice to be served without delay, 202. Cannot be served after return day, 202. *How to be served*, 202. To take property forthwith, 203. Not to take any but defendant's property, 203. Separating from a larger mass, 203. If property not particularly, place of location should be pointed out, 203. Breaking buildings, 203. Demand to be first made, 203. Searching inside of building, 203. What concealment means, 204. Reasons for allowing house to be broken, 204. Constable may call power of county, 204. Duty to assist officer on demand, 204. Process defective on face, all parties trespassers for executing it, 205. Building cannot be broken unless property concealed in it, 205. Officer breaks it open at his peril, 205. If property not all found, must take what is found, 205. Officer must take property notwithstanding any resistance, 205. *Serving copies on defendant*, 205. Copy must be served by personal delivery, 205. Constable comparing papers before service, 205. He is liable for false return, 206. *Serving copies on defendant's agent*, 206. *Leaving copies at defendant's residence*, 206. If property taken copies to be left at usual place of abode, &c., if defendant not found, 206. Cannot serve thus on agent, 206.

REPLEVIN — *continued.*
If no service made constable to return that fact, 206. *Delivery of property to plaintiff*, Defendant may except to plaintiff's sureties, 206. Or he may demand return of property, 206. He must give undertaking to do that, 206. When to deliver property to plaintiff, 206. When not to deliver to plaintiff, 207. Constable to retain possession until return day, 207. Sureties need not justify until return day, 207. *Constable's return, when to be made*, 207. *What the return should show*, 207. Must be according to actual facts, 207. Facts should be stated fully in return, 207. Should state time and manner of service, 207. Should be signed by constable, 207. Return to be made on the original summons, 208. Annexing papers together, 208. Delivery of them to the justice, 208. *Forms of returns*, 208 to 210. *Proceedings on part of defendant*, 210. May except to plaintiff's sureties or demand a return of property, 210. But exception must be made at least two days before return day, 210. Notice of, must be in writing, 210. Copy must be served on plaintiff or constable, 210. How served if neither found, 210. *Form of notice*, 210. Who may serve notice, 210. Proof of service, form of, 211. If not served two days before return day right to except waived, 211. If properly served sureties must justify, 211. *Form of oath to sureties*, 211. Reducing statement to writing, 211. Defendant's right to examine sureties. 211. Several sureties may be allowed, 212. *Returning property to defendant*, 212. If defendant excepts to sureties he cannot demand return of property, 212. Demand must be made before return day, 212. Need not be made on plaintiff or constable, 212. Only necessary to give undertaking and file it with justice, 212. It must be executed to plaintiff, 212. Must be filed with justice before return day, 212. Sureties may justify on return day, 212. *Form of bond for return of property to defendant*, 213. Need not be approved by justice, 213. New sureties may be substituted, 213. *Claim of property by third persons*, 214. *Must be one affidavit in such case*, 214. Affidavit must state grounds of right or title of claimant, 214. Must state particulars of right or title if claimant does not own property, 214. Affidavit to be served on constable, 214. Constable should notify plaintiff, 214. He should demand bond of indemnity from plaintiff, 214. Time to procure sureties in such bond, 214. If bond given property to be given to plaintiff, 214. Claimant cannot maintain action but must give affidavit, 214. *Form of affidavit*, 215. *Form of bond to constable*, 215. It need not be approved by justice, 216. Qualifications of sureties, 216. Claimant need not give bond, 216. Replevin against defendant for the property, 216. Owner of property may maintain replevin against constable, 216. No such demand,

REPLEVIN — *continued.* necessary in that case, 216. Damages in action of replevin, 692.

REQUEST: When to be alleged in complaint, 318. To charge jury, 612.

RESCINDING: Damages for rescinding contract, 654.

RESIDENCE: Difference between residence and domicil, 62. Every person has one, 62. Non-resident cannot be sued by long summons, 62. In cases of short summons, 80. Leaving copies of process or papers at, 68, 174, 206.

RETURN: *Return of summons*, 72. Constable must make and sign, 72. When to be made, 72. Must be in writing and indorsed on process, 72. Justice no jurisdiction without it, 72. Where there are several defendants, 73. Of service of process on corporations, 73. Must state time and manner of service, 74. Falsity of, assigned as error of fact, 74. Defendant may controvert truth of, 74. *Forms of, to summons*, 74, 75. *Forms of returns to warrants*, 120. RETURN OF ATTACHMENT, 180. To be done with care, 180. When to be made, 180. To be in writing and signed, 180. To show manner of service, 180. Leaving copy attachment and inventory, 180. To state whether personally served, 180. Return as to joint debtors, 180. *Forms of returns to attachments*, 181. When justice to proceed on return day, 182. Issuing summons, 182. *Forms of returns to summons*, 182. Return to be indorsed on attachment, 182. Delivery of papers to justice, 183. Return, though false, protects justice, 183. RETURN OF REPLEVIN PROCESS, 207. When to be made, 207. What it should show, 207. *Forms of returns*, 208, 209, 210. See also *Replevin.* RETURN OF EXECUTION, 755. Need not return before return day, 755. May return before that time, 755. *Forms of returns*, 755, 756. RETURN ON APPEAL. See *Appeals.*

SALE: Property sold on execution, 741, 742. Damages for breach of contract of sale 659. Breach of warranty, 663

SANITY: Is presumed, 387.

SCIENTER: See *Knowledge.*

SEAL: What a seal is, 160. Process may be sealed or without seal, 41. Certificates under official seal, 421. Public officer's seal need not be on wax or wafer, 421. Imports more solemnity than unsealed writing, 456. Not so conclusive but consideration may be impeached in this state, 456, 464. Papers returned with a commission need not be attached by seal, 576. See *Bond, Covenant, Undertaking, Security, Process.* Execution of sealed instrument, 428. Need not be any to justice's return, 803.

SECURITY: See *Bond, Undertaking, Short Summons, Warrant, Attachment, Replevin, Adjournment, Appeal.*

SERVICE OF PROCESS: See *Officer, Summon, Warrant, Attachment, Replevin, Execution, &c.*

SET-OFF: Answer of, 978.

SETTLEMENT: Giving note evidence of, 387. Receipt is evidence of, 468, 469.

SHERIFF: Action against for an escape, 57. Bound by admissions of deputy, 374. When such declarations not admissible, 374. Costs and fees on execution, 714. Execution issued to him by county clerk, 716. May levy on money and apply it on execution without sale, 729. Return to attachment for contempt, 816.

SICKNESS: When excuse for not performing a contract, 318. Excuses officer from service of process, 50. When ground for an adjournment, 355. Excuses attendance of juror, 593.

SIGNATURE, SIGNING: Process to be signed, 41. To return of process, 72. See *Summons, Warrant, Attachment, Replevin, Process.* Proof of, 428, 432.

SILENCE: When construed as an admission, 380. When an estoppel, see *Answer of estoppel*, 984. Should be observed during a trial, 616.

SPLITTING DEMANDS: Law does not tolerate, 287. Rule the same either as to contracts or for torts, 287, 288.

STAMPS: Process must be in some cases. See Vol. I, title *Stamps.* Must be on power of attorney, 229. Must be on confession of judgment of $100 or more, 705.

STATUTES: See Vol. I, for numerous statutes. Jurisdiction conferred by, must be strictly complied with, 14, 15, 16. Advantages given may be waived, 17 to 19. Public statute need not be pleaded, 303. But private ones must, 303. General statutes noticed judicially, 366. Foreign laws must be proved, 367, 388. How they are proved, 418. Must be complied with to stay execution, 792.

STAYING PROCEEDINGS: Staying execution on appeal, 789. In cases of new trial security must be given, 789. In other cases security may be given or omitted, 790. Defective security amended, 790. *Form of undertaking to stay proceedings*, 791. Delivery of undertaking to justice, 791. Certificate by justice, 791. Service of certificate, &c., on officer, 792. No stay until statute complied with, 792.

STIPULATION: For allowing an adjournment to plaintiff, 342.

STRIKING OUT EVIDENCE: Cannot withdraw books of account, 450. Striking out evidence of witness who died before cross-examination, 615. Illegal evidence may be struck out on motion, 635. Striking out illegal evidence does not obviate a valid objection, 905. Power of court to do so, 400, 485, 487.

STRIKING OUT NAMES: Authority to do so, 276, 277. On judgment in actions for torts, 696, 697. In actions on contract, 697.

STRIKING OUT PLEADINGS: Justice has no power to do this, 615. On answer of title, 251.

SUBPŒNA: Material witnesses to be subpœnaed, 548. Who to issue subpœna, 548. Proof to obtain it, 548. *Ad testificandum*, 548, 549. *Duces tecum*, 548, 549. *Forms of*, 549. Describing papers in *duces tecum*, 549. Producing papers in obedience to it, 549. Liability for not producing, 549. Exemption from producing, 549. Court decides as to production, 550. Witness must bring paper with him, 550. Exception when he has no control over it, 550. Not compelled to produce a chattel, 550. Notice to produce, and refusal, authorizes parol proof of contents, 550. Party may serve as many subpœnas as he chooses, 550. How filled up by justice, 550. Names may be inserted at any time, 550. Must be served so as to give witness a reasonable time to attend, 551. Reasonable time for travel allowed to witness, 551. But he cannot limit it to 30 miles a day, 551. He need not travel on Sunday, 551. Service of, must be personal, 551. On married women must be on her and not on husband, 551. Where service to be made, 551. Must be in county of justice, or adjoining county, 551. May be in witness's house, 551. Right to enter house to make service, 551. Evading service, 551. Must pay fees to witness, 552. Party entitled to fees like other witnesses, 552. Witness not bound to attend until fees paid, 552. Nor need he be sworn although present, 552. Party to tender fees to witness if trial will last more then one day, 552. Witness may waive fees, 552. May accept board and expenses in lieu, 552. If two suits at same time may draw pay in both, 552. Party cannot charge fees unless he attended as witness, 552. Fees not taxable unless witness was paid or actually attended, 553. Amount of fees, 553. Witness duly subpœnaed bound to attend, 553. For neglect liable to fine and for damages, 533. But must be shown to be material before action will lie against him, 553. Must show that action failed because of his absence, 553. Official proof of officer's proceedings, 553. In action against witness plaintiff need not show jury impanneled, nor that there was a a good cause of action, 553. Witness may show that he knew nothing about the case, 553. Subpœnaing one vexatiously a contempt, 553. If nonsuit voluntarily submitted to when written proof available no action lies against witness, 553. Witness attending at request entitled to fees although not subpœnaed, 553. He cannot in any case, recover more than statute fees, 554. Cannot recover for loss of time, 554. Exception to the rule as to witnesses of skill, 554. Witness need not be sworn until paid, 554. Subpœnaed by both parties, taxing fees of, 554. Must testify on cross-examination, 554. Exempt from arrest while attending, 554. But must have been a subpœnaed witness, 555. Witness from another state, 555. Reasonable time for going and returning, 555. Privilege from arrest personal, 555. *Attachment against defaulting witness*, 555. Must be proof of materiality of service of subpœna, and of non-attendance, 555. Proof, by whom made, 555. How made, 555. Witness must show good excuse or liable to attachment, 556. Calling him in open court, 556. *Form of affidavit for attachment*, 556. *Form of oath to prove service of subpœna*, 556. *Proof of materiality of witness, by whom made*, 556. *Form of constable's return to subpœna*, 557. Proof of materiality by agent or attorney, 557. Party should see that witnesses are present when the cause is called. 557. Holding open to procure them, 557. Holding open for return of attachment, 557. Adjournment for that purpose, 557, 558. Second and further adjournments, 558. *Form of attachment against witness*, 558. Delivery, execution and return of it, 558. *Form of return*, 558. Fees of constable, by whom paid, 558, 559. Party must if witness excused, 558, 559. Witness must unless excused, 558, 559. *Form of oath as to excuse*, 559. Witness to be interrogated by justice or tne person procuring the attachment, 559. Justice's costs and fees, 559. *Imposing fine upon the witness*, 559. Witness disobeying subpœna liable to fine and imprisonment, 559. Opportunity of being heard before fine, 559. Excuse must be upon oath, 559. Amount of fine, 559. Circumstances in mitigation, 560. Summons to procure attendance of witness, 560. When to be returnable, 560. To be personally served, 560. *Form of summons*, 560. *Form of return*, 561. Service, by whom made, 561. Proper return necessary to jurisdiction, 561. Conviction of fine to be entered in docket, 561. *Form of conviction*, 561. Fine must be paid, 561. Execution to collect, 561. Imprisonment for want of property, 561. Levy and sale of property, 562. No action lies against justice, 562. Review is by appeal, 562. *Form of execution to collect fine*, 562. Remitting fine by county court, 562.

SUBSCRIBING WITNESS, 428. See *Evidence*, title *Subscribing witness*.

SUMMING UP: Latitude allowed to counsel, 617. Must confine himself to the case, 617. What may be objected to, 617. Brief for trial, 546. Hints relating to summing up, 609 to 611. Argument of an appeal, 835, 836.

SUMMONS: See *Process*. LONG SUMMONS, 59. The common or usual process, 59. Issues of course without proof or security, 59. Cannot be taken in all cases, 59. May always be taken against resident defendants, 59. By non-resident plaintiffs, 59. Against railroad corporations, 59. So as to other corporations, 60. Non-resident plaintiff may take without oath or security, 60. Joint debtors may be sued by, even though one of them non-resident,

SUMMONS — *continued.*
60. Otherwise where debt several or joint and several, 60, 61. Infant joint debtor defendant, 61. Part non-resident plaintiffs and all resident defendants, 61. If defendants all non-residents long summons never proper, 61. Long summons never proper against non-resident, in action for tort, 61, 62. Nor in actions when defendant liable to arrest, 62. Party who is not a resident of a county cannot be sued in it by long summons, 62. Summons must be long or short, 63. Cannot be a five days' summons, 63. Requisites of by statute, 63. *Form of summons*, 63. Presumed to be in proper form, 63. Mode of stating names of parties, 63 to 65. SERVICE OF SUMMONS, 65. Duty of constable to serve it, 65. Private person may be deputed, 65. Plaintiff cannot be deputed, 65. Constable may serve summons in his own favor, 65. May charge fees, 65. Liable for false return, 65. Any constable of county may serve, 65. Form of service, 65, 66. Cannot be served on Sunday, 66. Nor on election or town meeting days, 66. Nor on Saturday kept as Sabbath, 66. Must be served in the county, 66. Service out of the county void, 66. Presumed to have been served in proper county, 66. Entering dwelling to make service, 66. Constable bound to search for defendant, 67. Summons, how served, 67. May be read, or contents stated, 68. Reading may be insisted upon, 68. Defective mode of service, 68. Defendant running away after service begun does not avail him, 68. Service when defendant is in dwelling, 68. When service must be by copy, 68. When it may be by copy, 68. When service by copy valid, 68, 69. Service upon non-resident must be personal, and not by leaving copy at hotel, 69. Service by copy when statute of limitations is about to attach, 69. Or to avoid set-off, 69. Or where a warrant may be issued, 69. Personal service essential to jurisdiction, 69. Service on corporations, 69 to 72. Service on its officers or agents, 69 to 72. May be on president, secretary, treasurer, director or managing agent, 71. Who is such a managing agent and who not, 71. Service by delivering a copy of summons, 71. *Constable must make a return*, 72. It must be written and signed, 72. Summons to be returned before return day, 72. In replevin must be done forthwith, 72. Return must state time and manner of service, 72. Jurisdiction depends upon valid service and return, 72. Justice cannot proceed without return, 72. Nor if return is defective, 72. It must show time and manner of service, and that it was personal, 72, 74. Showing regular service affirmatively, 73. Where several defendants return should show what was done to each of them, 73. Return where service on corporation, 73. Must show all necessary facts, 73. False

SUMMONS — *continued.*
return alleged as error in fact, 74 May be controverted on return day, 74. *Forms of returns*, 74, 75. SHORT SUMMONS, 75. First authorized, when and how, 75. Takes place of old warrant in some cases, 75. When warrant must issue instead, 76. Proper for non-resident plaintiff against resident defendant, 76. Proper agaist non-resident defendants, 76. *Cases in which short summons is proper*, 77, 78. Cases in which it is not proper, 78, 79. Corporations may be sued by, 80. *What necessary to authorize short summons*, 80. Must always be an affidavit, 80. No bond required of resident plaintiff, 80. Otherwise of non-resident plaintiff, 80. He must give both affidavit and bond, 80. Justice cannot dispense with affidavit, 80. *What facts should be stated in affidavit*, 80. What facts when plaintiff resident and defendant non-resident, 80, 81. Belief of cause of action sufficient, 81. Must show defendant non-resident, 81. *Form of affidavit, resident plaintiff, non-resident defendant*, 81. Need not be made by plaintiff in person, 82. *Facts to be stated by non-resident plaintiff and resident defendant*, 82. *Form of affidavit in that case*, 82. Must be security, though not necessarily in form of bond, 83. *Form of bond in such a case*, 83. Bond, by whom executed, 83. Sureties should be responsible, 83. *Facts to be stated when all non-residents*, 84. *Form of bond in that case*, 84. Bond must be given, 84. Condition of bond is to pay any sum adjudged against plaintiff, 84. Waiver of condition, 84. Security must be given before the summons is issued, or it is too late, 84. Amendment of bond, 84, 85. Liability of surety in bond, 85. Whether liable to costs of appeal, 85, 86. Application for summons need not be in writing, 86. Difference as to security between summons and attachment, 86. *Deposit of money*, 86. *Form of short summons*, 86.

SUNDAY: Process cannot be issued on, 46. Nor served, 46. Saturday, when treated as Sunday, 46. Holding court open over, 618. Jury going out on, 617. Receiving verdict on, 627. Cannot enter judgment on, 627. Witness need not travel on, 551.

SUPERVISORS: Form of summons in action by, 64. Statement of name and title in summons, 272. Parol proof to show title of office, 463. Action by board of, 281.

SURETY: In actions by short summons, 80 to 86. By attachment, 157 to 164. By warrant, 105 to 107. Of replevin, 195 to 198. On answer of title, 248 to 250. For adjournments, 351 to 354. On appeals to county court, 789 to 793. On appeals to supreme court, 919, 920.

SURPLUSAGE: What it is, 305. Usually does no harm, 305. May be struck out, 305. May sometimes require additional proof, 305.

SURPRISE: Defendant not to be entrapped, 51, 120. Preparation to avoid, 546, 547. Adjournment granted to relieve, 355, 356. Relief against, by appeal, 840 to 852. By act of fraudulent witness, 523 to 525.

SURVIVOR: When to be plaintiff, 275. When to be defendant, 278, 279.

SWORN COPIES: Proving records by, 400, 418, 419. Proving justice's docket by, 402. Copy, how made and compared, 419.

TAXING COSTS: See *Costs*. Judicial act by justice, 710. By county clerk in appeal cases, 916, 917. Review of taxation, 916, 917.

TEAM: Exempt from execution, 747, 748.

TELEGRAPH: Company, when liable for damages, 656.

TENDER: Answer of, 979. Consistent with a denial, 306.

TITLE TO LAND: *In what actions answer may be interposed*, 245. In every action in which title to land may properly come in question, 245. *Time of interposing the defense*, 245. Must be at joining of issue, 245. Cannot be done afterwards, 246. Answer may be amended, 246. *Who may interpose the defense*, 246. Title in defendant or in stranger, 246. Title in one defendant, 246, 247. Title as defense to one of several causes of action, 247. Defense as agent or servant of owner, 247. *How to plead title*, 247. Must be written signed answer, 247. Oral answer a nullity, 247. Undertaking to be given, 248. Condition of undertaking, 248. Failure to comply with statute forfeits right to prove title, 248. If answer and bond sufficient, action must be dismissed, 248. New action in supreme court, 248. Must be begun within twenty days, 248. Depositing summons and complaint with justice, 248. Need not serve it on defendant, nor give him notice of deposit, 248. Rule under the old practice, 249. Defendant must give admission within twenty days or be in default, 249. Court cannot relieve sureties if default permitted, 249. Answer to be delivered to plaintiff, 249. Bond to remain with justice until breach, 249. After breach delivered to plaintiff, 250. *Action in supreme court*, 250. Restricted to same cause of action, 250. Form of pleadings need not be the same, 250. Both parties restricted to same pleadings in substance, 250. A motion the remedy for an attempt to violate this rule, 250, 251. Party may abandon part of a defense, 251. Sufficient if pleadings in substance the same as below, 251. Striking out new cause of action, 251. Appealing to the court of appeals, 251. *Title on plaintiff's own showing*, 251. If no answer of title and undertaking defendant cannot prove title, 252. But he may raise the question if the plaintiff proves title, 252. *Forms of answer of title*, 252, 253. Countersigning by justice, 253. General denial to be interposed if plaintiff is to be put to proof of his title, 253. Pleading title alone admits the plaintiff's title, unless,

TITLE TO LAND — *continued.*
&c., 253. Number of defenses interposed, 253. *Form of bond or answer of title*, 254.

TOWN: Justice a town officer, 10. Actions, when limited to, 52 to 54. Actions by and against, 281. Town officers, 272, 283. Certificate of town clerk, 421, 422.

TORTS: See *Warrant*, *Replevin*. Parties to actions for, 283 to 286. Complaints in actions for, 322 to 327. Executions for, 715, 716, 744, 745. Precedents of complaints for, 960 to 971.

TRANSFER: See *Assignment*. Of cause to supreme court when county judge incompetent, 858.

TRANSCRIPT: See *Judgment*. Of justices' judgments, 706. Docketing, 706. Justice's certificate of, 403. County clerk's certificate, &c., 404.

TRESPASS: See *Warrant*, *Replevin*. Complaints in actions for, 960, 962. Allegations of motives in actions for, 324. Injuries by animals while trespassing, 326. Warrant may issue for, 90. Attachment illegally issued and served a trespass, 97. Breaking dwelling, when a trespass, 116, 205.

TRIAL: Preparation for, 546. Making brief, 546. Importance of preparation, 547. Procuring subpœna, 547. Subpœnaing witnesses, 547. See *Subpœna*. Procuring commission when important to do so, 563. See *Commission*. GENERAL RULES RELATING TO TRIALS, 577. Time for fixed at adjournment, 577. Trial on return day, where held, 577. Or on adjourned day, and defendant absent, 577. Where held if both parties appear, 577. Justice may adjourn to different place, 577. Waiting one hour for parties to appear, 577. Erroneous information by justice as to time of trial, 577. Justice must wait one hour, &c., 578. Holding open cause, 578. Justice cannot be sworn as a witness, 578. Parties may waive objection thereto, 578. Plaintiff's right to discontinue action, 578. May withdraw action at any time before verdict actually rendered, 578. Right to withdraw is absolute, 578, 579. Non-appearance of plaintiff is a discontinuance, 579. Nonsuit, and kinds of, 579. Motion for, to be made before cause submitted, 579. Too late after submission to jury, 579. Or to the justice, 579. Exception to this rule, 579. Grounds of motion for nonsuit must be fully stated, 579, 580. Otherwise if motion founded upon the merits of the whole case, 580. Motion made at close of plaintiff's case, 580. May be after all the evidence is given, 580. Not granted if a conflict of evidence, 580. Nor in cases of doubt, 580. But granted if a material defect in the proofs, 580, 581. Or if a verdict on the evidence would be set aside, 581. In cases of usury, 581. Permitting defects in evidence to be supplied, 581. Refusal to do so error, 581. Defendant must not supply defect, 581. If supplied by either party defect cured, 581.

TRIAL — *continued.*
Nonsuit as to some of the defendants, 581. For non-joinder of plaintiffs, 582. For misjoinder of plaintiffs, 582. In actions of replevin same rule, 582. On appeal any ground may be urged to sustain nonsuit, 582. No error that decision was put on untenable grounds, 582. Mere nonsuit no bar to new action, 582. Otherwise in courts of record if nonsuit on merits, 582. Failure to prove action for tort is ground of nonsuit, not for changing complaint, 582. Discretion of justice during the trial, 582. TRIAL WITHOUT A JURY, 583. What a trial is, 583. Joining issue before adjournment, 583. Defendant failing to appear complaint must still be put in and proved, 583. Adjournment in such a case, 583. No issue without answer or demurrer, 583. Plaintiff must prove a case even if defendant does not appear, 583. But need not negative defense, 583. Nor prove more than is required if a general denial had been put in, 584. Rule as to statute of limitations, 584. If no issue joined, no jury can be called, 584. Otherwise, if issue of fact joined, 584. Justice acts both as court and jury on a trial before him alone, 584. Justice ought to take full minutes, 584. He has time for deliberation, 584. Deciding on the admissibility of evidence, 585. Difficulties of the subject, 585. Evidence to be confined to points in issue, 585. Order of receiving evidence, 585. Objections and offers to be carefully and fully noted by justice, 585. Justice not liable to challenge like a juror, 586. He is, however, sometimes disqualified, 586. Defects in proofs must be objected to on trial if defendant appears, 586. If defendant absent he may rely on the defect on appeal, 586. Or to the admission of illegal evidence, 586. But not as to the competency of a juror, 586. Plaintiff cannot submit to a nonsuit after a final submission. 586. Justice must render some judgment, 586. Judgment of nonsuit a bar to a new action, 586. If judgment of nonsuit reversed plaintiff's right to recover is established, 587. Cannot nonsuit because witnesses not credible, 587. Decision of justice viewed same as that of a finding by a jury, 587. Failure to establish affirmation of issue, 587. Credit of witnesses for justice, 587. Right of parties to be heard on summing up cause, 587. Duty of justice to hear both sides, 588. He has four days to render judgment, 588. May have longer time by consent, 588. Rules for deciding a cause, 588.

TRIAL BY JURY, 589. Either party may call jury, 589. But not after trial begun, 589. Issues of fact are tried by a jury, 589. But not issues of law, 589. Must be issue of fact or jury cannot be called, 589. Jury trial a matter of right in a proper case, 589. Venire may be demanded at any time after issue joined, 589. May be required by either party, 589. Twelve jurors to be summoned, 589. Statutory qualifications of jurors, 589 to 593. Incompetent jurors ought not to be summoned, 593. *Form of a venire,* 593. *Form of a return to it,* 593. Six jurors a full jury, 593. Parties may agree on less number, 593. Waiver of irregularity in impanneling, 593. Or as to mode of summoning jurors, 594. Waiver need not be express, it may be implied, 594. Venire to be delivered to impartial constable, 594. Constable acting as counsel or agent cannot summon a jury, 594. Venire not to be delivered to constable until parties have a chance to object, 594. What a good objection to constable, 594, 595. Important to have an honest and impartial constable, 595. He should execute a venire fairly and impartially, 595. Oath on making objection to a constable, 595. Decision by justice on objection, 595. Packing a jury a misdemeanor in constable, 595, 596. Jurors to be summoned personally, 596. A list of them must be made and returned with the venire, 596. How this is done, 596. If jury called, must be jury trial unless parties waive it, 596. Jury may be waived by consent, 596. Right to jury may be waived or forfeited, 596. Suppressing a venire, 596. Issuing a new venire in such a case, 596. What amounts to a waiver of a jury, 596, 597. Jury may be dispensed with at any time before verdict, 597. Justice no right to insist on jury trial, 597. Not even if jury has been summoned, 597. Practice on impanueling a jury, 597. Talesmen when to be called, 598. New venire when to be issued, 598. Contents of new venire, 598. As to challenges, see *Challenge.* Swearing jury, 606. *Form of juror's oath,* 606. Opening the case to the jury, 606. Who entitled to open and close, 606. What stated in opening case, 606. Calling witnesses, 607. *Form of oath to witnesses,* 607. Mode of examination, 607. Discretion of justice as to number of witnesses to be called, 607. When number may be limited, 607. When not, 607. Objections to witnesses, 608. Closing case before resting, 608. Rule not generally enforced, 608. *Defense stated and evidence,* 608. Moving for a nonsuit, 608. Defendant's opening of the case, 608. Cannot sum up the case, 608. Defendant calling his witnesses, 609. Evidence in reply, 609. What rebutting evidence is, 609. Waiver of errors in mode of swearing witnesses, 609. Summing up the cause, 609. See *Summing up. Charging jury,* 612. See *Charging jury.* Withdrawing juror, 613. Adjournment after trial begun, 613. Discharge of jury, 613. Holding open court, 613. Opening case to introduce evidence omitted by mistake, &c., 613, 614. Or by discovering important evidence, 614. Receiving evidence after case closed, 614. Recalling witnesses, 614. Refusing to exercise discretion from supposed want of power, is error, 614. Liberality in open-

TRIAL BY JURY — *continued.*
ing case for justice, 614. Substitution of jurors during trial, 614. Striking out names of defendants, 615. Substitution of parties, 615. Nonsuit before evidence all given, 615. Striking out pleadings, 615. Defective pleading no ground for disregarding it when not demurred to, 615. Illness of witness during examination, 615. Death of witness before close of trial, 615. Justice may reject irrelevant evidence on his own motion, 616. Must reject it on proper objection, 616. Rebutting irrelevant evidence received under objection, 616. When such evidence not objected to, 616. Jury to be kept in separate place, 616. Order to be kept in court, 616. See *Summing up.* Deliberation upon verdict, 617. Jury cannot retire on Sunday, 617. Holding cause over Sunday, 618. Constable must be sworn to attend jury, 618. Parties may waive this, 618. *Form of oath to constable,* 618. Misrecital or non-recital of the oath, 618. Care in guarding jury from outside influences while deliberating, 618, 619. Duties of a juror, 619. To continue together until verdict is made, 619. No separation or communication with persons outside, 619. Informing successful party of intended verdict, 619. Constable not to interfere with discussions of jurors, 620. Interference by party renders verdict erroneous, 620. Sealed verdict, 620. Determining verdict by lot, 620. Or the amount of it, 620. To decide upon law and fact, 621. If charge given, bound by that, 621. Taking depositions or writings with them, 621. Or minutes of counsel, 621. Cannot examine witness by themselves, 621. If in doubt, court will recall witness, 621. Or the justice will read from his minutes, 621. Minutes not to be sent to jury, 621. Justice not to go into jury room unless parties consent, 621, 622. Consent, when inferred, 622. Jury reading law books, 622. Not to converse with persons outside, 622. Agreement of jury, and of confining them until verdict found, 622, 623. Discharging jury which cannot agree, 623. New venire in such case, 623. *The verdict,* and what it is, 623. General and special verdicts, 624. Must be a general verdict, 624. Double and treble damages, 624. Jury may find single damages, and court will increase them, 624. Intendment as to finding, 624. Verdict in action of replevin, 624. Verdict to be delivered in open court, 624. Calling names of jurors, 624. Calling plaintiff, 624. If he is not present, verdict not received, 624. Not error to receive unless he is absent, 624, 625. Judgment on verdict received in absence of plaintiff not void, but erroneous, 625. Manner of receiving verdict, 625. Form of verdict, 625. Judgment on the verdict, 625. Remitting part of verdict, 626. Verdict for defendent, 626. Justice cannot open judgment, 626. Jury may correct verdict, 626. Juror dissenting from ver-

TRIAL BY JURY — *continued*
dict, 626. Changing his mind, 626. Polling jury, 626, 627. How this is done, 627. Absolute right to poll jury, 627. Sealed verdict, 627. Paying jury, 627. Jury cannot retire on Sunday, 627. But verdict may be received, 627. QUESTIONS OF FACT FOR JURY, 627 to 630. QUESTIONS OF LAW FOR THE COURT, 630, 631. OBJECTIONS, EXCEPTIONS, &c., 631. Importance of taking in time, 631. Mode of taking, 631. Justice to note fully and carefully, 632. Vexatious questions, 632. Objections to evidence as irrelevant, incompetent, illegal, &c., 633. Omission to object is a waiver, 633. Illegal evidence to be objected to, 633. Error to receive it, 633. Cases holding it not error, 633. If evidence could do no harm, 634. Objector must point out irregularity, &c., 634. General objection, when sufficient, 634. Evidence competent as to one defendant but not as to other, 634. Offer to prove several connected facts, 634. Objection to be promptly made or it is waived, 634. Deceptive or secret objection, 634. Objection which might have been answered if properly taken below, 634. If not answerable below, 635. Illegal evidence when defendant does not appear, 635. Objections to jurisdiction may be taken at any time, 635. Erroneous ruling no harm if no evidence received under it, 635. Reasons for decision not important, 635. Striking out illegal evidence, 635, 636. Evidence received must be acted on, 636. Must admit or reject absolutely, 636. Facts assumed below conclusive, 636. Objection to want of evidence must be taken below, 636. Rejection of legal and competent evidence, 636. Specific objections, how taken, 636. Objections taken too broadly, 637. Offers to prove facts, 637. Objection useless if decision discretionary, 637. Objection waived though once valid, 637. Curing error as to nonsuit, 637. JUSTICE'S DISCRETION, 637. Opening and closing case not discretionary, 638. Reading pleadings to jury, 638. Order of receiving proof, 638. Opening case for further proof, 638. Suspending examination of witness, 638. Irrelevant evidence, 638. Parol proof of contents of paper. 638. Limiting number of witnesses, 639. Requiring party to show relevancy of evidence, 639. Excluding irrelevant evidence, 639. Leading questions, 639. Recalling witnesses, 639. Refusing evidence after resting, 639. Witness reiterating statements, 639. Recalling witness while summing up, 639, 640. Holding open court, 640.

TROVER: Form of complaint, 962. Warrant issues in actions of, 90.

TRUSTEES: Actions by, 271.

UNDERTAKINGS: See *Short Summons, Warrant, Attachment, Replevin, Adjournments, Executions, Appeals, Bonds, &c.*

USAGE: See *Custom.*

USE AND OCCUPATION: Form of complaint for, 936.

VARIANCE. See *Evidence*, title *Variance*. Rules relating to, 408 to 413.

VENIRE, 593. See *Trial by jury*, title *Venire*.

VENUE: In affidavits, 147, 148. See *Place of trial*.

VERDICT, 623 to 627. See *Trial by jury*, title *Verdict*.

VERIFICATION: Of affidavits, 148. See *Oath*.

VIGILANCE: The law favors vigilance, 236. For interposing plea of title to land, 245. For securing witnesses, 548. See *Delay*, *Laches*.

VOIRE DIRE: Examining witnesses on, 471. *Form of oath*, 471.

VOID, VOIDABLE: Erroneous judgment, 16. Judgments by and against infants, 231.

WAIVER: Of errors by pleading, 17. Proceedings before pleadings, 234. See *Irregularity*, *Process*, *Appeal*, *Objections*.

WARRANT: Nature of the process, 87. Against whom issued, 87, 88. In what cases, 87. In what actions issued, 88. When issued in actions on contract, 88, 89. *Cases in which a warrant may issue*, 89. Trespass to real estate, 90. Injuries to personal property, 90. Or by illegal process, 90. Or in actions of trover, 90. In actions for fraud, 90. Or for penalties, 91. Against officer for money collected, 91. Or for official misconduct, 91. Injuries to servant of plaintiff, 91. *Cases in which warrant must issue*, 91. Against non-resident when a warrant may be issued it must, 91. In actions for torts, 92. For penalties, 92. Female not to be arrested, 92. No warrant in replevin, 92. *Actions against freeholders, &c.*, 92. Generally first process is a summons, 93, 97. When warrant issued against a freeholder, 93. When defendant did not appear on summons, 93. *Form of return of such summons*, 94. Warrant to be issued on same day of return, 94. Summons may be issued instead, 94. Excuse to prevent warrant, 94. To prevent warrant, 94. Continuing action by second summons, 95. What is a freehold, 95. *Resident defendants not having families*, 96. *Affidavit for warrant*, 96. Must be affidavit in all cases, 96. Exception by statute, 96. Trespass to issue warrant without proof, 97. What the affidavit should contain, 97, 98. Belief will not answer, 98. Though held otherwise in a late case, 98. Must be sufficient facts and circumstances, 99. Suing defendants separately, 99. *Fictitious name of defendant*, 99, 100. *Stating amount of demand*, 100. *Affidavit, by whom made*, 100. By plaintiff or any other person, 100. *Original affidavits defective*, 101. *Quashing warrant*, 101. *Application for warrant, how made*, 102. *In what town to sue*, 102. *What the affidavit should show*, 102. Must show facts to authorize issuing a warrant, 102. Facts as to freeholder, or resident, &c., 102. As to non-residents, 102, 103. Resident and non-resident plaintiffs, 103. All residents and defendant freeholder, 103. Fictitious name of defendant, 104. *Forms of affidavits*, 104. *Form of bond*, 105. Liabilities of sureties in bond, 106. Need not be in form of bond, 106. One surety enough, if responsible, 106. Requisites of bond or security, 106. Amount secured by bond, 107. *Form of warrant*, 107. Stating plea in warrant, 107, 108. Warrant returnable forthwith, 108. *Detention of canal boats*, 108. Provisions of the statute, 108, 109. Must be proper affidavit, 109. *Form of bond to detain boat*, 109. *Form of warrant for penalty*, 110. Form of indorsement on warrant, 111. SERVICE OF WARRANT, 111. *What an arrest is*, 111. *Who may make an arrest*, 111. *When to arrest*, 111. *Where to arrest*, 112. Who exempt from arrest, 112. Attorneys and counselors attending court, 112. Officers of the court also exempt, 112. Parties exempt while attending court, 113. So of witnesses, 113. But they must have been subpœnaed, 113. Canal officers, 113. Married women, 113. Persons in militia service, 113. Members of legislature, 114. Voters at election or town meeting, 114. Fictitious name of defendant, 114. Mode of making arrest, 114. Resisting officer, 115. Showing his process, 115. Breaking into dwelling, 115. Obtaining entrance by fraud, 115. House a protection to all inmates, 115. Privilege extends to curtilage, 116. Breaking to arrest after an escape, 116. Taking defendant before the justice, 116. To be done promptly, 116, 117. Delay a false imprisonment, 117. Justice absent or unable to hear the cause, 117. *Form of justice's certificate of inability*, 117. Proceedings before nearest justice, 117, 118. How long defendant may be detained, 118. Notifying plaintiff of arrest, 118. *Form of notice*, 119. Proceedings and trial before justice, 119. Adjournments, 119. Defendant must be personally before the justice or proceedings void, 119, 120. Constable cannot take bail, 120. Privilege from arrest and motion for discharge, 120. Confining defendant to prevent escape, 120. Commanding assistance, 120. *Forms of returns*, 120.

WARRANT OF ATTORNEY: To authorize appearance. 228. May be acknowledged, 228. General or limited, 228. Requisites of, 228. *Form of, to prosecute, &c.*, 228. *Form of, to defend, &c.*, 229. *Form of acknowledgment of*, 229. *Must be stamped*, 229.

WEARING APPAREL: Exempt from execution, 747. See *Execution*, title *Exemption*.

WEIGHING EVIDENCE, 525 to 545. See *Evidence*, *Trial*.

WIDOW: What rights to the property of her deceased husband, 270. When a woman presumed to be, 388. May hold exempt property, 747.

WILLFUL TRESPASS: Damages increased, 324. Exemplary damages for, 682, 683, 685.

WITHDRAWING ACTION. See *Discontinuance.*

WITNESS. See *Subpœna*, *Trial*, *Commission*, *Contempt of court*, *Appeals*. JUSTICE A MATERIAL WITNESS, 237. *General principles*, 237. *When to make application*, 237. Before joining issue, 238. Usually after complaint put in, 238. May be before that, 238. *Who to make application*, 239. *How to apply*, 239. Affidavit to be very full, 239. Justice bound to dismiss on full compliance with the statute, 240. Not if affidavits defective, 241. Must show justice to be a material and necessary witness, 242. *In what actions*, 242. *Form of affidavit*, 243. Facts stated in the affidavit, 243. Justice bound to administer oath, 244. *Judgment of discontinuance*, 244. *Errors of justice, how corrected*, 244.

WORK, LABOR AND SERVICES: Complaint for, 954.

WRIT: *Certiorari* abolished, 763, 764.

WRITING. See *Evidence.*

WRONGDOER. See *Trespass*, *Trover*, *Replevin*, *Warrant*, *Arrest*, *Torts.*

WRONGS. See last title.

INDEX TO FORMS.

PROCESS:

Deputation of private person to serve process, 49. Long summons, 63. Of titles of parties suing in a representative character, 64, 65. Returns to summons, 74, 75. Affidavit for short summons by resident against non-resident, 81. Same by non-resident against resident, 82. Bond by non-resident for short summons, 83. Constable's return to summons to authorize warrant, 94. Affidavits for warrant when defendant not a freeholder, 104. Same where he is a freeholder, 104. Bond by non-resident for warrant, 105. Civil warrant, 107. Bond to detain canal boat, 109. Warrant for a penalty, 110. Indorsement on warrant, 111. Indorsement by justice who is unable to hear the case, 117. Notice to plaintiff of arrest, 119. Returns to warrant, 120. Title of an action, 129. Subpœna to make affidavit for attachment, 135. Application for attachment, 156. Affidavit for attachment, 156. Bond on attachment, 158. Attachment, 165. Affidavit for short attachment, 170. Inventory on service of attachment, 173. Certificate on attachment, 174. Certificate on inventory, 174. Bond to prevent renewal of attached goods, 175. Bond by claimant of attached property, 179. Return to attachments, 181. Returns to summons issued on return of attachment, 182. Indorsement on affidavit in replevin, 192. Affidavit in replevin, 193. Affidavit to recover exempt property, 194. Affidavit made by agent, 195. Bond in replevin action, 198. Summons in replevin, 201. Returns to replevin process, 208, 209, 210. Notice of exception to sureties, 210. Affidavit of service of notice, 211. Oath to sureties, 211. Bond for return of property, to defendant in replevin, 213. Affidavit on claim of property by third person. 215. Bond on claim by third person, 215.

APPEARANCE:

Warrant of attorney to prosecute, &c., 228. Warrant of attorney to defend, &c., 229. Acknowledgment of warrant, 229. Application by infant plaintiff for appointment of next friend, 232. Consent of next friend, 233. Appointment by justice, 233. Application for guardian, 233. Consent to act as guardian, 233. Appointment of guardian, 233. Connected form for same, 234. Affidavit that justice is a material witness, 243. Judgment of discontinuance, 244.

TITLE TO LANDS:

Answer of title to land in defendant, 252. Answer of title in third person, 253 Countersigning by justice, 253. Bond on answer of title to land, 254.

OFFER OF JUDGMENT:

Offer of judgment. 257. Offer of judgment in replevin, 257. Acceptance of offer of judgment, 258. Judgment on offer, 258. Oath of attorney as to authority to make offer, 259. Formal parts of a complaint, 312.

ADJOURNMENT:

Stipulation to allow adjournment to plaintiff, 342. Affidavit for adjournment, 349. Oath of adjournment, 349. Bond for adjournment when execution issues against body, 351. Bond in ordinary cases, 352. Affidavit of sureties in bond, 353. Examination or deposition of witness on adjournment in a warrant case, 357. Certificate of justice to deposition, 357. Justices' certificate of transcript of judgment, 403. County clerk's certificate, 404. Notice to produce paper, 406. Oath as to loss of paper 407. County clerk's certificate of a copy of a record, 421. Town clerk's certificate of a copy of paper, &c., 422. Oath on *voire dire*, 471. Interpreter's oath, 474.

SUBPŒNA:

Oath to obtain subpœna from a strange justice, 548. Subpœna to testify, 549. *Duces tecum* clause, 549. Affidavit for attachment against witness, 556. Oath proving service of subpœna, 556. Return to subpœna, 557. Attachment against witness, 558. Return of constable to attachment, 558. Oath to witness excusing himself, 559. Summons against witness, 560. Return to summons, 561. Convic-

SUBPŒNA — *continued.*
tion of witness, 561. Execution to collect fine, 562.

COMMISSION:
Notice of application for a commission, 564. Affidavit of service of notice, 564. Oath to prove service of notice, 565. Oath for commission, 565. Commission, 567. Directions indorsed thereon, 567. Interrogatories and cross-interrogatories, 567. Assent of parties to interrogatories, 568. Settlement of interrogatories by justice, 568. Commissioner's summons to witness, 568. Commissioner's subpœna to witness, 568. Oath to witness, 568. Caption of deposition, 569. Indorsement of an exhibit, 569. Return to commission, 569. Certificate of mailing, 569. Affidavit of agent carrying commission, 570.

TRIAL:
Venire, 593. Return to venire, 593. Oath on objection to constable, 595. Oath to witness on trial of challenge, 604. Oath to juror on trial of challenge, 604. Oath to triers on challenge to array for favor, 605. Oath to triers on challenge to polls for favor, 605. Juror's oath on trial, 606. Witness's oath on trial, 607. Oath to constable on retiring with jury, 618. Summons against defaulting juror, 641. Constable's return to summons, 641. Attachment against juror, 641. Conviction of defaulting juror, 642. Execution against juror to collect fine, &c., 642. Warrant of arrest for contempt, 643. Conviction for a contempt, 644. Commitment for a contempt, 645. Oath of materiality of witness who refuses to be sworn, &c., 646. Commitment of witness, &c., 646.

JUDGMENT:
Justice's entries in docket, 699. Judgment for plaintiff in replevin, where property not delivered to him, 700. Same where property was delivered, 700. Judgment for defendant in replevin, where property delivered to plaintiff, 700. Same, where property not delivered to plaintiff, 701. Judgment in actions for torts, where one defendant acquitted and one convicted, 701. Confession of judgment, 704. Affidavit where sum exceeds $50, 705.

EXECUTION:
Execution against property, 714. Same against body, 157. Affidavit to authorize execution against body, 715. Execution in favor of plaintiff in replevin, 715. Execution issued by county clerk, 716. Same against body, 716. Indorsement on execution, 717. Indorsement on execution against joint debtors, 717. Notice of trial of claim to property taken on execution, 725. Oath to jurors on claim of property, 725. Oath to witness on such trial, 726 Inquisition of jury upon claim to property, 726. Bond to indemnify constable, 726, 727. Constable's indorsement of a levy, 734. Same when inventory attached, 734. Inventory of goods seized, 734. Receipt for goods levied upon, 734. Constable's

EXECUTION — *continued.*
notice of sale, 738. Memorandum of sale by constable, 742. Affidavit to obtain discharge from jail, 745. Security to be given by constable and his sureties, 755. Returns to executors, 755, 756. Renewal of executions, 757.

APPEALS:
Notice of entry of judgment, 771. Notice of appeal to county court, 784. Undertaking on appeal, 791. Certificate of justice on copy of undertaking, 791. Notice of undertaking, 792. Offer by respondent to reduce judgment, 797. Acceptance of offer, 798. Return where new trial is not had in county court, 807. Return where new trial is had, 808. Notice to justice to make return, 812. Affidavit that no return has been made, 813. Order to show cause against attachment, 814. Proof of service of order, 814. Notice of application for attachment, 815. Order for attachment, 815. Attachment, 816. Bond of justice for appearance, 817. Order to file interrogatories, 818. Interrogatories, 818. Answer to interrogatories, 819. Order discharging attachment, 819. Order convicting justice of contempt, 819. Warrant of commitment, 820. Additional return of justice, made voluntarily, 825. Affidavit for amended return, 826. Notice of motion for amended return, 827. Order for amended return, 828. Notice of order, 829. Amended return, 829. Notes of issue, 832. Notice of argument, 834. Affidavit to excuse default in justice's court, 838. Notice served with affidavit, 839. Order for new trial before justice, 853. Notice of trial, 863. Admission of service of notice, 864. Offer of judgment in county court, 867. Notice of acceptance of offer, 868. Affidavit of acceptance, 868. Judgment on offer, 869. Subpœna on trial in county court, 872. Subpœna ticket, 872. Conditional order for reversal of judgment unless reduced, 881. Consent to reduce judgment, 882. Notice of application for restitution, 910. Order for restitution, 910. Judgment of affirmance, 911. Judgment of reversal, 911. Judgment of reversal in part absolutely, 911. Judgment of reversal in part conditionally, 911. Judgment of reversal with restitution, &c., 912. Judgment on dismissal of appeal, 912. Judgment for plaintiff on verdict, 912. Judgment for defendant on verdict, 913. Judgment when respondent did not offer to correct judgment. 913. Judgment when appellant refused to accept respondent's offer to correct judgment, 913. Execution on affirmance of justice's judgment, 918. Indorsement of execution, 918. Execution where a new trial is had, 919. Notice of appeal to supreme court, 922. Same from affirmance or reversal by county court, 922. Same from order of county court, 922. Undertaking to stay proceedings on appeal to supreme court, 922.

COMPLAINTS:
Formal parts of complaint, 925. Complaint by infant plaintiff, 926. Formal parts of answer, 926. Complaint on a justice's judgment, 926. Complaint on a chattel mortgage, 927. Complaint on bond for payment of money only, 928. Complaint on bond for limits, 928. Complaint on attachment bond, 929. Complaint on bond given on claim of attached property, 930. Complaint on bond for costs, &c., 930. Complaint on undertaking on an appeal, 931. Complaint on replevin bond, 932. Complaint on bond of indemnity, 932. Complaint on bond to indemnify against a lost note, 933. Complaint on a fire policy for goods, &c., 934. Complaint on a subscription for plank road, &c., 934. Complaint swearing to justice of a debt, 936. Complaint for rent due on a lease, 936. Complaint for use and occupation, 936. Complaint against tenant for not keeping in repair, 937. Complaint against landlord for neglect to repair, &c., 937. Complaint by schoolmaster against trustees, &c., 938. Complaint by discharged employee, 938. Complaint against employee, 939. Complaint against overseers of poor for support of bastard, 939. Complaint against seller for not delivering, 939. Complaint against purchaser for not accepting goods, 940. Complaint to recover balance on exchange of horses, 940. Complaint for breach of warranty of title to goods sold, 941. Complaint for breach of warranty as to quality of goods sold, 942. Complaint against receiptor for not delivering goods, 943. Complaint against an agent for not accounting, &c., 943. Complaint against agent for selling on credit, &c., 944. Same for selling on credit contrary to express orders, 945. Complaint to recover a reward offered by defendant, 945. Complaint for breach of marriage promise, 945. Complaint by payee against maker of note, 946. Complaint by payee against maker and indorser, 946. Complaint by indorsee against maker and indorser, 946. Complaint on a note made by partners, 946. Complaint on a note wrongly dated, 947. Complaint on a note made by an agent, 947. Complaint on a note by a surviving partner, 947. Complaint against surviving maker of note, 947. Complaint by first indorsee against maker of a note, 948. Complaint on note by second indorsee against maker, 948. Complaint on note by first indorsee against payer and indorser, 948. Complaint on bill of exchange, payee against acceptor, 948. Complaint on bill, payee against drawer for non-acceptance, 949. Complaint on bill, payee against drawer and acceptor, 949. Complaint on bill, indorsee against drawer and acceptor for non-acceptance, 949. Complaint on bill, against drawer, acceptor and indorser, for non-payment, 949. Complaint on bill, drawer against acceptor, on bill returned to drawer and

COMPLAINTS — *continued.*
taken up by him, 950. Complaint on check, payee against drawer, 950. Complaint on check, indorsee or bearer against drawer, 950. Complaint on check, indorsee against drawee, drawer insolvent, non-presentment therefor excused, 951. Complaint on check, indorsee or bearer against drawer and indorser, 951. Complaint on check, against bank on certified check, 951. Complaint on chattel note, 952. Complaint on guaranty of payment, 952. Complaint on guaranty to pay for goods sold, &c., 953. Complaint on guaranty of a precedent debt, 953. Complaint on a contract of sale or return, 954. Complaint for services, general form, 954. Complaint for services, on an account, 954. Complaint for work and materials furnished, 954. Complaint for goods sold, 955. Same, price agreed on, 955. Same upon an account, 955. Complaint for board and lodging, 955. Complaint for hire of personal property, 955. Same, with damages for ill use, 956. Complaint for money lent, 956. Same, assignee of lender against borrower, 956. Complaint for money had and received, 956. Complaint to recover money lost by betting, 957. Complaint for money received on a judgment afterwards reversed, 957. Complaint for money paid, 958. Complaint by surety against principal for money paid on undertaking on appeal, 958. Complaint for money due on an account, 958. Complaint on an account stated, 958. Complaint on an award, 959. Complaint for revoking submission to arbitrators, 959. Complaint upon a compromise of an action, 960. Complaint for trespass to land, 960. Same in an other form, 960. Same, for cutting and converting timber, 960. Same for treble damages for injuring trees, 960. Complaint for diverting water from plaintiff's mill, 961. Samo for erecting a dam below, causing backwater, 961. Complaint for nuisance by slaughter house, 962. Same, for continuing nuisance, 962. Complaint, trespass for taking goods, &c., 962. Complaint, trover for converting goods, &c., 962. Same, trover by assignee after conversion, 962. Complaint, replevin, ordinary form, 963. Same, owner against wrongdoer for taking goods from plaintiff's bailee, 963. Same, assignee against wrongdoer, 963. Complaint for enticing away servant, 963. Complaint for false warranty of a horse, 964. Same, for a fraudulent concealment on a sale, 964. Complaint for fraudulently obtaining goods on credit, 965. Samo, for fraudulently representing credit of another person, 965. Complaint against owner for act of driver of carriage, 965. Complaint for neglecting to return execution, 966. Same, for neglecting to levy, 966. Same, for false return to execution, 966. Same, for an escape, 967. Complaint for keeping a mischievous dog, which bit plaintiff, 967. Same, for keeping dog accustomed to bite sheep and other

COMPLAINTS — *continued.*
animals, 967. Complaint for a penalty given by statute, 968. Complaint against witness for disobeying subpœna, 968. Complaint against depositary for not taking care of goods, 969. Same against mechanic for doing work badly, 969. Same against mechanic for not using due care and skill in repairing, 970. Complaint against carrier for loss of goods, 970. Same for breach of carrier's duty, 970. Complaint against innkeeper for loss of a trunk, &c., 971.

ANSWERS:
Answer, non-joinder of plaintiffs in action on contract, 972. Same, non-joinder of plaintiffs in actions for torts, 972. Same, non-joinder of defendants in actions on contract, 973. Action brought in wrong town, 973. Another action pending, 973. General denial, 973. General denial of one of several causes of action, 973. Specific denial, 974. Infancy of defendant, action on contract, 974. Infancy of defendant in actions for torts, 974. Insanity of defendant, 974. Intoxication of defendant, 974. Rescission of contract, 974. Coverture of defendant, 975. Alteration of instrument without consent, 975. Illegal demand, money lost at play, 975. Note given for liquors sold without license, 975. Higher security taken, 975. Alteration of instrument, 976. Performance, 976. Former action and judgment for defendant, 977. Former action by defendant, and plaintiff set off his demand, 977. Former action in which plaintiff ought to have set off, but did not, 977. Former recovery by plaintiff for same cause of action, 977. Recoupment in action for goods sold, alleging a breach of warranty on the sale, 977. Recoupment in an action on a note given for property sold, and a breach of warranty on the sale, 978. Set-off, 978. Statute of limitations, 978. Release, 978. Arbitrament and award, 979. Accord and satisfaction, 979. Tender of payment, 979. Justification of entering into plaintiff's house and seizing his goods under an execution against him, 979. Justification of trespass by reason of defective fences, 980. Justification for taking property *damage feasant*, 980. Eviction of tenant, 981. Surrender of premises, 981. Want or failure of consideration, 981. Statute of frauds, leasing or sale of lands, 981. Statute of frauds, agreement not to be performed within one year, 982. Statute of frauds,

ANSWERS — *continued.*
promise to answer for debt or default of an other, 982. Statute of frauds, sale of personal property of $50 or upwards, 982. Payment, 982. Payment by bill or note, 982. Duress by imprisonment, 982. Duress by threats, 983. Contract or instrument obtained by fraud, 983. Usury in making note, 983. Cause of action assigned. 983. Mistake in amount of note, 983. License, 984. Lien for services, 984. Replevin, title in defendant or in a stranger, 984. Estoppel, 984. *Puis darrien continuance*, 985.

DEMURRERS:
Demurrer to complaint, 985. Demurrer to answer, 985.

ACKNOWLEDGMENTS:
Acknowledgments, 985 to 990. Satisfaction of a mortgage, 990. Satisfaction of judgments, 991. Same justice's judgment docketed, 991. Certificate of clerk of satisfaction of judgment, 992. Forms for compelling witnesses to attend proof of papers, 992 to 994.

ARBITRATION:
Submission to arbitration, 994. Bond of arbitration, 995. Bond for an award by an umpire, 995. Condition providing for third arbitrator, 996. Arbitrator's oath, 996. Notice of hearing before arbitrators, 996. Oath on application for subpœna, 996. Subpœna to appear before arbitrators, 996. Oath to witness, 997. Revocation, 997. Notice of revocation, 997. Award, 997. Affidavit proving the award, 998. Affidavit proving the bond of arbitration, 999. Affidavit proving the agreement of submission, 999. Notice of motion to confirm award, 999. Notice of motion to vacate the award, 999. Notice of motion to modify or vacate the award, 999. Order confirming award and for judgment, 1000. Order vacating award, 1000. Judgment record, 1000.

MORTGAGES:
Chattel mortgage, 1000. Same, an other form, 1002. Notice of chattel mortgage sale, 1003. Bill of sale, 1003.

AGREEMENTS:
Agreement to sell and deliver wood, 1004. Agreement with workman or clerk, 1006. Agreement on a sale of wheat, 1006.

HIGHWAYS:
Notice to justice or commissioner regarding animals in highways, 1007. Notice to owners of animals trespassing, 1007. Notice to owners of animals at large, 1007.

WILL, 1004.

OPINIONS

OF THE BENCH AND THE BAR.

From Hon. Hiram Denio, Chief Judge of the Court of Appeals.

DEAR SIR — I have had time only to read the preface, and to examine the distribution of the subjects into parts, chapters and sections of your work on Law and Practice, and these seem to me judicious.

I am not aware of any work relating to justices' courts published since the recent considerable change in the law, and hence I conclude that your work will be found extensively useful to magistrates and gentlemen conversant with those courts; and as the law administered there is for the most part the same which prevails universally, I don't doubt but that the members of our profession generally will derive advantage from your labors.

With a sincere wish that your industry, which has evidently been great, may meet with an adequate return in pecuniary advantage and personal reputation.

I am, dear sir, very truly yours,

H. DENIO.

From Hon. Henry E. Davies, Judge of the Court of Appeals.

DEAR SIR — I have looked over your first volume of Law and Practice with interest and with pleasure. The arrangement of topics treated appears to me judicious and appropriate. They are such as will most generally be serviceable, and upon which information will be most sought and needed. Part first, relating to the Law and Practice in Justices' Courts, and on Appeals to the County Courts, is apparently full, and contains all the existing statutory provisions relating to those topics. Part second, relating to Contracts, is an elaborate exposition of the law applicable thereto, and the subject is perspicuously treated.

The great number of authorities referred to evinces the industry and research you have bestowed upon your work, and, as far as I have been able to compare your abstracts of the principles of particular cases with the cases themselves, it appears to have been made with accuracy and discrimination. These observations apply with equal force to part third, relating to Torts, and to part fourth, relating to Defenses.

I cannot, I think, be mistaken in the impression that your work will be found of great value to the profession, and to all engaged in the administration of justice.

I confidently hope that a discriminating public will properly reward you for the great labor you have bestowed in a most laudable effort to serve it, and to render the administration of justice not only certain, but in harmony with established principles of law.

I doubt not you have been actuated by the honorable motive of rendering some useful service to your profession, and that you can say, with Lord COKE, that your "only end and desire is, that such as are desirous to see and know may be instructed; such as have been taught amiss may see and satisfy himself with the truth; and such as know and hold the truth may be comforted and confirmed."

I am, very respectfully and truly yours,

HENRY E. DAVIES.

From Hon. William B. Wright, Judge of the Court of Appeals.

DEAR SIR — My examination of your work on Law and Practice induces me to speak of it in the highest terms of commendation. The treatment of subjects is complete and perspicuous. For the latter characteristic it is worthy of all praise. Unlike other similar publications

that have preceded it, it is not a mass of legal rules and principles thrown together in confusion, but its contents are systematically, skillfully and judiciously arranged.

I hope the publication will prove, as it eminently deserves to be, a success. Its merit entitles it to a place in the library of every member of the legal profession in the State, whether he be at the bar or on the bench.

Yours truly,

WM. B. WRIGHT.

From Hon. John K. Porter, Judge of Court of Appeals.

DEAR SIR — You are entitled to the hearty thanks of the profession for your admirable work on Law and Practice. In my judgment it is the most perfect treatise of its kind which has yet appeared in this country. You have brought the wealth and the learning of a law library within the compass of two compact volumes.

I congratulate you on the signal success of an undertaking to which you have given the best years of your professional life. The work is one of enduring value. It evinces great ability and research, and its merit will be universally appreciated. The lawyer who does not avail himself of the fruit of your labors will be at a disadvantage among his brethren.

Very truly yours,

JOHN K. PORTER.

From Hon. Daniel P. Ingraham, Justice of the Supreme Court.

DEAR SIR — I have examined the first volume of your work on Law and Practice with much pleasure. While it is well suited for those whose business is connected with the justices' courts, and will furnish them with an assistant which they can find nowhere else, I by no means think its value to be confined to that class. It is a valuable compendium of the law as settled by judicial decisions, which will be of great use to practitioners in all the courts, and useful as a digest to the judges. There is no branch of the profession to which the work will not be found valuable. I trust the sale of the work will be such as so ably prepared a treatise deserves.

Yours very respectfully,

D. P. INGRAHAM.

From Hon. William H. Leonard, Justice of the Supreme Court.

DEAR SIR — I have not been able to give your work on Law and Practice a very careful examination, but as far as I have seen it, it appears admirably calculated to be useful.

Truly yours,

WM. H. LEONARD.

From Hon. John W. Brown, Justice of the Supreme Court.

DEAR SIR — I have examined with some care the first volume of your work entitled "The Law and Practice in Civil Actions and Proceedings in Justices' Courts," &c., and think it one of no ordinary merits.

It evinces research, industry and accuracy, and combines within a moderate space a mass of learning and knowledge upon the subjects of which it treats which could only be obtained by resort to many authorities.

It can hardly fail to be of much value to the members of the profession and all others who may desire to qualify themselves for the prosecution and defense of actions, or to administer the law in the justices' courts of the state.

I am, very respectfully, yours, &c.,

JOHN W. BROWN.

From Hon. William W. Scrugham, Justice of the Supreme Court.

DEAR SIR — I have examined, with some care, the first volume of your work on the Law and Practice in Civil Actions and Proceedings in Justices' Courts, and on Appeals to the County Courts of the State of New York.

Furnishing and explaining a great number and variety of legal principles, under an admirable arrangement of titles, it will be found very convenient by the profession for ready reference, and will afford to justices of the peace a better substitute for a library than any work which has been published since the adoption of the Code.

Yours very respectfully,

WM. W. SCRUGHAM.

From Hon. Joseph F. Barnard, Justice of the Supreme Court.

DEAR SIR — I have, with considerable care, looked through the first volume of your Law and Practice. It shows great care and labor in its preparation, and must be very useful to the profession.

J. F. BARNARD.

From Rufus W. Peckham, Justice of the Supreme Court.

DEAR SIR — I have examined "Wait's Law and Practice," with as much attention as my time would permit. In my opinion this work presents the law as to the practice and proceedings in justices' courts, and in appeals therefrom, fully and accurately. It also presents, methodically, and well sustained by authorities, a great body of law as to the rights and remedies of parties in civil causes. The principles, with their distinctions, are well stated. It is obviously a work of great labor, and, I think, of great value to the mass of the profession.

R. W. PECKHAM.

From Hon. Henry Hogeboom, Justice of the Supreme Court.

DEAR SIR — I have given the first volume of your Law and Practice some attention, and regard it as a valuable addition to the body of the law.

Though professing to be especially intended for the practice in justicea' courts, the principles discussed are of universal application, and cannot be otherwise than highly useful in every branch of the profession.

I admire the ability as well as the simplicity and method with which the work is executed, and shall regard it as a valuable auxiliary in my own legal researches. I trust the sale of the work may afford you an adequate compensation for the large amount of time and labor evidently devoted to it. You have reason to be well satisfied with the results of your labors, and such, I have no doubt, will be the verdict of the profession.

I am, very respectfully, yours,

H. HOGEBOOM.

From Hon. Theodore Miller, Justice of the Supreme Court.

DEAR SIR — I have examined the first volume of your excellent work upon the Law and Practice in Civil Actions and Proceedings in Justices' Courts, &c., and it gives me much pleasure to express my gratification with its general plan, arrangement and contents.

It contains a vast amount of legal knowledge, and evinces great industry, learning and research. I discover many cases collected which are not to be found in any other elementary work.

The references to authorities are of great value, and show a thorough acquaintance with the various subjects which are presented and discussed. No work has been published since the late Judge Cowen's Treatise which contains so much useful information in the department of the law of which it treats. And this work is nearly three times as large as that, with the advantage of being adapted to the law in its present condition. I consider it an invaluable acquisition to every law library. And to young men, especially, who are about entering upon professional life, its importance cannot be too highly estimated.

The preparation of such a work must necessarily have required years of patient toil and attention, and entitles its author to the thanks of the profession.

I most cheerfully recommend it to the profession, and hope that it may meet with the success which it so richly deserves.

I am very truly yours,

THEODORE MILLER.

From Hon. Charles R. Ingalls, Justice of the Supreme Court.

DEAR SIR — I have examined with satisfaction, your work on Law and Practice, and am convinced that it will be found by the bench and the bar a valuable work for ready reference. Whoever examines it cannot fail to observe and appreciate the accuracy with which authorities are cited and their applicability to the subject sought to be supported thereby.

The work exhibits great labor and research, for which, I trust, you will be amply rewarded. Very truly yours, &c.,

C. R. INGALLS.

From Hon. Platt Potter, Justice of the Supreme Court.

DEAR SIR — I have had before me, and have examined with much care, the first volume of your work on Law and Practice, and am much pleased with it. I find it to be a work that, especially to young members of the bar, will be of great value.

It combines the advantage of a Treatise, a well arranged Compilation, a Digest and an Index, to a body of law brought down to the present time, which ordinary libraries of moderate size will hardly supply. Its reference to, and selection of cases of authority, evinces great study, care and judgment.

Doubtful cases are carefully omitted. and cases of apparent similarity well distinguished. It supplies, in fact, to the several trial courts, a work similar to that of Cowen's Treatise to Courts of Justices' of the Peace.

I think the work will be a valuable and popular one with the profession, and hope that you may receive the reward of long and diligent labor.

Respectfully and truly yours, &c.,

PLATT POTTER.

From Hon. Augustus Bockes, Justice of the Supreme Court.

DEAR SIR — I have examined with considerable care your new work, entitled Law and Practice, and find it admirable and complete, both in execution and arrangement.

It is well entitled to take the place of Cowen's Treatise, and has the advantage of that work in this, that it contains references to all the recent decisions bearing on the subjects considered, with brief extracts therefrom, showing concisely and clearly the points determined.

The more I examine the work the better I am pleased with it. It ought to have a place in the library of every practicing lawyer, and especially should every justice of the peace have a copy.

Yours, &c.,

A. BOCKES.

From Hon. Amaziah B. James, Justice of the Supreme Court.

DEAR SIR — I have given your work on Law and Practice a very careful examination, and pronounce it, for the purpose intended, the most valuable work ever published.

It is just such a work as the young practitioner needs, and one which no young man, desiring faithfully to serve his clients, will be without.

It must have cost you great labor, and I sincerely trust it may meet with the favor due to its merits.

Yours truly,

A. B. JAMES.

From Hon. Joseph Mullin, Justice of the Supreme Court.

DEAR SIR — I have examined to some extent the first volume of your Law and Practice. While it is published for the especial guide and instruction of those having business in justices' courts, it still is of great general value to all members of the profession.

Following to some extent the plan of Cowen's Treatise, its law is more modern, the authorities cited are more numerous, and brought down to the present time.

In it the practitioner will find a very good brief upon all subjects relating to contracts and injuries to property,

The principles laid down are, as far as I have examined them, correctly stated, and the citations are apposite and very numerous, both from American and English reports. I have no hesitation in recommending the work to the patronage of the public.

Respectfully yours, &c.,

J. MULLIN.

From Hon. Le Roy Morgan, Justice of the Supreme Court.

DEAR SIR — I regret that I have not had time to give your work on Law and Practice a more careful and extended examination.

From a cursory examination of its contents, I can recommend it for its careful analysis of the recent cases, and its adaptation to the wants of the young lawyer who is obliged to make his first debut in a justice's court. And it will, I think, be found very useful to those who have made further progress in the profession.

Very respectfully yours, &c.,

LE ROY MORGAN.

From Hon. William W. Campbell, Justice of the Supreme Court.

DEAR SIR — I have not given to your first volume of the Law and Practice in Civil Actions and Proceedings in Justices' Courts, that careful examination which would enable me to speak with certainty of its entire accuracy. And yet, from such examination as I have found time to make, I have reason to think that it has rare merit in that respect.

If the second volume shall be as complete as the first, your work will be indeed a law library for the magistrate and the young lawyer. To the young practitioner it will be a *vade mecum*. My good old preceptor, the venerable Dr. Nott, frequently said to the students in college that he always feared to meet, in debate, a man who had studied thoroughly one good book treating of the subject under discussion. A lawyer will be well informed in his profession, and may prove a dangerous antagonist, if familiar with all the principles and rules of law contained in your volumes.

Sincerely hoping that you may gather honors and pecuniary reward, as a recompense for your years of labor,

I am, very respectfully, yours,

WILLIAM W. CAMPBELL.

From Hon. John M. Parker, Justice of the Supreme Court.

DEAR SIR — I have examined with considerable care the first volume of your Treatise on the Law and Practice in Civil Actions and Proceedings in Justices' Courts.

It is a very thorough and accurate compend of different titles of the law which come in question in those courts; and not only invaluable to justices of the peace, but very serviceable to practitioners in all the courts.

I have no doubt that it will be deemed indispensable to every lawyer's library.

Very truly yours,

JOHN M. PARKER.

From Hon, Charles Mason, Justice of the Supreme Court.

DEAR SIR — I have examined with some care your book of Law and Practice in Justice's Courts, and find it a very valuable book.

The design of the work is good, its execution is certainly well done, and in many particulars, in my judgment, is ahead of any similar publication, and cannot fail to commend itself to the favorable consideration of the bar.

I found it cited at the last general term in several cases on appeal from justices' courts.

You certainly have rendered a great service to the bar and the courts to which it is particularly devoted.

I am, very truly, yours,

CHARLES MASON.

From Hon. Ransom Balcom, Justice of the Supreme Court.

DEAR SIR — I have examined with considerable care the first volume of Wait's Law and Practice. It appears to be carefully written, and is well arranged.

If the second volume be as good as the first, the work will be better than any of the kind now in use. Such a work is greatly needed by justices of the peace, and all lawyers who practice in their courts.

I shall call the attention of my associates to it with the view of having a copy purchased for "The Supreme Court Library." It will enable magistrates to conduct special proceedings and determine suits before them with that accuracy which the interests of the people require.

Very respectfully yours,

RANSOM BALCOM.

From Hon. Thomas A. Johnson, Justice of the Supreme Court.

DEAR SIR — I have examined volume one of your Law and Practice, and regard it as a most valuable work for the purpose for which it is intended. I wish it might find its way into the hands of every justice of the peace in the state, where such a work is much needed, and where it would certainly advance a more enlightened and accurate administration of the law than now generally prevails.

I have already had occasion to consult it repeatedly, and find it a most convenient and accurate digest and summing up of the law upon the various subjects of which it treats.

I remain yours, very truly,

T. A. JOHNSON.

From Hon. James C. Smith, Justice of the Supreme Court.

DEAR SIR — The first volume of Wait's "Law and Practice in Civil Actions and Proceedings in Justices' Courts," &c., has been placed in my hands and I have examined many portions of it with considerable care.

It is evident that a great amount of well directed labor has been employed in the execution of the work, especially in the very full and convenient digest of cases in the courts of this and other states, and in the courts of England.

The plan of the work is comprehensive, including the general principles of law relating to "Contracts," and "Torts," and also to "Defenses." Its style is perspicuous, and it contains not only a digest of recent cases, but also a synopsis of the latest statutes in this state relating to justices' courts and appeals therefrom.

I think it will be found an invaluable aid to justices of the peace in the discharge of their duties, and a most convenient book of reference to all practitioners in the trial of causes in justices' or other courts.

JAMES C. SMITH.

From Hon. Henry Welles, Justice of the Supreme Court.

DEAR SIR — From the examination I have been able to give to the first volume of your work on Law and Practice, I think it will be a most valuable addition to the library of the practicing lawyer.

The various topics treated of seem not only exhausted but fortified by copious references to authorities.

I hazard the opinion, that when the second volume is completed, the two will form an ample law library for a justice of the peace and for suitors in his court, excepting in the administration of criminal law. Hoping that the sale of the work may be such as to secure a liberal remuneration for the great labor it must have cost you, I subscribe myself,

Yours, very truly,

HENRY WELLES.

From Hon. E. Darwin Smith, Justice of the Supreme Court.

DEAR SIR — I have examined with some care the first volume of your work on Law and Practice.

As a treatise upon proceedings in justices' courts, and upon appeals to the county courts, and proceedings therein, it is a valuable work, and supplies a want that has been especially felt by the profession since the recent changes in the law.

As a summary of the law upon questions arising in all courts, it possesses great value.

I am respectfully yours, &c.,

E. DARWIN SMITH.

From Hon. Noah Davis, Justice of the Supreme Court.

DEAR SIR — I have had the first volume of Wait's "Law and Practice" in use for several months, and have given it an attentive examination.

As a compendium of the law on the several subjects of which it treats, it is, in my judgment, of great value, not only to justices of the peace, but to all persons connected with the administration of the laws. It is the best hand-book of reference for the use of the general practitioner that has ever fallen under my notice, and as such I consider it well worthy a place on the table of every lawyer.

I am, very truly, &c.,

NOAH DAVIS.

From Hon. Martin Grover, Justice of the Supreme Court.

DEAR SIR — I have read the first volume of your Law and Practice, with much pleasure. I can cheerfully recommend it to the profession. It is written in a clear style, well arranged, with great research and accuracy. No lawyer acquainted with the work will fail to have it in his library. It is very essential to those who commence with a small library. In short, it will fill the place now that Cowen's Treatise did twenty years ago.

Yours truly,

MARTIN GROVER.

From Hon. Charles Daniels, Justice of the Supreme Court.

DEAR SIR — I have examined your first volume of Law and Practice, containing a systematized and orderly compendium of the law of actions and proceedings.

It furnishes the most complete and useful arrangement of legal principles of any single work yet published, with a very faithful collection of the authorities sustaining them.

It is a valuable work, well deserving a place in the library of every legal practitioner.

Respectfully yours,

CHARLES DANIELS.

From Hon. Richard P. Marvin, Justice of the Supreme Court.

DEAR SIR — I have examined with much care the first volume of your "Law and Practice in Civil Actions and Proceedings in Justices' Courts," and in my judgment it is a very able work. Great faithfulness, in its preparation, is manifest.

It is very full and complete, and a work much needed.

It really consists of numerous treatises of many branches of the law.

It is not simply a work on Practice, but it contains the great body of the law, to which resort may be necessary by justices and those who practice in justices' courts.

It will be very useful to the profession generally.

I have called the attention of justices and the profession to the work, and have warmly recommended it. Very truly, &c.,

R. P. MARVIN.

From Hon. Amasa J. Parker, Ex-Justice of the Supreme Court, and Professor in the Albany Law School.

DEAR SIR — I have examined with much interest your two volumes of Law and Practice, and am satisfied they will prove to be of great value to the profession.

The work is full and comprehensive, methodically arranged, with an excellent index, and deserves a place in the library of every practicing lawyer.

Very respectfully yours,

AMASA J. PARKER.

From Amos Dean, LL. D., Professor of Law in Albany Law School, &c., &c.

DEAR SIR — I have examined with considerable care the first volume of the Law and Practice in Justices' Courts, and on Appeals to the County Courts, by William Wait, Esq., and without undertaking to speak of that portion of it that relates purely to practice, I have no hesitation in saying that the legal topics which are discussed in it are very judiciously selected, being such as the practicing lawyer has the most frequent occasion to apply in practice; that the most important principles embraced in the different topics are clearly stated, and the most important cases sustaining them are referred to. As a book for immediate reference, and one that while covering a great deal of ground offers much that is special and definite upon every subject introduced, it will be found to have very few equals and perhaps no superior.

AMOS DEAN.

From Hon. Lyman Tremain, late Attorney-General, &c.

DEAR SIR — I have examined with satisfaction your work on Law and Practice.

It is a valuable contribution to the jurisprudence of the state. It will be highly useful as a hand-book of reference for the advocate and practitioner in courts. The work displays great care and research, and its arrangement seems careful and judicious.

The list of explanations and abbreviations of law reports in England and America, is alone worth the price of the book. I recommend the work cheerfully to my professional brethren.

Yours truly,

LYMAN TREMAIN.

From Hon. John H. Reynolds.

MY DEAR SIR — I have examined, with as much attention as my engagements would permit, volume first of "Wait's Law and Practice," and I beg to say to you that I regard it as a valuable addition to the legal literature of the state, for which you are entitled to the thanks of the profession.

It is obviously the result of great care and labor, and must prove invaluable to every practicing lawyer, not only as a correct and careful digest of the branches of the law upon which it professes to treat. but as a valuable work upon the practice in all the courts.

To the young practitioner it will prove an indispensable companion, and it cannot fail to

greatly abridge the labors of every lawyer in full practice. Every member of the profession who shall, by patient industry and careful research, produce, in a compact and methodical form, a book which shall tend to lighten the labors of his brethren, is entitled to their warmest thanks. For this volume I give you mine, and take great pleasure in commending it to all my professional friends throughout the state.

I am very truly yours,

JOHN H. REYNOLDS.

From Hon. Clark B. Cochrane.

MY DEAR SIR — I have examined, with some attention, your work on "Law and Practice," and do not hesitate to commend it to the profession as one of great value and convenience.

It will be found eminently useful, not merely as a sound treatise on the various branches of legal learning to which its pages are devoted, but as a comprehensive digest of authorities appropriately selected and classified.

It is fairly due to you to say that, by the production of this work, you have made a substantial contribution to legal science, and that lawyers of every class will find these volumes of very great service. Very respectfully yours,

CLARK B. COCHRANE.

From Benjamin Vaughan Abbott, Esq., one of the authors of "Abbotts' Digest," "Abbotts' Forms," &c.

DEAR SIR — I have examined with as much care as the time at my disposal has permitted, the first volume of your Law and Practice, and desire to express to you my sense of the care, learning and good judgment displayed throughout the volume, and of the value which it will possess for the profession.

To those who preside over or practice in our numerous courts of subordinate jurisdiction, your work will be a very valuable hand-book.

It combines, economically, the advantages of a statute book, digest and general treatise, and the quantity of information supplied is remarkable.

As it is not confined to a statement of the jurisdiction and peculiar rules of practice of the courts, but comprehends a general, though succinct presentation of the rules of American law of ordinary application to the subject matter of the various actions and proceedings which may be prosecuted in them, it will serve as a general guide to the practitioner in framing his pleadings, collecting his evidence, and trying his cause.

It thus covers substantially the ground so usefully occupied by Cowen's Treatise. The book appears to be also well adapted to be read by students of law in their course of study, as presenting concisely and practically the law of those subjects with which a young lawyer is almost always first called upon to deal when he enters upon the practice of his profession. Hoping that the volume and its promised successor may command a ready and extensive sale.

I remain, very truly yours,

BENJ. VAUGHAN ABBOTT.

From Hon. George Wolford, late County Judge of Albany County, and one of the Editors of the Fifth Edition of the Revised Statutes of this State.

DEAR SIR — I have examined your elaborate treatise on Law and Practice with considerable care.

I know something of the time and labor bestowed upon it while it was in progress of preparation, and watched its advancement to completion with a solicitude which can only be appreciated by its author, or by a person who, in their experience, have felt the great need of such a work.

The table of contents, the table of cases, the table of abbreviations, and the index to each of the volumes, complete in themselves, will be of incalculable service to the practitioner. A full and methodical index constitutes a chief value to any law book, and it seems to me that in this respect your work is a decided success.

So far as the body of the work is concerned, each chapter of it is a treatise, in which is presented an exhaustive statement of the principles of law upon the subjects discussed.

The variety of the subjects, their logical arrangement, the full and clear statement of the principles of the law in each chapter, and the illustrations, consisting of well selected adjudications of recognized authority, make your work not only invaluable for the purposes for which it was designed by its author, but useful to persons engaged in the higher walks of the profession.

While chiefly designed for the profession in this state, I believe it will prove to be useful to lawyers of other states of the Union, and especially in those states in which the practice is in harmony with the practice in this state.

I know of no work recently published which, in the same space and in so accessible a form, embraces so much that is useful to the lawyer engaged in active practice. And for beginners and persons practicing in magistrate's courts and county courts, I know of no work equal to it. The profession, while thanking you for your conception, will, in my opinion, prove to you, by *material and substantial* rewards, as well as by words, that the achievement has been fully equal to the conception.

Very respectfully,

GEORGE WOLFORD.

From Hon. Josiah T. Miller, County Judge of Seneca County.

DEAR SIR — I have received and carefully examined the first volume of your truly great work on the Law and Practice in Civil Actions, &c., and I have no hesitation in pronouncing it one of the most useful and valuable works which has emanated from the law book publishers of this state for years.

It is indispensable to every intelligent justice of the peace, and it would be well if the legislature should enact a law requiring every justice of peace elect, before attempting to do any litigated business, to procure and *read* a copy; and boards of supervisors would promote the best interests of their constituents if they would supply each town clerk's office with a copy at the public expense.

Every lawyer accustomed to a country practice will appreciate the force and propriety of these suggestions.

I shall adopt your work as a hand-book in the discharge of my official duties, and shall specially recommend it to each practicing lawyer and justice of the peace in this county.

It is in some sense a law library in itself, and my wonder is how you succeeded even by seven years' labor in getting so much useful matter in so small a compass — ponderous as your volumes are.

For my own table I shall order *an other copy*, to be interleaved and bound in *four* volumes. With my thanks for the benefit you have conferred upon the profession,

I am, with regards, yours truly,

JOSIAH T. MILLER.

From Hon. Henry L. Knowles, County Judge of St. Lawrence County.

DEAR SIR — From the examination and use I have thus far made of the first volume of your Law and Practice, I doubt not, by its great range and arrangement of subjects, the multitude and accuracy of abstracts of cases cited, and its copious index, it will become — is becoming — a great convenience to practicing attorneys.

For justices of the peace this, with the promised second volume, will go far towards supplying their long felt need of a ready, reliable guide.

Yours respectfully,

HENRY L. KNOWLES.

From Hon. Henry S. Walbridge, County Judge of Tompkins County.

DEAR SIR — I have examined the first volume of your Law and Practice with such care and attention as my limited time would permit, and I am happy to state, from such examination, that I regard it as a work of great value, not only to those concerned in the administration of the law, and the legal profession generally, but to all whose taste or inclination leads them to examine into the reason and philosophy of the jurisprudence of the courts.

The beauty and chasteness of diction of the work render it attractive and readable by all persons seeking legal information.

Its copious and skillfully arranged index, by which the law upon the different subjects can easily be found, is of great value in the economy of time and labor. Hoping you may be amply paid for the arduous and valuable services you have rendered the public,

I remain your much obliged and obedient servant,

H. S. WALBRIDGE.

From Hon. Peter S. Palmer, County Judge of Clinton County.

DEAR SIR — I have examined the first volume of your Law and Practice, and consider the work almost indispensable to magistrates and those who do not have ready access to the reports.

To the practicing lawyer, with his library, it is also valuable, as you have, in an able, and it would seem, most faithful manner, collected and systematized the principles and decisions governing all the questions which usually arise in the business of the country.

Yours truly,

PETER S. PALMER.

From Hon. Carlos P. Scovil, County Judge of Lewis County.

DEAR SIR — I have examined the first volume of your Law and Practice. I am certainly very much pleased with it. The work shows great care and ability in its preparation. The whole plan and arrangement is most admirable, and it cannot be otherwise than popular with the legal profession.

No justice of the peace, doing any considerable amount of business, should think of being without it.

I have conferred with most of the profession in this county, in relation to it, and all those who have examined the work expressed themselves very decidedly in its favor, as being just what has been wanted for a long time. Yours truly,

C. P. SCOVIL.

ERRATA.

Page 101. Line 13 from top, read 98 instead of 90.
" 241. Bottom line read *to* instead of "th."
" 265. In heading of page read ACTION instead of NOTICE.
" 270. Line 5 from bottom, read representative, &c.
" 335. Line 3 from bottom, read Vol. I, instead of Ante.
" 338. Line 21 from top, read Vol. I, instead of Vol. II.
" 340. Lines 3 and 19 from top, and line 20 from bottom, read Vol. I, instead of Vol. II.
" 343. Line 14 from bottom, expunge the comma after the word *is*.
" 427. Line 18 from top, expunge the comma after the word "respect."
" 432. Line 12 from bottom, after word *handwriting*, cite *Magee* v. *Osborn*, 5 Tiff., 669.
" 443. Line 10 from bottom, read 439, instead of 428.
" 543. Line 14 from top, at * cite *Roth* v. *Wells*, 2 Tiff., 471.
" 671. Line 16 from top, read *obligor* instead of "oblitor."
" 702. Line 6 from bottom read *offer* instead of "offier."
" 767. Line 9 from bottom, add after *Post*, 906.
" 780. Line 25 from bottom, read *Randles* instead of "Rawdles."
" 783. Line 20 from top, read *Muir* instead of "Moore."
" 787. Line 12, from bottom, read 8, instead of "7."
" 803. Line 22 from bottom, add 853, after the word "*Post*."
" 808. Line 8 from top, read *my* instead of "any."
" 849. Line 20 from bottom, read *respondent* instead of "appellant."